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KENNETH COUNTS
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

Case No. 5721

1. **Name of party filing this fast track response:** The State of Nevada
2. **Name, law firm, address, and telephone number of attorney submitting this fast track response:**

Steven S. Owens
Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2750
3. **Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:**

Same as (2) above.
4. **Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal:** None
5. **Procedural history.**

On June 20, 2005, the State charged Appellant Kenneth “KC” Counts (Appellant) with Count 1 – Conspiracy to Commit Murder (Felony – NRS 200.010, 200.030, 193.165); and Count 2 – Murder With Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165). On July 7, 2005, the State filed a Notice of Intent to Seek the Death Penalty. On February 8, 2008, following trial, the jury returned a guilty verdict on Count 1, and a not

1 guilty verdict on Count 2. On February 11, 2008, the State filed pursuant to NRS 207.010 a
2 Notice of Intent to Seek Habitual Criminal Treatment. On March 11, 2008, Defendant's
3 Motion for New Trial and Request for Evidentiary Hearing was heard and denied. On March
4 20, 2008, Defendant was adjudged a habitual criminal and sentenced to a minimum term of
5 ninety-six (96) months and a maximum term of two-hundred forty (240) months with one
6 thousand twenty-nine (1,029) days credit for time served. The Court filed its Judgment of
7 Conviction on March 31, 2008.¹

8 On May 7, 2008, Defendant filed a Notice of Appeal. On March 27, 2009, the Nevada
9 Supreme Court affirmed Defendant's conviction, with remittitur issuing on April 21, 2009.
10 Respondent's Appendix (RA) 217-227. On April 16, 2010, Defendant filed a Petition for
11 Writ of Habeas Corpus and Points and Authorities in Support of Post-Conviction Writ. On
12 April 30, 2010, Defendant filed an Additional Points and Authorities in Support of Post-
13 Conviction Writ. The State filed its opposition on June 28, 2010. Defendant filed a reply on
14 July 9, 2010.

15 **6. Statement of Facts.**²

16 In his post-conviction Petition for Writ of Habeas Corpus, Appellant asserted the
17 following grounds for relief:

- 18 (1) Ground 1- Appellant received ineffective assistance of trial and appellate
19 counsel who:
- 20 (a) failed to object at sentencing that the State failed to prove
21 Appellant was represented by counsel or waived his right to counsel
22 during his prior felony convictions, which lead to the imposition
23 habitual criminal treatment without proof beyond a reasonable doubt
24 that Appellant was eligible for such treatment. AA 28-29;
 - 25 (b) failed to object that the State did not fulfill its discovery obligations
26 to provide Appellant, prior to the sentencing hearing, certified copies of
27 the judgments of conviction to be used in support of the request for
28 habitual criminal treatment. AA 31-32;
 - (c) failed to investigate and obtain Appellant's prior criminal convictions,

1 Appellant has at various times claimed he received a sentence of two concurrent or
consecutive ninety-six (96) to two-hundred forty (240) month sentences. Fast Track
Statement (FTS) 1 ¶ 7 (concurrent); AA 30:16-18 (consecutive).

² For some factual background underlying Appellant's conviction see Counts v. State, Case
No. 51549, Order of Affirmance, March 27, 2009 (Order of Affirmance), 1; 3. RA 217-227.

1 which would have permitted them to “argue[] convincingly that the
2 remaining charges were either non-violent or not significant enough for
3 a ‘just and proper’ finding that the Petitioner was a person who was
4 subject to the ‘Habitual Criminal Statute.’[sic]” AA 34;

- 5 (d) failed to argue the certified copies of Appellant’s prior judgments of
6 conviction were not authentic reproductions of the originals. AA 34-36;
7 (2) Ground 2 – the district court abused its discretion in adjudicating Appellant a
8 habitual criminal because it “merely added up the number of convictions,
9 without considering the type or remoteness...[and]...Petitioner’s Habituality
10 [sic] status was garnered from mere police contact.” Moreover, the court and
11 State used the habitual criminal statute to vindictively punish Appellant for his
12 Murder acquittal. AA 38-39;
13 (3) Ground 3 – the district court abused its discretion in adjudicating Appellant a
14 habitual criminal due to trial counsel’s numerous deficiencies identified in
15 Ground 1, and their failure to argue the PSI reflected convictions of
16 Appellant’s six other cousins who share Appellant’s exact name. And the court
17 erroneously counted the instant conviction for purposes of qualifying
18 Appellant for habitual criminal treatment. AA 36-45; and
19 (4) Ground 4 – cumulative errors denied Appellant a fair trial and due process. AA
20 45-46.

21 In its Findings of Fact, Conclusions of Law, and Order, the district court determined
22 none of these claims have merit and denied the petition. Specifically, the court determined
23 that claims relating to trial and appellate counsel’s failure to challenge the district court’s
24 adjudication of Appellant as a habitual criminal had not merit because the Nevada Supreme
25 Court had already determined there was no error committed when the court imposed habitual
26 criminal treatment. AA 99:1-7. Further, the specific claims of trial and appellate
27 ineffectiveness cited in Appellant’s Ground 1, supra, did not make out a Strickland claim
28 because the arguments Appellant contends counsel should have made were meritless and
their assertion would have been futile. AA 99:8-10. Further, Appellant’s claims that his trial
counsel failed to object to not being timely provided the judgments of conviction to be used
at sentencing was belied by the record. AA 11-13. Finally, the district court determined
Appellant’s claim of cumulative error had no merit because the issue of guilt had not been a
close question, and the Court had held the district court committed no errors in adjudicating
Appellant a habitual criminal. AA 16-21.

25 **7. Issue(s) on appeal.**

26 1. Whether the district court erroneously applied the law of the case doctrine or
27 procedural default rules to determine Appellant was barred from challenging trial and
28 appellate counsel’s effectiveness.

2. Whether the district court erred or abused its discretion by denying Appellant's petition based on his trial and appellate counsel's failure to "raise issues in trial or on appeal resulting in the Appellant's claim of ineffective assistance of counsel[.]"³

3. Whether the district court "committed reversible error" when sentencing Appellant because: (a) it "denied Appellant the evidentiary presumption he was entitled to" under to NRS 47.250(4); and (b) the State's notice of habitual criminality was filed in derogation of Appellant's rights under long-standing English common law.

8. Legal Argument, including authorities:

I. The District Court Did Not Apply the Law of the Case Doctrine or Procedural Default Rules to Preclude Appellant from Asserting that His Trial and Appellate Counsel Were Ineffective

Defendant appears to contend the district court refused to consider his claims of trial and appellate counsel ineffectiveness because they were: (a) barred from consideration by the law of the case doctrine; or (b) were procedurally defaulted when Appellant failed to present them on direct appeal. Defendant intentionally misconstrues the district court's order in an attempt to manufacture a straw man argument on appeal.⁴ The district court denied his petition on the merits of the substantive arguments. AA 93:13-21; 94:4-15. The district court never determined Appellant could not challenge trial and appellate counsel's effectiveness or that he could not challenge appellate counsel's effectiveness in failing to assert particular arguments on appeal. Appellant never cites to any point in the record where the district court made such a determination; nor could he because the record is devoid of any such ruling.

Appellant fails to grasp the interaction between the Court's order on direct appeal and his post-conviction challenge to counsel's effectiveness. The Court determined on direct

³ Appellant's first and second issues are essentially identical. Thus, the State responds to both issues under a single heading, ¶ 8.I, *infra*.

⁴ The district court's references to procedural bar applied to the substantive arguments of trial court error that should have been raised on direct appeal. They are barred under NRS 34.810. But the district court realized the bar can be overcome by showing ineffective assistance of trial or appellate counsel and did address the ineffectiveness of counsel claims on their merits.

1 appeal that the district court properly adjudicated Appellant under the habitual criminal
2 statute. RA 225-226. Appellant's entire habeas petition was devoted to alleging defense
3 counsel's failure to assert a host of spurious challenges to the propriety of adjudicating
4 Appellant a habitual criminal. Because the Court had already determined Appellant's
5 adjudication was proper, counsel could not have been ineffective for failing to raise the
6 facially meritless arguments Appellant contends should have been asserted at trial and on
7 appeal. See, e.g., Piper v. Neven, 2009 WL 874246 at 5 (D. Nev. 2009) (claim belied by the
8 record where "Petitioner claimed that the habitual offender adjudication was not supported
9 by certified copies of the prior judgments of conviction, but the Supreme Court of Nevada
10 found that the contrary was true and that certified copies in fact were made of record."). As
11 the district court noted, counsel is not ineffective for failing to raise futile arguments. AA 99.

12 Moreover, the district court judge was in a position to summarily deny Appellant's
13 objections to the judgments of conviction, for purposes of assessing effectiveness of counsel,
14 because she had already personally reviewed them at sentencing when they were submitted
15 as exhibits. See AA 21:23-22:8; 23:4-16; RA 1-216.

16 Rather than deciding the law of the case doctrine or procedural default rules
17 prevented Appellant from litigating his counsel's effectiveness, the district court applied the
18 well-established principle that the Sixth Amendment does not require defense attorneys to
19 make frivolous motions or take other futile action. See Ennis v. State, 122 Nev. 694, 137
20 P.3d 1095 (2006); Kimmelman v. Morrison, 477 U.S. 365, 375, 106 S.Ct. 2574, 2583
21 (1986); Ceja v. Stewart, 97 F.3d 1246, 1253 (9th Cir. 1996) (citing Lowry v. Lewis, 21 F.3d
22 344, 346 (9th Cir. 1994), cert. denied, 513 U.S. 1001, 115 S.Ct. 513 (1994). Indeed, "a
23 defense attorney has an obligation not to bring frivolous motions." Rodriguez v. Young, 708
24 F.Supp. 971, 982 (E.D. Wisc. 1989), aff'd, 906 F.2d 1153 (7th Cir. 1990), cert. denied, 498
25 U.S. 1035, 111 S.Ct. 698 (1991). Because the district court found the habitual criminal
26 sentencing proper, Appellant was unable to demonstrate any prejudice under Strickland
27 caused by trial or appellate counsel's failure to raise the objections and motions identified in
28 the petition. Where a defendant faults trial counsel for not asserting a motion or objection, he

1 must demonstrate that it would have been successful, otherwise he fails to establish
2 Strickland prejudice. See, e.g., Ebert v. Gaetz, 610 F.3d 404, 415 (7th Cir. 2010) (citing
3 Kimmelman v. Morrison, 477 U.S. 365, 382, 106 S.Ct. 2574, 2587-2588 (1986)) (“Ebert []
4 cannot demonstrate that a motion to suppress would have been meritorious, a requisite for a
5 successful ineffective assistance of counsel claim ...regardless of the deficiency of counsel’s
6 performance.”). Moreover, counsel is not ineffective for failing to challenge the notice of
7 intent and subsequent adjudication as a habitual criminal where a defendant receives
8 reasonable notice and qualifies under Nevada’s statute. See, e.g., Stanley v. Whorton, 2009
9 WL 873958 at 7-8 (D. Nev. 2009). Thus, the district court did not commit an error in finding
10 Appellant had failed to establish an entitlement to relief under Strickland.

11 The district court properly rejected a number of Appellant’s claims because they were
12 either belied by the record or were “bare” pursuant to the Court’s decision in Hargrove v.
13 State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). AA 99:9-10. For instance, Appellant
14 argued in his habeas petition that there were various *potential* defects in the judgments of
15 conviction that the district court relied upon in sentencing him, such as he may not have been
16 represented by counsel on the prior convictions or the convictions may have belonged to one
17 of his six cousins, each of whom allegedly shares an identical name with Appellant. AA 28;
18 34; 40. These bare, speculative, and conclusory claims, the Petition alleged no facts to
19 demonstrate lack of counsel or which convictions were a cousin’s and how that was
20 determined. Thus the Petition is fails to allege facts, if true, would demonstrate deficiency or
21 prejudice.⁵

22 Some of the claims are belied by the record. Appellant admitted while testifying
23 during his jury trial that *he had in fact sustained both felony convictions*. AA 9:23-10:1.
24 Moreover, the district court judge had already reviewed the certified judgments of conviction
25

26 ⁵ Appellant’s post-conviction counsel has never presented for review or attached as an
27 exhibit the judgments of conviction he purports to find so much fault with. Copies of the
28 certified judgments of conviction and accompanying documents admitted at sentencing are
contained in the Respondent’s Appendix. RA 1-216

1 and related documents, and from that review, she would know, for instance, that Appellant
2 was represented by counsel on the cases. See RA 11; 20; 56. Likewise, many of Appellant's
3 other claims were simply belied by the record pursuant to Hargrove, such as his claim that
4 trial counsel never received the judgments of conviction in advance of the sentencing
5 hearing. AA 99:11-13. Thus, Appellant never put the district court in a position to find there
6 had been any prejudice pursuant to Strickland's second prong because he never established
7 or alleged with specificity any infirmity in the judgments of conviction. See, e.g., Thomas v.
8 U.S., 2009 WL 1561436 at 2 (M.D. Fla. 2009) (counsel not ineffective for failing make
9 pointless challenges to prior judgment of conviction); Coca v. Neven, 2008 WL 2074005 at
10 6 (D. Nev. 2008).⁶

11 Even assuming the district court somehow misapplied the law of the case doctrine, it
12 was still correct in denying Appellant's petition based on its conclusion that trial and
13 appellate counsel were not ineffective. All of the substantive arguments Appellant proposes
14 trial and appellate counsel should have made lacked any merit and their assertion would have
15 been futile. Thus the district court would have been right for the wrong reason.

16 As noted above, none of Appellant's proposed grounds for relief had any merit. To
17 the extent he claims any alleged infirmities in the judgments of conviction, such as a lack of
18 representation for his prior felony convictions or attribution of the convictions to his cousins,
19 those claims are belied by the record. To the extent he challenges the procedures employed
20 during his adjudication, such as whether he was denied discovery rights, etc., those claims
21 have no legal merit or are otherwise belied by the record. Thus, even if the district court did
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23 ⁶ ("The Nevada Supreme Court's rejection of this ineffective assistance claim was neither
24 contrary to nor an unreasonable application of Strickland on the record and arguments
25 presented to that court. Petitioner did not allege, much less establish, that there was any
26 deficiency in any of the nine convictions that served as the basis for the habitual criminal
27 adjudication, including the three convictions added by the amended information. He
28 therefore did not establish either that counsel's concession constituted deficient performance
or that he was prejudiced thereby. That is, he did not establish-or even allege-that if counsel
instead had objected to the convictions that any conviction thereby would have been
excluded from consideration.").

1 misapply the law of the case doctrine or procedural default rules, it was still correct in
2 denying Appellant's petition on the merits.

3 Appellant has not demonstrated the district court improperly denied the petition by
4 applying the law of the case doctrine or procedural default rules. Moreover, nothing in the
5 record indicates the district court prevented petitioner from challenging his trial and
6 appellate counsel's effectiveness, or decided procedural default rules prevented it from
7 addressing appellate counsel's effectiveness. Indeed, the record clearly demonstrates the
8 district court denied Appellant's claims because they lacked any substantive merit.

9
10 **II. Appellant's Issue #3 Fails to Demonstrate the District Court Abused Its
Discretion or Committed an Error in Denying the Petition**

11 Appellant's arguments of trial court err as described under Issue # 3 are procedurally
12 barred under NRS 34.810 as they could have been raised on appeal. And because the district
13 court correctly found that counsel was not ineffective for failing to make these arguments,
14 Appellant did not demonstrate good cause and prejudice to overcome the procedural bars. In
15 any event, the State will assume for purposes of argument that Appellant is contending the
16 district court erred by denying relief based on a claim that appellate and trial counsel were
17 ineffective for failing to raise these issues. However the argument is construed, no error or
18 abuse of discretion is demonstrated.

19 Appellant contends the Court erred by "den[ying] [him] the evidentiary presumption
20 he was entitled to" pursuant to NRS 47.250(4). NRS 47.250(4) provides: "All other
21 presumptions are disputable. The following are of that kind:...(4) That higher evidence
22 would be adverse from inferior being produced." Liberally construing Appellant's
23 argument,⁷ he appears to claim trial and appellate counsel were ineffective for failing to
24

25 ⁷ It is not exactly clear what argument Appellant believes counsel should have made; in the
26 second paragraph of his argument he makes the following mutually exclusive statements:

27 In addition, it should be noted that NRS 207.012(3) sets forth that if a
28 defendant denies any previous conviction charged that **a hearing on same is
required**....But, even if sentencing counsel had asked for a hearing on this

1 argue NRS 47.250(4) required the sentencing court to find the judgments of conviction were
2 not competent evidence. This argument would have been futile for the reasons already
3 identified in the Court's order affirming Appellant's conviction, the district court's order
4 denying the petition, and numerous other reasons, such as Appellant's admission during his
5 jury trial that he sustained the two felony convictions. Moreover, Appellant has never
6 demonstrated any infirmity in the judgments of conviction so it is unclear what "higher
7 evidence" would have triggered NRS 47.250(4)'s presumption. See Langford v. State, 95
8 Nev. 631, 600 P.2d 231 (1979) ("... NRS 47.250(4) obtain[s] only where it can be shown
9 that a party actually has in his possession better and stronger evidence than that which was
10 presented."). In any event, NRS 47.250(4) is superseded by the more specific statutes
11 elaborating the procedure for habitual criminal adjudication and sentencing.

12 The district court also did not commit an error or abuse its discretion in finding trial
13 and appellate counsel were not ineffective in failing to challenge the State's notice of intent
14 to seek habitual criminal treatment based on alleged rights rooted in the English common
15 law. Passage of NRS 207.016 abrogated any common law notice requirements inconsistent
16 with the statute. See Hamm v. Carson City Nugget, Inc., 450 P.2d 358, 85 Nev. 99 (1969);
17 Hamilton v. Kneeland, 1 Nev. 40 (1865).

18 Moreover, Appellant intentionally misrepresents the case from which he purports to
19 derive his common law rule. He cites to Graham v. West Virginia, 224 U.S. 616, 624, 32
20 S.Ct. 583, 585-86 (1912) as support, but Graham stands for a much different and contrary
21 proposition: that a defendant is *not* entitled to be charged by formal indictment when he is
22 brought back before a court to be punished for prior felony convictions. Graham, 224 U.S.
23 628-629, 32 S.Ct. 587-588; see also Almendarez-Torres v. U.S., 523 U.S. 224, 243-244, 118
24

25 issue, NRS 207.012(3) states that, 'At such hearing, the defendant may not
26 challenge the validity of a previous conviction.'

27 FTS 10:3-12 (emphasis original).

28 NRS 207.012 contains neither provision and does not provide for any hearing; the
reader can only speculate as to Appellant's intended argument.

1 S.Ct. 1219 (1998) (“the sentencing factor at issue here-recidivism-is a traditional, if not the
2 most traditional, basis for a sentencing court's increasing an offender’s sentence...Consistent
3 with this tradition, the Court said long ago that a State need not allege a defendant’s prior
4 conviction in the indictment or information that alleges the elements of an underlying crime,
5 even though the conviction was ‘necessary to bring the case within the statute.’”); Oyler v.
6 Boles, 368 U.S. 448, 452, 82 S.Ct. 501, 503-504 (1962) (“due process does not require
7 advance notice that trial for substantive offense will be followed by accusation that the
8 defendant is a habitual offender....”). Thus, Graham provides no support for Defendant’s
9 claim that he was denied common law notice rights. He manages a contrary argument only
10 by intentionally quoting the case out of context. See Graham, 224 U.S. at 625-626, 32 S.Ct.
11 at 586. Thus, trial and appellate counsel could not have been ineffective for failing to assert
12 this futile argument, and the district court did not err in denying the claim.

13 **9. Preservation of the Issue.**

14 The issues were preserved for appeal.
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VERIFICATION

I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to raise material issues or arguments in the fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 2nd day of March, 2011.

Respectfully submitted,
DAVID ROGER
Clark County District Attorney

BY /s/ Nancy A. Becker
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