

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

KENNETH COUNTS,

Petitioner,

vs.

DWIGHT NEVEN, et al.,

Respondents.

Case No. 2:11-cv-01571-JAD-GWF

ORDER

Before the court are Kenneth Counts's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#1) and respondents' answer (#22). Having thoroughly and thoughtfully considered this matter, the court finds that relief is not warranted and denies the petition.

A. Procedural History

In state district court, petitioner Counts was charged with conspiracy to commit murder and murder with the use of a deadly weapon. Ex. 3 (#23). After a jury trial, Counts was found guilty of conspiracy to commit murder and found not guilty of murder with the use of a deadly weapon. Ex. 22 (#24). After the verdicts, on February 11, 2008, the prosecution filed a notice of habitual criminality pursuant to Nev. Rev. Stat. § 207.010. Ex. 23 (#24). The state district court held its sentencing hearing on March 20, 2008, and the judge decided to adjudicate petitioner as a habitual criminal. Ex. 29 (#24). He was sentenced pursuant to the small habitual criminal statute, Nev. Rev. Stat. § 207.010(1)(a). The judge imposed a prison sentence with a minimum term of 8 years and a maximum term of 20 years. Ex. 30 (#24).

1 Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 39 (#24). Mr. Counts
2 then filed a post-conviction habeas corpus petition in the state district court, Ex. 52 (#25), which
3 denied the petition. Ex. 63 (#25). Counts appealed, and the Nevada Supreme Court affirmed. Ex.
4 78 (#25). Petitioner Counts then commenced this action.

5 **B. Habeas Relief in Federal Court**

6 Congress has limited the circumstances in which a federal court can grant relief to a
7 petitioner who is in custody pursuant to a judgment of conviction of a state court.

8 An application for a writ of habeas corpus on behalf of a person in custody pursuant to the
9 judgment of a State court shall not be granted with respect to any claim that was adjudicated
10 on the merits in State court proceedings unless the adjudication of the claim—

11 (1) resulted in a decision that was contrary to, or involved an unreasonable application of,
12 clearly established Federal law, as determined by the Supreme Court of the United States; or

13 (2) resulted in a decision that was based on an unreasonable determination of the facts in
14 light of the evidence presented in the State court proceeding.

15 28 U.S.C. § 2254(d). “By its terms § 2254(d) bars relitigation of any claim ‘adjudicated on the
16 merits’ in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2).” Harrington v.
17 Richter, 131 S. Ct. 770, 784 (2011).

18 Federal habeas relief may not be granted for claims subject to § 2254(d) unless it is shown
19 that the earlier state court’s decision “was contrary to” federal law then clearly established in
20 the holdings of this Court, § 2254(d)(1); Williams v. Taylor, 529 U.S. 362, 412 (2000); or
21 that it “involved an unreasonable application of” such law, § 2254(d)(1); or that it “was
22 based on an unreasonable determination of the facts” in light of the record before the state
23 court, § 2254(d)(2).

24 Richter, 131 S. Ct. at 785. “For purposes of § 2254(d)(1), ‘an unreasonable application of federal
25 law is different from an incorrect application of federal law.’” Id. (citation omitted). “A state
26 court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded
27 jurists could disagree’ on the correctness of the state court’s decision.” Id. (citation omitted).

28 [E]valuating whether a rule application was unreasonable requires considering the rule’s
specificity. The more general the rule, the more leeway courts have in reaching outcomes in
case-by-case determinations.

Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

Under § 2254(d), a habeas court must determine what arguments or theories supported or, as
here, could have supported, the state court’s decision; and then it must ask whether it is

1 possible fairminded jurists could disagree that those arguments or theories are inconsistent
2 with the holding in a prior decision of this Court.

3 Richter, 131 S. Ct. at 786.

4 As a condition for obtaining habeas corpus from a federal court, a state prisoner must show
5 that the state court’s ruling on the claim being presented in federal court was so lacking in
6 justification that there was an error well understood and comprehended in existing law
beyond any possibility for fairminded disagreement.

7 Id. at 786-87.

8 **C. Counts’s Arguments**

9 ***1. Ground 1: ineffective assistance of counsel***

10 Ground 1 contains claims of ineffective assistance of counsel regarding the habitual-criminal
11 adjudication. “[T]he right to counsel is the right to the effective assistance of counsel.” McMann v.
12 Richardson, 397 U.S. 759, 771 & n.14 (1970). A petitioner claiming ineffective assistance of
13 counsel must demonstrate (1) that the defense attorney’s representation “fell below an objective
14 standard of reasonableness,” Strickland v. Washington, 466 U.S. 668, 688 (1984), and (2) that the
15 attorney’s deficient performance prejudiced the defendant such that “there is a reasonable
16 probability that, but for counsel’s unprofessional errors, the result of the proceeding would have
17 been different,” id. at 694. “[T]here is no reason for a court deciding an ineffective assistance claim
18 to approach the inquiry in the same order or even to address both components of the inquiry if the
19 defendant makes an insufficient showing on one.” Id. at 697.

20 Establishing that a state court’s application of Strickland was unreasonable under § 2254(d)
21 is all the more difficult. The standards created by Strickland and § 2254(d) are both “highly
22 deferential,” . . . and when the two apply in tandem, review is “doubly” so The
23 Strickland standard is a general one, so the range of reasonable applications is substantial.
24 Federal habeas courts must guard against the danger of equating unreasonableness under
Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is
not whether counsel’s actions were reasonable. The question is whether there is any
reasonable argument that counsel satisfied Strickland’s deferential standard.

25 Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (citations omitted).

26 Both the Nevada Supreme Court and the state district court summarily rejected Counts’s
27 claims of ineffective assistance of counsel. The question before this court is whether the Nevada
28

1 Supreme Court reasonably could have concluded that petitioner received effective assistance of
2 counsel. See Harrington, 131 S. Ct. at 784.

3 First, petitioner appears to complain that counsel did not object to the filing of the notice of
4 habitual criminality until after the jury's verdicts. At the time, the law allowed the prosecution to
5 file a notice of habitual criminality after the jury gave its verdicts, so long as sentencing occurred at
6 least 15 days after the filing of the notice. Nev. Rev. Stat. § 207.016(2) (2008).¹ The filing of the
7 notice complied with the statute because the sentencing hearing occurred more than a month later.
8 Trial counsel objected to the notice of habitual criminality at the sentencing, arguing that the notice
9 was improper after petitioner had been acquitted of murder. Appellate counsel raised the issue on
10 direct appeal. Ex. 37, at 12-14 (#24). The Nevada Supreme Court rejected the issues. Ex. 39, at 8-
11 9 (#24). Counsel could have done nothing more.

12 Second, petitioner argues that counsel ignored that he should have been arraigned on the
13 habitual-criminal notice. Due process requires that a defendant be given notice of the intent to seek
14 habitual-criminal adjudication, but due process does not require that the notice be given before the
15 trial on the underlying, substantive offense. Oyler v. Boles, 368 U.S. 448, 452 (1962).
16 Additionally, state law defines habitual criminality as a status, not as a crime by itself. "Since an
17 allegation of habitual criminality does not charge a crime, a sentence may be imposed thereon in the
18 absence of a formal guilty plea." Parkerson v. State, 678 P.2d 1155, 1156 (Nev. 1984). The lack of
19 argument for arraignment was not ineffective assistance of counsel.

20 Third, petitioner argues that counsel should have denied the existence of his prior felony
21 convictions and insisted upon a hearing to prove their existence pursuant to Nev. Rev. Stat. §
22 207.016(3). However, petitioner himself confirmed the existence of the prior convictions in his
23 testimony at trial. Ex. 21, at 219-22 (direct examination), 240-44 (cross-examination) (#24).
24 Counsel then could not have denied the existence of those convictions at sentencing.

25
26
27
28 ¹A 2013 amendment changed when the prosecution may file a separate notice of habitual
criminality, but petitioner's judgment of conviction became final before that amendment took effect.

1 Fourth and last in ground 1, petitioner argues that counsel should have objected that certified
2 copies of the prior convictions were not provided to the defense before the sentencing hearing.
3 However, at the sentencing hearing, the prosecutor stated that copies were provided with the pre-
4 trial discovery. Ex. 29, at 2-3 (#24). In the order denying the state habeas corpus petition, the state
5 district court found the same. Ex. 63, at 4 (#25). Petitioner has not shown how the state district
6 court’s finding was unreasonable in light of the evidence presented to that court. 28 U.S.C.
7 § 2254(d)(2). Additionally, petitioner’s own testimony at trial shows that both he and his counsel
8 knew about the prior convictions long before the sentencing hearing, regardless of their possession
9 of certified copies. The purpose of the certified copies of prior judgments of conviction is not to
10 give petitioner notice of the prior convictions—the notice of habitual criminality serves that
11 purpose—but to provide prima facie evidence to the court at sentencing that the convictions exist.
12 See Nev. Rev. Stat. § 207.016(5). Petitioner suffered no prejudice from not being provided with
13 certified copies of his prior judgments of conviction before sentencing.

14 **2. Ground 2: due process violations related to the habitual-criminal adjudication**

15 Ground 2 contains three claims of due-process violations. First, petitioner Counts claims
16 that he was ineligible for adjudication as a habitual criminal because his prior convictions were both
17 non-violent and remote in time. There are no such limitations on habitual-criminal adjudication in
18 Nevada. “NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of
19 convictions; instead, these are considerations within the discretion of the district court.” Arajakis v.
20 State, 843 P.2d 800, 805 (Nev. 1992). This part of ground 2 is without merit.

21 Second, petitioner claims that the trial court did not make the proper findings that it was just
22 and proper to adjudicate him as a habitual criminal. Nev. Rev. Stat. § 207.010 does not require any
23 such particularized findings of fact, only that the court know that it has the discretion to adjudicate a
24 person as a habitual criminal. Tilcock v. Budge, 538 F.3d 1138, 1144 (9th Cir. 2008) (citing
25 O’Neill v. State, 153 P.3d 38 (Nev. 2007), Hughes v. State, 996 P.2d 890 (Nev.2000) (per curiam)).
26 The transcript of the sentencing hearing reflects that the judge considered the arguments of both
27 sides before deciding to impose the habitual criminal enhancement. Ex. 29, at 14-15 (#24). This
28 part of ground 2 is without merit.

1 Third and last in ground 2, Counts claims that the determination that he was a habitual
2 criminal was based upon incorrect information in the pre-sentence investigation report and that he
3 shares the same first and last name with six cousins. However, the notice of habitual criminality
4 relied upon two prior convictions to which petitioner himself admitted in his trial testimony and
5 which the prosecution provided to him in pre-trial discovery. Counts has the burden of proving that
6 the other arrests and criminal activities in his pre-sentence investigation report were incorrectly
7 attributed to him; he has presented no such proof. And, as respondents note, once the requisite
8 number of convictions has been established, the trial court may consider other criminal activity in
9 determining whether to adjudicate petitioner as a habitual criminal. This part of ground 2 is without
10 merit.

11 **3. Ground 3: additional due process arguments**

12 In ground 3, petitioner claims that due process was violated because he could not have been
13 sentenced under any one of three alternatives. First, he argues that he could not have been
14 sentenced under Nev. Rev. Stat. § 207.010(1)(b), also known as the large habitual criminal statute,
15 because the prosecution did not prove that he had been convicted of three prior felonies. Second, he
16 argues that he could not have been sentenced as a habitually fraudulent felon under Nev. Rev. Stat.
17 § 207.014 because fraud was not an element in his prior or current convictions. Third, he could not
18 have been sentenced as a habitual felon under Nev. Rev. Stat. § 207.012 because his prior crimes
19 were not those listed as qualifying felonies. Petitioner overlooks the one provision that is applicable
20 to him, the small habitual criminal statute:

21 1. Unless the person is prosecuted pursuant to NRS 207.012 or 207.014, a person convicted
22 in this State of:

23 (a) Any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any
24 felony, who has previously been two times convicted, whether in this State or elsewhere, of
25 any crime which under the laws of the situs of the crime or of this State would amount to a
26 felony, or who has previously been three times convicted, whether in this State or elsewhere,
of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to
defraud is an element, is a habitual criminal and shall be punished for a category B felony by
imprisonment in the state prison for a minimum term of not less than 5 years and a
maximum term of not more than 20 years.

27 Nev. Rev. Stat. § 207.010 (emphasis added) (2008). The prosecution presented two prior felony
28 convictions, both of which petitioner admitted in his trial testimony. See Ex. 23 (#24). The trial

1 court sentenced him to prison for a minimum term of 8 years and a maximum term of 20 years,
2 which is authorized by § 207.010(1)(a), and the trial court mentioned specifically the small habitual
3 criminal statute. See Ex. 30 (#24). This part of ground 3 is without merit.

4 As for the remaining arguments in ground 3, either they rest upon petitioner's incorrect
5 assumption that he was adjudicated as a habitual felon pursuant to Nev. Rev. Stat. § 207.012 or the
6 court already has rejected the arguments in its analysis of grounds 1 and 2.

7 **4. Ground 4: Eighth Amendment violation**

8 In ground 4, Counts claims that his sentence violates the Eighth Amendment. In its analysis
9 of grounds 1, 2, and 3, the court has already has addressed and rejected all the arguments that
10 petitioner has presented in this ground. Changing the constitutional theory does not change the
11 outcome. Ground 4 is without merit.

12 **D. No Certificate of Appealability**


13 To appeal the denial of a petition for a writ of habeas corpus, Petitioner must obtain a
14 certificate of appealability, after making a "substantial showing of the denial of a constitutional
15 right." 28 U.S.C. §2253(c). "Where a district court has rejected the constitutional claims on the
16 merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate
17 that reasonable jurists would find the district court's assessment of the constitutional claims
18 debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). This court concludes that
19 reasonable jurists would not find any of the court's determinations to be debatable or wrong, and the
20 court will not issue a certificate of appealability.

21 **Order**

22 IT IS THEREFORE ORDERED that the petition for a writ of habeas corpus (#1) is
23 **DENIED**. The clerk of the court shall enter judgment accordingly.

24 IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

25 July 22, 2014

26
27
28


JENNIFER A. DORSEY
United States District Judge