

IN THE SUPREME COURT OF THE STATE OF NEVADA

GUS W. MILLER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45034

**FILED**

AUG 24 2005

ORDER OF AFFIRMANCE

JANETTE W. GUDOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

On February 26, 1997, the district court convicted appellant, pursuant to a jury verdict, of one count of conspiracy to commit murder, one count of first degree kidnapping with the use of a deadly weapon, and one count of possession of a controlled substance with the intent to sell. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole for the kidnapping count, a consecutive term of forty-eight to one hundred and twenty months for the conspiracy count and a concurrent term of nineteen to forty-eight months for the possession count. This court dismissed appellant's direct appeal.<sup>1</sup>

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<sup>1</sup>Miller v. State, Docket No. 30157 (Order Dismissing Appeal, April 13, 1999).

On December 9, 1999, appellant filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to assist appellant, and on August 19, 2004, appellant's post-conviction counsel filed a supplement to the petition. The State opposed the petition, and appellant filed a reply. On April 7, 2005, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he received ineffective assistance of trial counsel.<sup>2</sup> To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.<sup>3</sup> A petitioner must further establish a reasonable probability that, in the absence of counsel's errors, the results of the proceedings would have been different.<sup>4</sup> The court can dispose of a claim if the petitioner makes an insufficient showing on either

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<sup>2</sup>To the extent that appellant raised any of the following issues independently from his ineffective assistance of counsel claims, we conclude that they are waived, and appellant failed to demonstrate good cause for his failure to do so. See NRS 34.810(1)(b); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

<sup>3</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>4</sup>Id.

prong.<sup>5</sup> A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence, and the district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>6</sup>

First, appellant claimed that his trial counsel was ineffective for failing to object to the first degree kidnapping jury instruction. Appellant claimed that the jury instruction precluded the jury from determining the validity of the state's conspiracy theory and precluded the jury from determining the question of an additional risk of harm. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. There was nothing improper in the kidnapping jury instruction as it properly instructed the jury that a kidnapping committed for the purpose of killing another is first degree kidnapping.<sup>7</sup> The jury received additional instructions about conspiracy to commit murder. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Second, appellant claimed that his trial counsel was ineffective for failing to object to the deadly weapon jury instruction because it precluded the jury from determining the question of actual or

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<sup>5</sup>Strickland, 466 U.S. at 697.

<sup>6</sup>Means v. State, 120 Nev. \_\_\_, \_\_\_, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

<sup>7</sup>See NRS 200.310(1).

constructive possession. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Jury instruction 26 properly instructed the jury about actual and constructive possession of the weapon.<sup>8</sup> We note that the evidence at trial established that appellant was in actual possession of the gun. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Third, appellant claimed that his trial counsel was ineffective for failing to object to the jury instruction relating to possession of a controlled substance with the intent to sell because it precluded the jury from determining whether there was proof of an overt act or agreement and the issue of actual or constructive possession. Appellant failed to demonstrate that his trial counsel's performance was unreasonable or that he was prejudiced. The jury was not required to be instructed about whether there was an agreement relating to the controlled substance.<sup>9</sup> Jury instruction 31 did not preclude the jury from determining the issue of possession of the controlled substance.<sup>10</sup> Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

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<sup>8</sup>See Walters v. State, 108 Nev. 186, 189, 825 P.2d 1237, 1239 (1992).

<sup>9</sup>See NRS 453.337; Sanders v. State, 110 Nev. 434, 874 P.2d 1239 (1994).

<sup>10</sup>See id.

Fourth, appellant claimed that his trial counsel was ineffective for failing to object to the reasonable doubt jury instruction. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Jury instruction 5 correctly stated the statutory definition of reasonable doubt.<sup>11</sup> This court has held that the statutory definition of reasonable doubt does not "dilute the state's burden to establish guilt beyond [a] reasonable doubt and does not shift the burden of proof."<sup>12</sup> Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Fifth, appellant claimed that his trial counsel was ineffective for failing to object to the conspiracy jury instruction because it precluded the jury from determining if there was an overt act or agreement or intent to commit murder. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The jury was properly instructed on the elements of a conspiracy to commit murder.<sup>13</sup> Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

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<sup>11</sup>See NRS 175.211.

<sup>12</sup>Cutler v. State, 93 Nev. 329, 337, 566 P.2d 809, 813-14 (1977); see also Bollinger v. State, 111 Nev. 1110, 1114-15, 901 P.2d 671, 674 (1995); Lord v. State, 107 Nev. 28, 38-40, 806 P.2d 548, 554-56 (1991).

<sup>13</sup>See NRS 199.490; Garner v. State, 116 Nev. 770, 780, 6 P.3d 1013, 1020 (2000) overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

Sixth, appellant claimed that his trial counsel was ineffective for failing to have the jury instructed about mere presence. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The jury was provided with a mere presence jury instruction. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Seventh, appellant claimed that his trial counsel was ineffective for failing to demand a cautionary jury instruction addressing the credibility of confidential informant testimony. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. An instruction addressing the credibility of confidential informant testimony would have been inappropriate as the victim was not testifying as a confidential informant but as the victim of the charged offenses. Moreover, a cautionary jury instruction would not have had a reasonable probability of altering the outcome of the trial where there was testimony that the victim was reliable.<sup>14</sup> Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Eighth, appellant claimed that his trial counsel was ineffective for failing to inquire about his criminal history. Appellant claimed that it was error for his trial counsel to rely on the State's representation of his criminal history. Appellant failed to provide any specific facts in support of this claim, and thus, appellant failed to demonstrate that he was

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<sup>14</sup>See King v. State, 116 Nev. 349, 355-56, 998 P.2d 1172, 1176 (2000); compare Champion v. State, 87 Nev. 542, 490 P.2d 1056 (1971).

prejudiced.<sup>15</sup> Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Ninth, appellant claimed that his trial counsel was ineffective for failing to file crucial pretrial formal discovery motions seeking the confidential informant file. Appellant's trial counsel did seek discovery of the confidential informant file. Appellant failed to indicate what further steps counsel should have taken that would have had a reasonable probability of altering the outcome of the proceedings. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Tenth, appellant claimed that his trial counsel was ineffective for failing to adequately investigate the victim. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to indicate what further investigation should have been performed such that there is a reasonable probability of a different outcome. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Eleventh, appellant claimed that his trial counsel was ineffective for failing to file a pretrial motion to suppress the gun, to demand a curative jury instruction regarding the mishandling of the gun, to demand inspection of evidence, and to demand that the gun be processed for fingerprints. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The theory

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<sup>15</sup>See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

of defense as presented in opening statements was that appellant brought the gun, but that he did not intend to kidnap or kill the victim, but rather, he intended to bribe or intimidate the victim into not testifying in the Arizona case. Appellant was observed by the police reaching down to the floor where the gun was ultimately found. A bullet found in appellant's pocket matched the type of bullets found in the gun itself. Appellant failed to demonstrate that further testing of the gun would have revealed exculpatory evidence that would have had a reasonable probability of altering the outcome of the trial. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Twelfth, appellant claimed that his trial counsel erroneously advised him not to testify on his own behalf. Appellant claimed that his testimony would have established reasonable doubt as to who possessed the gun and drugs. Appellant further indicated his testimony would have cast doubt that he kidnapped the victim or conspired to commit the victim's murder. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that any testimony would have had a reasonable probability of altering the outcome of the trial given the substantial evidence of guilt presented at trial. Further, it was reasonable to advise appellant not to testify in light of at least one prior felony conviction that could have been used for impeachment purposes.<sup>16</sup> Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

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<sup>16</sup>See NRS 50.095.



Thirteenth, appellant claimed that his trial counsel was ineffective for failing to file a motion for a directed verdict and a motion for a new trial. Appellant further argued that his trial counsel failed to plan and implement a defense strategy and exercise diligence and skill. Appellant failed to demonstrate that his trial counsel's performance was unreasonable or that he was prejudiced. Appellant failed to provide any specific facts in support of this claim.<sup>17</sup> Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Fourteenth, appellant claimed that his trial counsel was ineffective for failing to file a motion to sever his trial from that of his co-defendants. Appellant claimed that his trial counsel's performance was hampered because the district court limited defense counsel from asking questions previously asked by the counsel for the co-defendants. He further claimed that he was unable to testify because the trials were joined, and thus, he was unable to have evidence admitted relating to bribery or intimidating of a witness. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that a joint trial was improper.<sup>18</sup> Appellant failed to demonstrate that the ground rules established by the district court were unreasonable or hampered his trial counsel, and he failed to indicate what questions he was prevented from asking as a result

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<sup>17</sup>See Hargrove, 100 Nev. 498, 686 P.2d 222.

<sup>18</sup>See Tabish v. State, 119 Nev. 293, 301-09, 72 P.3d 584, 589-94 (2003); Rowland v. State, 118 Nev. 31, 44-46, 39 P.3d 114, 122-23 (2002).

of the district court's admonition. Appellant further failed to demonstrate that he was prevented from testifying simply because his co-defendants had testified. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Next, appellant claimed that he received ineffective assistance of appellate counsel. "A claim of ineffective assistance of appellate counsel is reviewed under the 'reasonably effective assistance' test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)."<sup>19</sup> Appellate counsel is not required to raise every non-frivolous issue on appeal.<sup>20</sup> This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal.<sup>21</sup> "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."<sup>22</sup> Again, a petitioner must demonstrate the factual allegations underlying the ineffective assistance of counsel claim by a preponderance of the evidence.<sup>23</sup>

First, appellant claimed that his appellate counsel failed to argue that the trial court committed reversible error when it permitted

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<sup>19</sup>*Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

<sup>20</sup>*Jones v. Barnes*, 463 U.S. 745, 751 (1983).

<sup>21</sup>*Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

<sup>22</sup>*Kirksey*, 112 Nev. at 998, 923 P.2d at 1114.

<sup>23</sup>*Means*, 120 Nev. at \_\_\_, 103 P.3d 25 at 33.

introduction of evidence obtained through an illegal search and seizure. Appellant claimed that the stop of the vehicle, in which he was a passenger, was pretextual and that there was no consent or warrant for a search of the glove compartment in which marijuana packaged for sale was found. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that this issue had a reasonable likelihood of success on appeal. First, appellant had no standing to challenge the search of the vehicle as he was a passenger in the vehicle and he was not the owner of the vehicle, nor had he rented or borrowed the vehicle from the registered owner.<sup>24</sup> Even assuming that appellant had standing to challenge the search of the car, appellant failed to demonstrate that the search was not valid because appellant failed to establish that the stop was pretextual and because the record reveals that the marijuana was discovered in an inventory search of an impounded vehicle.<sup>25</sup> Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Second, appellant claimed that his appellate counsel was ineffective for failing to argue that the district court committed reversible

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<sup>24</sup>See Scott v. State, 110 Nev. 622, 627-28, 877 P.2d 503, 507 (1994); see also Rakas v. Illinois, 439 U.S. 128, 148 (1978).

<sup>25</sup>See Hughes v. State, 116 Nev. 975, 980, 12 P.3d 948, 951 (2000); Scott, 110 Nev. at 628, 877 P.2d at 508; see also Whren v. United States, 517 U.S. 806, 810 (1996); South Dakota v. Opperman, 428 U.S. 364, 372 (1976).

error when it failed to conduct a Petrocelli<sup>26</sup> hearing prior to granting the State leave to present prior bad act evidence. Appellant claimed that the State failed to provide clear and convincing evidence of the prior bad acts. Appellant further claimed that because Arizona later dismissed the drug charges that served as the prior bad acts that the prior bad acts were not credible. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that these issues had a reasonable probability of success on appeal. This court considered appellant's claim that the district court failed to conduct the required Petrocelli hearing and concluded that it was harmless error because the prior bad act evidence would have been admissible had the proper hearing been conducted.<sup>27</sup> Appellant failed to indicate what further argument should have been made that would have had a reasonable probability of altering the outcome of the direct appeal. Appellant further failed to demonstrate that information relating to the subsequent dismissal of the Arizona drug charges would have had a reasonable probability of altering the outcome of the direct appeal. Therefore, we conclude that the district court did not err in determining that that these claims lacked merit.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that the State failed to properly preserve potentially exculpatory evidence. Appellant claimed that the State

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<sup>26</sup>Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

<sup>27</sup>See Qualls v. State, 114 Nev. 900, 961 P.2d 765 (1998).

mishandled the gun found in the car and failed to test the gun for fingerprints. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that this issue had a reasonable probability of success on appeal. Appellant failed to demonstrate that the State improperly failed to gather exculpatory evidence as he failed to establish that the potential evidence was material.<sup>28</sup> Appellant failed to demonstrate that the gun would have provided exculpatory evidence. As discussed earlier, the theory of defense as presented in opening statements was that appellant brought the gun, but that he did not intend to kidnap or kill the victim, but rather, he intended to bribe or intimidate the victim into not testifying in the Arizona case. Appellant was observed by the police reaching down to the floor where the gun was ultimately found. Further, the evidence at trial established that the gun was found on the floor near the area appellant was seated in the car. A bullet found in appellant's pocket matched the type of bullets found in the gun itself. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that the victim's testimony was inadmissible because impeachment evidence was not permitted. Appellant based this claim on his belief that the district court improperly denied trial counsel's

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<sup>28</sup>See Daniels v. State, 114 Nev. 261, 267-68, 956 P.2d 111, 115-16 (1998). The second prong, whether the failure to gather evidence was attributable to negligence, gross negligence or bad faith, need not be reached where materiality is not established. Id.

motion for discovery of Brady<sup>29</sup> material—the victim's confidential informant file. Appellant claimed that the failure to disclose this evidence violated his right to confront his accuser. This court considered and rejected appellant's claim on direct appeal that the district court improperly denied his motion for discovery of the confidential informant file. Appellant failed to indicate what further arguments should have been presented that would have had a reasonable probability of altering the outcome. Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Fifth, appellant claimed that his appellate counsel was ineffective for failing to argue that the prosecutor committed misconduct during the rebuttal argument. Appellant failed to demonstrate that his appellate counsel's performance was unreasonable or that any of the issues of prosecutorial misconduct had a reasonable probability of success on appeal because the evidence presented against appellant was not close.<sup>30</sup> Therefore, we conclude that the district court did not err in determining that this claim lacked merit.

Finally, appellant claimed that various constitutional rights were violated due to the ineffective assistance of counsel and cumulative errors. Because appellant failed to demonstrate that he received

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<sup>29</sup>Brady v. Maryland, 373 U.S. 83 (1963).

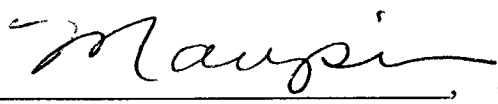
<sup>30</sup>See Smith v. State, 120 Nev. \_\_\_, 102 P.3d 569 (2004); Rowland, 118 Nev. at 38, 39 P.3d at 118-19.

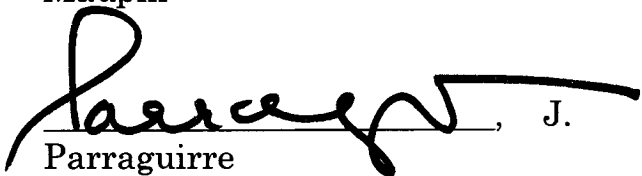
ineffective assistance of counsel, we conclude that the district court did not err in determining that this claim lacked merit.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>31</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Becker

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Parraguirre

cc: Honorable Jackie Glass, District Judge  
Gus W. Miller  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>31</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).