

IN THE SUPREME COURT OF THE STATE OF NEVADA

PETER MATTHEW BERGNA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52239

**FILED**

JUN 10 2010

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.<sup>1</sup> Second Judicial District Court, Washoe County; Brent Adams, Judge. Appellant was represented by appointed counsel below. We previously remanded this case for counsel, but appellant refused representation on appeal.

In this petition filed on March 24, 2006, appellant raised numerous claims of ineffective assistance of trial counsel. To prove a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice such that counsel's errors were so severe that they rendered the jury's verdict unreliable. Strickland v.

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<sup>1</sup>This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

Washington, 466 U.S. 668, 687-88 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). Both components must be shown. Strickland, 466 U.S. at 697. A petitioner must demonstrate the facts underlying such a claim by a preponderance of the evidence, and this court will defer to the district court's factual findings. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). Further, tactical decisions of counsel are virtually unchallengeable absent extraordinary circumstances. See Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Several of appellant's claims of ineffective assistance of trial counsel failed to demonstrate prejudice. These claims included that his trial counsel were ineffective for: promising during opening statement to present certain evidence; failing to investigate and impeach the jailhouse informant with newspaper clippings, medical history or other jailhouse informants; failing to ask for judicial notice that the jailhouse informant had lied in a different case; failing to object to questions about the jailhouse informant's religious beliefs; failing to request the Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001), instruction or a mistrial; failing to object to judicial misconduct; failing to challenge three jurors for cause; failing to request instructions on accident, negligent driving, or "the mere failure to take corrective action;" and failing to request an instruction on corpus delicti. Appellant failed to demonstrate that these claims created a reasonable probability of a different outcome at trial. Therefore, the district court did not err in denying these claims.

Next, appellant claimed that trial counsel were ineffective for failing to object to the victim impact testimony, to object to the

introduction of evidence from the truck and the hillside, and to request a jailhouse informant instruction. These claims were belied by the record. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). As to the first two claims, trial counsel filed motions prior to trial to exclude this evidence and they were denied. As to the third claim, a jailhouse informant instruction was given. To the extent that appellant claimed that a different instruction should have been given, appellant failed to demonstrate what other instruction should have been given or that there would have been a reasonable probability of a different outcome at trial had a different instruction been given. Therefore, the district court did not err in denying these claims.

Next, appellant claimed that trial counsel were ineffective for failing to hire a forensic brake expert. Appellant failed to demonstrate deficiency or prejudice because appellant did not provide any evidence to show what a forensic brake expert would have testified to. Id. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that his trial counsel were ineffective for opening the door to appellant's ex-wife's testimony by putting on a character defense. Appellant failed to demonstrate deficiency because it was a tactical decision. Trial counsel testified at the evidentiary hearing that based on the State's case, they needed to negate or diminish any inference that appellant had bad character. See Ford, 105 Nev. at 853, 784 P.2d at 953. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that trial counsel were ineffective because they failed to object when the informant and appellant's neighbor testified about threats. Appellant failed to demonstrate deficiency or

prejudice. Neither witness testified that appellant threatened them. Rather, the informant testified only that prison informants were not liked in prison and the neighbor testified that appellant had once made her uncomfortable by noting that he noticed that her husband was often away. Trial counsel testified at the evidentiary hearing that they did not object because they thought the better strategy was to impugn her credibility on cross-examination. See id. Further, appellant failed to demonstrate a reasonable probability of a different outcome at trial had trial counsel objected. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that trial counsel were ineffective for failing to object to testimony regarding a child's exposure to the Playboy channel. Appellant failed to demonstrate deficiency or prejudice. At the evidentiary hearing, trial counsel testified that they made a tactical decision to deal with it by undermining the witness's credibility on cross-examination since the district court had already ruled the testimony admissible. See id. Further, appellant failed to demonstrate a reasonable probability of a different outcome at trial had trial counsel objected. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that trial counsel were ineffective for failing to clarify his relationship with his fiancé. Appellant failed to demonstrate deficiency or prejudice. At the evidentiary hearing, trial counsel testified that the only way to present information regarding appellant's relationship with his fiancé was to have one of them testify, which trial counsel did not want and appellant agreed with this strategy. Id. Further, appellant failed to demonstrate a reasonable probability of a different outcome had evidence been presented regarding the relationship. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that trial counsel were ineffective for stating to the jury at jury selection that they would not hear anyone say that the victim had been belittled by the appellant. Appellant failed to demonstrate deficiency or prejudice. Trial counsel testified at the evidentiary hearing that they did not believe that any testimony presented by the State constituted 'belittling' and this was a reasonable belief. Id. Further, appellant failed to demonstrate that there was a reasonable probability of a different outcome had counsel not made that statement. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that counsel were ineffective for failing to impeach appellant's neighbor with evidence that: she was receiving information from the victim's former long-term live-in boyfriend, she bathed nude in her front-yard hot tub, and she collected some of the victim's things from Slide Mountain. Appellant failed to demonstrate deficiency or prejudice. Appellant failed to produce evidence to support the claims regarding the boyfriend and hot tub. See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. The neighbor was cross-examined about the victim's things on Slide Mountain and appellant failed to demonstrate a reasonable probability of a different outcome had a more effective cross-examination had been conducted. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that trial counsel were ineffective for failing to impeach the victim's aunt by pointing out that the victim did not speak Italian and the aunt did not speak English and by showing her letters written between the victim and appellant. Appellant failed to demonstrate deficiency or prejudice. Trial counsel inquired into the language barrier and the jurors could see that the aunt needed a

translator to testify. Further, trial counsel introduced the letters through another witness. Moreover, appellant failed to demonstrate a reasonable probability of a different outcome at trial had trial counsel asked more questions or introduced the letters through the aunt. Therefore, the district court did not err in denying this claim.

Next, appellant claimed trial counsel was ineffective for failing to specifically request one of the State's expert's personnel file and that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by not disclosing the file. Apparently, the same week that this expert testified, charges were sustained against him for twice falsifying timesheets. Appellant failed to demonstrate that this evidence was material and therefore he failed to demonstrate that counsel was ineffective for failing to specifically request the file. See Strickler v. Greene, 527 U.S. 263, 280 (1999); see also Bennett v. State, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). Therefore, the district court did not err in denying these claims.

Next, appellant claimed that trial counsel were ineffective for failing to challenge the State's expert's testimony based on Crawford v. Washington, 541 U.S. 36 (2004), because the experts relied on out-of-court material that was not admitted at trial. Appellant failed to demonstrate deficiency. Appellant failed to demonstrate that Crawford applies when an expert is relying on out-of-court materials not admitted at trial. See Estes v. State, 122 Nev. 1123, 1141, 146 P.3d 1114, 1126 (2006) (did not apply Crawford where a testifying doctor relied on opinions of non-testifying doctors). Further, appellant failed demonstrate a reasonable probability of a different outcome at trial had counsel objected based on Crawford. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that trial counsel was ineffective for failing to call appellant's first trial counsel at a hearing regarding a misstatement by the State during the grand jury proceedings. Appellant failed to demonstrate deficiency or prejudice. Appellant produced no evidence that the State made a misstatement during the grand jury proceedings. Further, appellant failed to demonstrate a reasonable probability of a different outcome at trial. Therefore, the district court did not err in denying this claim.

Appellant also made several claims of ineffective assistance of appellate counsel. To prove a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). This court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Several of appellant's claims in his petition failed to demonstrate prejudice. These claims included that his appellate counsel was ineffective for failing to argue: the destruction of evidence issue in an adequate manner; that the State failed to prove the corpus delicti; that the pre-indictment delay was excessive; that the corpus delicti cannot be proven by experts testifying beyond their expertise or through irrelevant character evidence and opinion testimony about guilt; numerous claims of prosecutorial misconduct; that the district court abused its discretion

when it allowed evidence as to the victim's intent to change her will; that the State improperly impeached a witness; that the district improperly limited the cross-examination of the State's expert as to the "Ford Documents" or recalls; that the district court erred in denying the motion for change of venue and for not allowing a jury questionnaire; that the district court committed judicial misconduct; that the district court erred in denying a nighttime view of the site; that the district court erred in denying the motion for new trial; and that appellant was entitled to a new trial based on letters from inmates regarding appellant's confession to the jailhouse informant. Appellant failed to demonstrate that these claims had a reasonable probability of success on appeal. Therefore, the district court did not err in denying these claims.

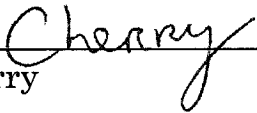
Next, appellant claimed that appellate counsel was ineffective for omitting claims from his brief rather than changing the format of the brief and for failing to file a supplemental brief based on Crawford. Appellant failed to demonstrate prejudice because he failed to demonstrate that the omitted issues had a reasonable probability of success on appeal. Therefore, the district court did not err in denying these claims.

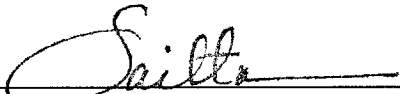
Finally, appellant claimed that appellate counsel was ineffective for failing to federalize his claims on appeal. Appellant failed to demonstrate prejudice because he failed to demonstrate he would have received a more favorable standard of review on appeal had counsel federalized his claims. See Browning v. State, 120 Nev. 347, 365, 91 P.3d 39, 52 (2004). Therefore, the district court did not err in denying this claim.




Having reviewed considered appellant's contentions, and concluding they are without merit,<sup>2</sup> we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Patrick Flanagan, District Judge  
Peter Matthew Bergna  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk

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<sup>2</sup>To the extent that appellant raised any of the underlying claims independently from his ineffective assistance of counsel claims, we conclude that they are waived because they could have been raised on direct appeal, 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, 751-52, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.