

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERTO MIRANDA-ZAMARRON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52641

FILED

FEB 04 2010

THOMAS K. LINDEMAN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a timely post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Ineffective assistance of trial counsel

Appellant argues that the district court erred in denying six claims of ineffective assistance of trial counsel. To prove ineffective assistance of 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 there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. Strickland v. 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 of the inquiry must be shown, Strickland, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings regarding ineffective

assistance of counsel are entitled to deference. Id.; Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, appellant argues that his trial counsel was ineffective for failing to argue that the four counts of drug trafficking constituted parts of one conspiracy and that the offenses violate double jeopardy because they merge into one count of trafficking in a controlled substance. Appellant also argues that two of the heroin counts were duplicative. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced because the four counts stemmed from four separate and distinct possessions, and the State properly charged each possession under a separate count. See United States v. Blakeney, 753 F.2d 152, 154-55 (D.C. Cir. 1985). Accordingly, there is no reasonable probability that the outcome of the proceedings would have been different had his trial counsel argued that the counts merged and the heroin counts were duplicative. Therefore, the district court did not err in denying this claim.

Second, appellant argues that his trial counsel was ineffective for failing to argue that the traffic stop leading to his arrest was illegal. Appellant fails to demonstrate prejudice because a challenge to the traffic stop had no merit. See Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996). Through surveillance of appellant and an informant, police gained probable cause to arrest appellant for two drug transactions that occurred approximately two weeks prior to appellant's arrest. Doleman v. State, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991). Because appellant cannot demonstrate prejudice, the district court did not err in denying this claim.

Third, appellant argues that trial counsel should have argued that the State unreasonably relied on the statements of an unreliable informant. Appellant fails to demonstrate that he was prejudiced. Appellant made only bare and naked allegations that the informant was unreliable. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). And appellant fails to demonstrate a reasonable probability that the outcome of the proceedings would have been different had his trial counsel made the argument, as the State did not rely solely on the statements of the informant. Therefore, the district court did not err in denying this claim.

Fourth, appellant argues that his trial counsel was ineffective for failing to file a motion to suppress the evidence obtained from a warrantless search of appellant and his vehicle. Appellant fails to demonstrate prejudice because a motion to suppress had no merit. Kirksey, 112 Nev. at 990, 923 P.2d at 1109. The search of appellant's person was properly conducted incident to his arrest, Chimel v. California, 395 U.S. 752, 762-63 (1969), and appellant consented to the search of the vehicle that he was driving, in which no contraband was found. All of the other drugs were found pursuant to search warrants. Because appellant cannot demonstrate prejudice, the district court did not err in denying this claim.

Fifth, appellant argues that his trial counsel was ineffective for failing to discuss the case with him, for believing that appellant was guilty, for accepting the police officers' version of events, and for attempting to get through trial quickly. Appellant fails to demonstrate that he was prejudiced because there was overwhelming evidence of his guilt, and therefore no reasonable probability that the outcome of the

proceedings would have been different had he met further with counsel, if counsel had not believed the police officers, or if counsel had not went as quickly during trial. Therefore, the district court did not err in denying this claim.

Sixth, appellant argues that his trial counsel was ineffective for failing to present mitigation evidence at the sentencing hearing. Appellant fails to demonstrate that he was prejudiced. Appellant did not identify any mitigation evidence which could have been presented. Hargrove, 100 Nev. at 502, 686 P.2d at 225. In addition, considering the large amount of controlled substances appellant had in his possession, appellant fails to demonstrate a reasonable probability that the outcome of the sentencing hearing would have been different had his trial counsel presented mitigation evidence at the sentencing hearing. Therefore, the district court did not err in denying this claim.

Ineffective assistance of appellate counsel

Next, appellant argues that the district court erred in denying his claims of ineffective assistance of appellate counsel. To prove 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, 112 Nev. at 998, 923 P.2d at 1114. Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). Rather, 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).

First, appellant argues that his appellate counsel was ineffective for failing to argue that the four counts merged and that the evidence found during a warrantless search of appellant and his vehicle was unconstitutionally obtained. As discussed previously, the underlying claims lack merit and appellant therefore fails to demonstrate that his counsel's performance was deficient or that there was a reasonable likelihood of success on appeal. Therefore, the district court did not err in denying these claims.

Second, appellant argues that his appellate counsel was ineffective for failing to argue that prosecutorial misconduct warranted a new trial. Appellant fails to provide any cogent argument concerning this claim. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Therefore, appellant fails to demonstrate that he is entitled to relief.

NRAP 3C

Next, appellant contends that NRAP 3C unconstitutionally chills the right to a direct appeal because it deprives counsel of adequate payment for an appeal.<sup>1</sup> This claim could have been raised on direct appeal, and appellant fails to allege or demonstrate cause for his failure to do so. See NRS 34.810(1)(b). In addition, as appellant fails to demonstrate that he was prejudiced by any of the above claims, he fails to demonstrate that his counsel was ineffective due to application of NRAP 3C or that the cumulative errors of counsel amounted to ineffective


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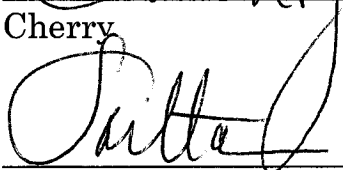
<sup>1</sup>We note that nothing in NRAP 3C limits the compensation of counsel. NRAP 3C(b) specifically directs counsel to "adjust their public or private contracts for compensation to accommodate the additional duties imposed by [NRAP 3C]."


assistance. Therefore, appellant fails to demonstrate that this claim entitles him to relief.

Having considered appellant's contentions and concluding that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Jerome Polaha, District Judge  
Karla K. Butko  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk