

IN THE SUPREME COURT OF THE STATE OF NEVADA

KASHARD O. BROWN A/K/A KASARD
OMAR BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52829

FILED

APR 28 2011

TRACIE 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 post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellant argues that the district court erred in denying his claims of ineffective assistance of trial counsel when it declined to hold an evidentiary hearing on the majority of his claims. 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). To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations that are not belied by the record and, if true,

would entitle him to relief. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). We give deference to the district court's factual findings regarding ineffective assistance of counsel but review the court's application of the law to those facts de novo. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant argues that his trial counsel was ineffective for failing to present testimony from D.L. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. At the evidentiary hearing, counsel testified that he did not call D.L. as a witness because D.L. had given inconsistent stories, telling the police she was not at the scene of the shooting, but writing to appellant that she was present. Counsel also testified that he was concerned that D.L. would testify about a sexual relationship with appellant and about appellant's drug use. In addition, counsel testified that in his opinion, the jury would not find D.L. credible because she had a felony conviction for prostitution while knowing she was HIV positive. Based on those reasons, counsel testified that he made a tactical decision not to call D.L. as a defense witness. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances." Ford v State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). The district court concluded that counsel was not ineffective for failing to present D.L.'s testimony and substantial evidence supports that decision. Therefore, the district court did not err in denying this claim.

Second, appellant argues that his trial counsel had a conflict of interest because the public defender's office represented D.L. on prostitution charges. Appellant fails to demonstrate that counsel's performance was deficient because appellant fails to demonstrate that an actual conflict of interest existed. Strickland, 466 U.S. at 692 (citing

Cuyler v. Sullivan, 446 U.S. 335, 348, 350 (1980)). Appellant fails to demonstrate that the public defender's office's representation of him for the murder charge and D.L. for an unrelated prostitution charge adversely affected his counsel's performance or created a situation conducive to divided loyalties. Id.; see also Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992). In addition, appellant fails to demonstrate that counsel violated RPC 1.7 because he failed to demonstrate that D.L. was directly adverse to appellant or that counsel was materially limited by representation of both clients. Therefore, the district court did not err in denying this claim without considering it at an evidentiary hearing.

Third, appellant argues that trial counsel was ineffective for failing to investigate and call multiple witnesses to testify. Appellant fails to demonstrate that he was prejudiced. For the majority of the witnesses appellant lists, appellant asserts that they would have provided information supporting D.L.'s testimony. As counsel testified at the evidentiary hearing that he made a tactical decision to not call D.L. to testify, appellant fails to demonstrate a reasonable probability that investigation into witnesses to bolster D.L.'s testimony would have changed the outcome of trial. Further, given the strength of the evidence of appellant's guilt, he fails to demonstrate that the witnesses that allegedly supported D.L. had a reasonable probability of changing the outcome had they testified at trial.

For the additional witnesses appellant lists, he asserts they would have offered further testimony concerning appellant's claim that the shooting was accidental. These witnesses would have been duplicative of witnesses who testified at trial and, given the strength of the evidence of appellant's guilt, appellant fails to demonstrate a reasonable probability of a different outcome had these witnesses been called to testify.

Therefore, the district court did not err in denying this claim without considering it at an evidentiary hearing.

Fourth, appellant argues that trial counsel was ineffective for failing to claim that the State committed prosecutorial misconduct by intimidating D.L. at a pretrial interview. Appellant fails to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant fails to demonstrate that the interview caused D.L. to feel threatened or compelled to change her testimony. See Rippo v. State, 113 Nev. 1239, 1251, 946 P.2d 1017, 1025 (1997). Further, as appellant's trial counsel testified that he made a tactical decision not to call D.L. as a witness, appellant fails to demonstrate that the State's interview with D.L. resulted in the denial of appellant's right to a fair trial. Id. (citing State v. Owens, 753 P.2d 976, 978 (Utah. Ct. App. 1988)). Therefore, the district court did not err in denying this claim without considering it at an evidentiary hearing.

Fifth, appellant argues that trial counsel was ineffective for failing to conduct an examination of the fingerprints collected from the apartment to demonstrate that D.L. was in the apartment at the time of the shooting and that D.L. or the victim entered the apartment through a window. Appellant fails to demonstrate that he was prejudiced. Appellant fails to identify any expert who could have testified further concerning the fingerprints recovered at the apartment. Appellant fails to demonstrate that further investigation would have demonstrated that D.L. or the victim entered the apartment through a window. In addition, given the evidence produced at trial, appellant fails to demonstrate a reasonable probability of a different outcome at trial had counsel conducted further investigation of the fingerprints at the apartment.

Therefore, the district court did not err in denying this claim without considering it at an evidentiary hearing.

Sixth, appellant argues that trial counsel was ineffective for failing to present a tape of a 911 call made after the shooting by a person named Helen.¹ Appellant fails to demonstrate that he was prejudiced. Appellant asserts that this 911 call would have bolstered his accidental shooting defense because Helen told the 911 dispatcher that appellant stated he accidentally shot the victim. During trial, multiple witnesses testified that appellant told them the shooting was an accident. The information from this 911 call would have been duplicative of that testimony. Given the evidence presented at trial, appellant fails to demonstrate a reasonable probability of a different outcome had this 911 tape been presented at trial. Therefore, the district court did not err in denying this claim without considering it at an evidentiary hearing.

Seventh, appellant argues that trial counsel was ineffective for failing to present testimony from a toolmark expert and a blood spatter expert. Appellant fails to demonstrate that he was prejudiced. Appellant names two expert witnesses whom counsel should have called, but fails to provide any reports or statements from those witnesses which would indicate that these experts would have testified in a different manner than the expert witnesses the State called to testify. Thus, appellant fails to demonstrate a reasonable probability of a different outcome had the experts he names been called to testify. Therefore, the district court did

¹In appellant's opening brief, he asserts that he made a 911 call and counsel should have presented a tape of that call, but in his reply brief he acknowledges that this assertion was an error. As appellant acknowledges his error, we decline to consider this claim.

not err in denying this claim without considering it at an evidentiary hearing.²

Eighth, appellant argues that counsel was ineffective for failing to present character witnesses on appellant's behalf at trial. Appellant fails to demonstrate that he was prejudiced. Given the evidence produced at trial, appellant fails to demonstrate a reasonable probability of a different outcome had testimony from character witnesses been presented at trial. Therefore, the district court did not err in denying this claim without considering it at an evidentiary hearing.

Ninth, appellant argues that trial counsel was ineffective for failing to request a change of venue because the victim's sister was a courtroom clerk. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant fails to demonstrate a reasonable likelihood that a fair and impartial trial could not be had in Clark County. NRS 174.455; see also Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966). Further, given the strength of the evidence produced at trial, appellant fails to demonstrate a reasonable probability that the outcome of the trial would have been different had his counsel

²On December 30, 2010, appellant filed a "motion to admit newly-discovered evidence and supplement or amend petition" and on January 19, 2011, appellant filed a "motion for limited remand." The State opposed the motions and appellant responded. Both of appellant's motions discuss a report and purported testimony from Robert Irvin, a firearms expert. This evidence was not presented to the district court and as such, we decline to consider this evidence in this appeal and deny these motions. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004).

sought a change of venue. Therefore, the district court did not err in denying this claim without considering it at an evidentiary hearing.

Tenth, appellant argues that the above claims cumulatively amount to ineffective assistance of trial counsel. We conclude that appellant fails to demonstrate a reasonable probability of a different outcome even when the alleged errors of counsel are considered cumulatively. Therefore, the district court did not err in denying this claim.³

Next, appellant argues that the district court erred in denying his claims of ineffective assistance of appellate counsel without conducting an evidentiary hearing on these claims. 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 had 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). 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). Both components of the inquiry must be shown. Strickland, 466 U.S. at 697.

First, appellant argues that appellate counsel was ineffective for failing to argue that it was prejudicial for courtroom spectators to wear

³To the extent that appellant asserts that the State did not sufficiently respond to this claim and therefore confessed error, we conclude that appellant's claim lacks merit as the State did respond to this claim with sufficient detail.

a button with a picture of the victim. Appellant fails to demonstrate he was prejudiced by counsel's omission of this issue. Given the strength of the evidence of appellant's guilt, appellant fails to demonstrate a reasonable likelihood of a different outcome on appeal had this issue been raised. Therefore, the district court did not err in denying this claim without considering it at an evidentiary hearing.

Second, appellant argues that appellate counsel was ineffective for failing to argue that the State committed prosecutorial misconduct by intimidating D.L. Appellant fails to demonstrate that his counsel's performance was deficient or that he was prejudiced. As discussed previously, appellant fails to demonstrate that the State caused D.L. to feel threatened or compelled to change her testimony. Appellant fails to demonstrate that the underlying claim had a reasonable likelihood of success on appeal. Therefore, the district court did not err in denying this claim without considering it at an evidentiary hearing.⁴

Third, appellant argues that appellate counsel was ineffective for failing to argue that the trial should have been moved to a different venue. Appellant fails to demonstrate that counsel's performance was deficient or that he was prejudiced. As discussed previously, appellant fails to demonstrate a reasonable likelihood that a fair and impartial trial could not be had in Clark County. Appellant fails to demonstrate that the underlying claim had a reasonable likelihood of success on appeal.

⁴To the extent that appellant raises this claim independent of his claim of ineffective assistance of counsel, we conclude that appellant fails to demonstrate cause for his failure to raise this claim on direct appeal. NRS 34.810(1)(b).

Therefore, the district court did not err in denying this claim without considering it at an evidentiary hearing.

Fourth, appellant argues that the above claims cumulatively amount to ineffective assistance of appellate counsel. We conclude that appellant fails to demonstrate a reasonable probability of a different outcome even when the alleged errors of counsel are considered cumulatively. Therefore, the district court did not err in denying this claim.⁵

Next, appellant claims that the jury was not properly instructed on appellant's theory of the case, the instructions shifted the burden of proof to the defense, the trial court erred in admitting evidence of appellant's prior bad acts, and the trial court erred in precluding a witness from stating his belief that the shooting was an accident. These claims were considered and rejected on direct appeal. Brown v. State, Docket No. 40718 (Order Vacating Prior Order and Affirming the Judgment of Conviction, October 25, 2005). The doctrine of the law of the case prevents further litigation of these claims and "cannot be avoided by a more detailed and precisely focused argument." Hall v State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). In addition, appellant fails to demonstrate that the doctrine of the law of the case should not be imposed

⁵To the extent that appellant asserts that the State did not sufficiently respond to this claim and therefore confessed error, we conclude that appellant's claim lacks merit as the State did respond to this claim with sufficient detail.

Additionally, appellant asserts that errors committed during trial amount to cumulative error, violating his right to a fair trial. Appellant fails to demonstrate cause for his failure to raise this claim on direct appeal. NRS 34.810(1)(b).

because he fails to demonstrate that “the controlling law of this state [was] substantively changed during the pendency of a remanded matter at trial or on appeal.” Hsu v. County of Clark, 123 Nev. 625, 632, 173 P.3d 724, 729-30 (2007). Therefore, the district court did not err in denying these claims.⁶

Next, appellant asserts that the district court’s order did not specifically address its conclusions for multiple grounds raised in appellant’s petition. We conclude that the district court’s order is sufficient to allow for meaningful appellate review. Therefore, appellant fails to demonstrate he is entitled to relief for this claim.

Next, appellant argues that the district court erred as appellant was not allowed the opportunity to review and respond to the proposed draft order in violation of Byford v. State, 123 Nev. 67, 69, 156 P.3d 691, 692 (2007), EDCR 7.21, and NCJC Canon 2, Rule 2.6(A).⁷ Even assuming the district court erred by not allowing appellant to review and respond to the proposed draft, we conclude any error was harmless and appellant fails to demonstrate prejudice. NRS 178.598. Appellant fails to demonstrate that any failure to be allowed to review the proposed factual findings adversely affected the outcome of the proceedings or his ability to


⁶Appellant also asserts that the State confessed error for these claims by failing to discuss these issues in depth in either its answering brief or its amended answering brief. We conclude that appellant’s claim lacks merit as the State’s responses for these claims are sufficient for our review on appeal.

⁷Formerly, NCJC Canon 3B(7).

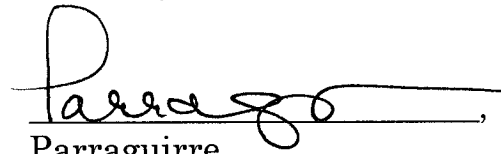
seek full appellate review. Therefore, we conclude that appellant is not entitled to relief on this claim.⁸

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

ORDER the judgment of the district court AFFIRMED.

 _____, J.
Saitta

 _____, J.
Hardesty

 _____, J.
Parraguirre

cc: Hon. Douglas W. Herndon, District Judge
Law Office of Lisa Rasmussen
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁸Further, Byford is distinguishable from this case. In Byford, the State's draft of the proposed order was premature because the district court had not conducted a hearing and had not made a ruling on a capital murder defendant's claims following a remand from this court to reconsider those claims. 123 Nev. at 69, 156 P.3d at 692.