

IN THE SUPREME COURT OF THE STATE OF NEVADA

GAREN M. PEARSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53471

**FILED**

SEP 30 2010

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
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; James M. Bixler, Judge.

On appeal, appellant raises several 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 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 claims that trial counsel was ineffective for: failing to present complete evidence of consent or to cross-examine witnesses, failing to establish sexual knowledge of the victims, failing to explore new evidence after the trial involving witnesses who would have disproved the veracity of key witnesses, failing to do a thorough investigation to establish that there was no sexual intent, failing to present mitigating evidence at sentencing, and failing to file a pretrial motion for bail or a motion to challenge the search warrant. Appellant fails to demonstrate that counsel was deficient or that he was prejudiced. Appellant failed to provide this court with trial and sentencing transcripts which makes it impossible to evaluate whether counsel was effective. The burden is on the appellant to provide an adequate record enabling this court to review assignments of error. See Thomas v. State, 120 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4 (2004); see also Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980); Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975). Further, the majority of these claims were not supported with specific facts that, if true, entitled appellant to relief. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying these claims.

Second, appellant claims that trial counsel was ineffective for failing to adequately challenge the jury instructions regarding consent. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Trial counsel successfully challenged the lack of consent instructions on appeal. Pearson v. State, Docket No. 38098 (Order Affirming in Part, Reversing in Part and Remanding, June 15, 2005). Appellant failed to demonstrate what more trial counsel could have done and failed to demonstrate a reasonable probability of a different outcome

on the lewdness counts had trial counsel successfully challenged the jury instructions at trial. Therefore, the district court did not err in denying this claim.

Third, appellant claims that trial counsel was ineffective for failing to limit the “other bad act” evidence presented at trial. Appellant failed to demonstrate that he was prejudiced. The underlying issue was raised on direct appeal and denied by this court because substantial evidence was presented of appellant’s guilt. Id. Therefore, appellant cannot demonstrate that there was a reasonable probability of a different outcome at trial had trial counsel attempted to limit this evidence. Thus, the district court did not err in denying this claim.

Next, appellant claims that his Sixth Amendment right to counsel was violated because he and his counsel had irreconcilable differences and because Judge Hardcastle abused her discretion when she reappointed the public defender’s office. These claims could have been raised on direct appeal and appellant failed to demonstrate good cause and prejudice to overcome the procedural bar. NRS 34.810(1)(b).

Furthermore, appellant’s claim regarding irreconcilable differences is not proper in a post-conviction petition because the issue of irreconcilable differences goes to whether the district court abused its discretion when denying a motion for substitution of attorney. See Young v. State, 120 Nev. 963, 968-69, 103 P.3d 572, 576 (2004) (adopting the test set forth in United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998): “(1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion.”). Appellant failed to demonstrate an actual conflict of interest or an adverse affect on his attorney’s performance. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Appellant

failed to demonstrate his counsel was placed in a situation conducive to divided loyalties, Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992), or that his counsel actively represented conflicting interests, Burger v. Kemp, 483 U.S. 776, 783 (1987). Therefore, he did not demonstrate a Sixth Amendment violation.<sup>1</sup> Further, it appears that the district court's statement that there were irreconcilable differences occurred after appellant filed a motion to withdraw the guilty plea that trial counsel had negotiated and was related to the guilty plea. After the guilty plea was withdrawn, appellant failed to demonstrate that an actual conflict remained. Accordingly, the district court did not err in denying this claim.

Appellant also specifically claims that there was an actual conflict of interest based on counsel's refusal to present a defense that appellant lacked the intent of sexual gratification as to the lewdness with a minor counts.<sup>2</sup> Appellant failed to demonstrate that there was an actual

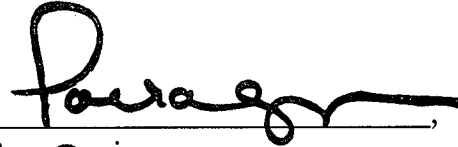
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<sup>1</sup>Appellant's claim of irreconcilable differences really goes to a disagreement over who had the right to choose the strategy for trial. Counsel is entrusted with making decisions regarding trial tactics, including what defenses to present. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) ("Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate—and ultimate—responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop."(quoting Wainwright v. Sykes, 433 U.S. 72, 93 (1977))).

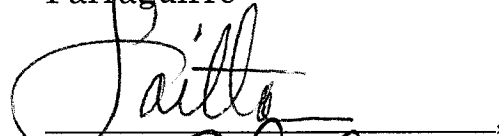
<sup>2</sup>As stated above, trial counsel determines what defenses to develop. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Further, it is impossible to assess whether there was a reasonable probability of a different outcome at trial had counsel presented a lack of intent defense because this court was not provided with trial transcripts in this case.

conflict of interest or that there was an adverse effect on trial counsel's performance. Cuyler, 446 U.S. at 348. Therefore, the district court did not err in denying this claim. Accordingly, we

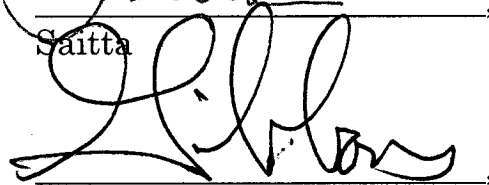
ORDER the judgment of the district court AFFIRMED.

 C.J.

Parraguirre

 J.

Saitta

 J.

Gibbons

cc: Hon. James M. Bixler, District Judge  
The Eighth District Court Clerk  
Attorney General/Carson City  
Bailus Cook & Kelesis  
Clark County District Attorney