

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOE MATTHEW CRUZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53483

FILED

JUL 15 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY M. M. M.
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.¹ Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

In his petition filed on December 8, 2008, appellant claimed he received ineffective assistance of trial and appellate 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. 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). To prove prejudice regarding the performance of appellate counsel, a petitioner must demonstrate that the omitted issue would have a

¹This 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 Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland, 466 U.S. at 697.

First, appellant claimed that trial counsel was ineffective for failing to object or file motions to suppress his confession. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that an objection or a motion to suppress would have been successful and counsel is not deficient for failing to make futile objections or motions. See Donovan v. State, 94 Nevada 671, 675, 584 P.2d 708, 711 (1978). Therefore, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to object to the officer's testimony regarding appellant's statements to the police because it was hearsay. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. The officer's testimony was not hearsay because appellant's statements to the police were admissions of a party opponent. NRS 51.035(3). Therefore, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to call appellant to testify about his confession. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. During trial, the district court canvassed appellant concerning his right to testify and whether he had discussed this right with his attorney. Thus, appellant waived the right to testify. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to require the State to play the interview tape for the jury. Appellant failed to demonstrate that he was prejudiced because he failed

to demonstrate a reasonable probability of a different outcome at trial had the tape been played. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to file a written notice of intent to cross-examine the victim regarding allegations she had made against another boy. Appellant failed to demonstrate that he was prejudiced because he failed to demonstrate that the district court would have allowed in this evidence had counsel properly requested it. Further, appellant failed to demonstrate a reasonable probability of a different outcome at trial had this evidence been allowed in. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective for failing to call witnesses for mitigation purposes. Appellant failed to allege specific facts, that if true, entitled him to relief. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Specifically, he failed to allege who these witnesses were or what they would have testified to. Therefore, the district court did not err in denying this claim.

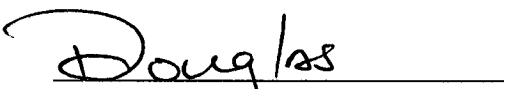
Seventh, appellant claimed that trial counsel was ineffective for failing to investigate the victim's motive and the previous allegations she had made against a different boy. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Appellant failed to allege what he believed the motive of the victim was and therefore failed to allege specific facts, that if true, would entitle him to relief. See id. As to the previous allegations, appellant failed to demonstrate what further investigation could have been done. Therefore, the district court did not err in denying this claim.

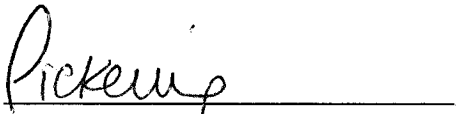
Finally, appellant claimed that he received ineffective assistance of appellate counsel. Appellant claimed that appellate counsel

was ineffective for failing to file a notice of appeal and for failing to consult with him regarding his appeal. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Appellate counsel filed a timely notice of appeal and appellant failed to allege what claims he wanted counsel to include on appeal. See id. Therefore, the district court did not err in denying these claims. We

ORDER the judgment of the district court AFFIRMED.²


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

²Appellant also alleged that his confession was involuntary and that there was insufficient evidence to convict him. These claims should 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)(2). Further, appellant raised sufficiency of the evidence on direct appeal, and therefore, this claim is barred by the doctrine of law of the case. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

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.

cc: Hon. Stefany Miley, District Judge
Joe Matthew Cruz
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk