IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT LEE KIMMELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55451

FILED

SEP 10 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 appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

In his petition, filed on April 18, 2006, appellant raised several claims of ineffective assistance of counsel. To prove ineffective assistance of trial counsel, a petitioner must demonstrate (1) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) resulting prejudice in 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. See Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant argues that counsel was ineffective in failing to adequately investigate the case, particularly the vehicle owner and J. Lair. Appellant fails to demonstrate prejudice. Appellant fails to show what evidence any additional investigation would have shown, including the name of the vehicle's registered owner or what J. Lair's testimony would have been. Thus, appellant fails to demonstrate a reasonable probability of a different outcome had trial counsel investigated these issues. We therefore conclude the district court did not err in denying this claim.

Second, appellant argues that counsel was ineffective in failing to put either his tattoos or his clothes at the time of arrest before the jury. Appellant fails to demonstrate prejudice. The jury heard testimony as to the distinctive nature of appellant's tattoos and as to whether appellant's pants were tan or dark brown, as well as the eyewitness's basis for identifying appellant as the perpetrator. Appellant fails to demonstrate a reasonable probability of a different outcome at trial had images been presented to the jury of the already-described tattoos or clothes.[1] We therefore conclude the district court did not err in denying this claim.

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[1]To the extent appellant argues there was insufficient evidence presented at trial to convict him, we held to the contrary on direct appeal, Kimmell v. State, Docket No. 44443 (Order of Affirmance, October 25, 2005), and that ruling is the law of the case and will not now be disturbed. See Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

Appellant also argues that trial counsel was ineffective in failing to file a pretrial challenge to the probable cause determination and a motion for new trial due to conflicting evidence and that both trial and appellate counsel were ineffective in failing to challenge the show-up identification procedures. Appellant did not raise these issues in his petition. While appellant briefly argued these issues at the evidentiary hearing, the district court, in not addressing these claims in either its oral ruling or its written order, appears to have declined to exercise its discretion and consider them for the first time at the evidentiary hearing. See Barnhart v. State, 122 Nev. 301, 303, 130 P.3d 650, 651-52 (2006). Accordingly, these claims are therefore not properly before this court, and we decline to consider them on appeal in the first instance. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Me ans v. State, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004).

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Steven R. Kosach, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk