

IN THE SUPREME COURT OF THE STATE OF NEVADA

RODNEY LYNN BUTCHEE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 55509

**FILED**

SEP 10 2010

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY J. MADP  
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.<sup>1</sup> Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

In his petition filed on September 24, 2009, appellant claimed that he received ineffective assistance of 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 there was a reasonable probability of a different outcome. 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). In order to prove prejudice regarding the performance of appellate counsel, a petitioner must demonstrate that the omitted issue

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<sup>1</sup>This 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).

would have a 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. A petitioner must demonstrate the facts underlying a claim of ineffective assistance of counsel by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

First, appellant claimed that his trial counsel was ineffective for not pursuing an allegation of a conspiracy between the police and the victims and for failing to impound an alleged digital recording of the burglary incident. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant's trial counsel testified that he did not pursue the allegation of conspiracy because he found no evidence of a conspiracy. Further, the victim testified that the incident was not recorded. Thus, there was no digital recording to impound. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to discover that a police officer committed perjury when he filled out the declaration of arrest as he was the transport officer and because the report was inconsistent with witness statements. Appellant failed to demonstrate that his trial counsel's performance was deficient because there was no showing of perjury. Appellant further failed to demonstrate any prejudice. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to investigate and relying on the district attorney's files.

Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel testified that he investigated the case and spoke to several witnesses, including J. Donsetti. Appellant failed to demonstrate that further investigation would have resulted in the discovery of evidence or witnesses that would have had a reasonable probability of altering the outcome of trial. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to object to victims' alleged perjury. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Notably, the record belies appellant's claim of inconsistent testimony regarding appellant's activities while in the vehicle. Trial counsel testified it was not worthwhile to point out any of the inconsistencies identified by appellant. Tactical decisions of counsel are virtually unchallengeable absent extraordinary circumstances, and appellant demonstrated no such extraordinary circumstances here. Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990). Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to object to jury instructions 4, 5, 18, and 19. Appellant failed to demonstrate that his trial counsel's performance was deficient because he failed to demonstrate that any of the challenged instructions contained incorrect statements of law. Appellant further failed to demonstrate any prejudice. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to let him see discovery until after the preliminary hearing. Appellant failed to demonstrate a reasonable probability of a different result had he seen the discovery before the preliminary hearing. Therefore, we conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel was ineffective for failing to object to the composition of the jury venire. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate a prima facie violation of the fair cross-section requirement. See Duren v. Missouri, 439 U.S. 357, 364 (1979); Evans v. State, 112 Nev. 1172, 1186-87, 926 P.2d 265, 275 (1996). Notably, appellant failed to demonstrate that any alleged underrepresentation was due to systematic exclusion in the jury selection process. Further, we note that variations in percentages of particular communities may be constitutionally permissible in a jury venire. See Williams v. State, 121 Nev. 934, 941, 125 P.3d 627, 632 (2005). Therefore, we conclude that the district court did not err in denying this claim.

Eighth, appellant claimed that his trial counsel was ineffective for failing to present a defense of lack of specific intent due to intoxication. Appellant failed to demonstrate that he was prejudiced. During trial, witnesses testified that appellant did not appear to be intoxicated. Therefore, we conclude that the district court did not err in denying this claim.

Ninth, appellant claimed that his appellate counsel was ineffective for failing to argue prosecutorial misconduct and the State knowingly used perjured testimony. Appellant failed to demonstrate that

these issues had a reasonable probability of success on appeal. Therefore, we conclude that the district court did not err in denying this claim.

Finally, appellant claimed that the district court misapprehended facts at sentencing, the State failed to collect evidence, and the jury commissioner did not keep proper records. These claims are waived as they could have been raised on direct appeal and he did not demonstrate good cause for his failure to do so. NRS 34.810(1)(b). Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>2</sup>

Hardesty, J.  
Hardesty

Douglas, J.  
Douglas

Pickering, J.  
Pickering

cc: Hon. Donald M. Mosley, District Judge  
Rodney Lynn Butchee  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>2</sup>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.