

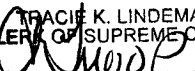
IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ALLAN CLARK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56201

FILED

FEB 09 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
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; Valerie Adair, Judge.

In his petition filed on February 23, 2010, appellant claimed that his trial counsel was ineffective. 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.

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).

First, appellant claimed that his trial counsel was ineffective in the cross-examination of the victim. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. Counsel vigorously cross-examined the victim and attempted to highlight inconsistencies in her version of events. In addition, appellant failed to demonstrate a reasonable probability of a different outcome at trial had counsel further questioned the victim. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to interview members of the victim's family because they would have stated that the victim was a liar. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. Counsel and counsel's investigator interviewed multiple members of the victim's family prior to trial. Appellant failed to demonstrate a reasonable probability of a different outcome had further interviews been conducted. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to seek an expert who would have examined the victim's aunt to see if she was actually unable to testify due to physical and mental issues. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. The district court was informed by the aunt's doctor that, due to multiple strokes, the aunt was unable to testify at trial. In addition, counsel informed the district court that his investigator stated that the aunt would not have provided helpful testimony due to her condition. Appellant failed to demonstrate a reasonable probability of a

different outcome had there been further examination of the aunt. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective during appellant's testimony. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. The questions that appellant indicated he wanted counsel to ask him related to statements made by the victim's aunt, but those statements were inadmissible because the district court determined that those statements were hearsay. NRS 51.065. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to exclude evidence of his past convictions. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced because appellant's felony convictions were properly admitted to impeach his credibility during his testimony. NRS 50.095(1). Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to use a peremptory challenge on a biased juror because appellant asserts he was compelled to testify due to that juror's bias. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. Counsel stated that he made a tactical decision to use the peremptory challenge on a different juror because that juror had a family member who had been the victim of sexual abuse. "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances," and appellant failed to demonstrate this decision constituted an extraordinary circumstance. Ford v State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In addition, appellant cannot demonstrate

prejudice because the underlying claim regarding juror bias was raised on direct appeal and was rejected by this court. Clark v. State, Docket No. 48647 (Order of Affirmance, January 30, 2009). Therefore, the district court did not err in denying this claim.

Next, appellant claimed that his appellate counsel was ineffective. 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 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, 105 Nev. at 853, 784 P.2d at 953. Both components of the inquiry must be shown, Strickland, 466 U.S. at 697.

First, appellant claimed that appellate counsel was ineffective for failing to include a transcript of jury selection in the appendices on direct appeal in order to allow this court to properly review his claim concerning juror bias. Appellant failed to demonstrate prejudice because our review of the transcript reveals that the district court did not err in determining that the juror was unbiased as the juror stated that he understood that a defendant did not have to testify and stated that he could apply the law. See Witter v. State, 112 Nev. 908, 914, 921 P.2d 886, 891 (1996), overruled on other grounds by Byford v. State, 116 Nev. 215, 249, 994 P.2d 700, 722 (2000). Therefore, the district court did not err in denying this claim.

Second, appellant claimed that appellate counsel was ineffective for failing to cite facts in the record regarding the conflict appellant had with trial counsel and for failing to prove he wanted to represent himself at trial. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. These issues were discussed at length on direct appeal and appellant did not identify any facts that were not considered in that appeal. Clark v. State, Docket No. 48647 (Order of Affirmance, January 30, 2009). Further, our review of the record reveals that the district court properly denied appellant's requests for self-representation made during trial as they were untimely. Tanksley v. State, 113 Nev. 997, 1001, 946 P.2d 148, 150 (1997). Therefore, the district court did not err in denying this claim.

Third, appellant claimed that appellate counsel was ineffective for failing to argue that evidence of his criminal history was improperly admitted. Appellant failed to demonstrate deficiency or prejudice because his criminal history was properly admitted to impeach his credibility. NRS 50.095(1). Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that appellate counsel was ineffective for failing to allege he was sentenced based on highly suspect evidence. Appellant failed to demonstrate prejudice because he failed to allege any highly suspect evidence that the district court relied on when imposing sentence. Therefore, the district court did not err in denying this claim.

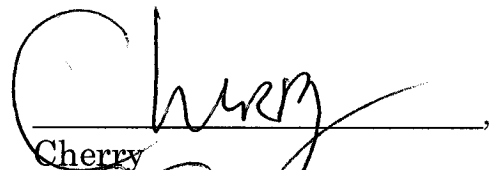
Fifth, appellant claimed that appellate counsel was ineffective for failing to argue that he had a right to be sentenced by a jury and that there was insufficient evidence of his guilt. Appellant failed to


demonstrate deficiency because these claims were raised and rejected on direct appeal. Clark v. State, Docket No. 48647 (Order of Affirmance, January 30, 2009). To the extent that appellant claimed that counsel did not provide sufficient support for these claims on direct appeal, appellant failed to demonstrate a reasonable likelihood of success on appeal had counsel provided further argument. Therefore, the district court did not err in denying these claims.

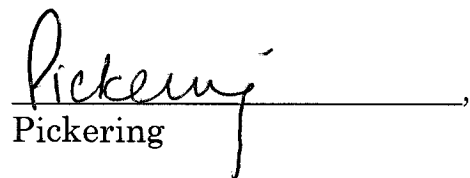
Sixth, appellant claimed that appellate counsel was ineffective for failing to support the cumulative error argument with all of the errors that occurred during trial. Appellant failed to demonstrate prejudice for any of the previous claims, and therefore, failed to demonstrate a reasonable likelihood of success had appellate counsel raised further arguments concerning cumulative error. Therefore, the district court did not err in denying this claim.

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

ORDER the judgment of the district court AFFIRMED.

 _____, J.
Cherry

 _____, J.
Gibbons

 _____, J.
Pickering

cc: Hon. Valerie Adair, District Judge
Michael Allan Clark
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk