IN THE SUPREME COURT OF THE STATE OF NEVADA

JEROME URBAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56443

FILED

MAY 09 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
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. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

On appeal from the denial of his April 9, 2008, petition, appellant claims that the district court erred in denying his claims of ineffective assistance of trial counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate (a) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (b) 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. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant argues that counsel was ineffective for failing to raise a challenge pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), when the prosecutor moved to dismiss a Native American juror for cause. Appellant fails to demonstrate deficiency or prejudice. The purpose of a Batson challenge is to ensure that the State does not violate the Equal Protection Clause of the United States Constitution by using peremptory challenges to remove potential jurors solely on account of their race. Id. at 89. Accordingly where, as here, the prosecutor successfully challenged the juror for cause due to the juror's expressed bias, there can be no Batson violation. Indeed, a biased juror cannot serve. See Murphy v. Florida, 421 U.S. 794, 799-800 (1975); Daniel v. State, 119 Nev. 498, 78 P.3d 890 (2003). Therefore, the district court did not err in denying this claim.[1]

Second, appellant argues that counsel was ineffective for failing to move to dismiss for cause a juror who was the victim of a crime similar to that committed by appellant. Appellant fails to demonstrate deficiency or prejudice. A juror should be removed for cause when she

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[1]Appellant also argues in his opening brief that appellate counsel was ineffective for failing to claim a Batson violation on direct appeal. The appellate-counsel argument was not raised in appellant's petition, and although the district court denied appellant's Batson claim on the grounds that he had not demonstrated ineffective assistance of appellate counsel, the appellate-counsel argument was not properly before the district court below. See Barnhart v. State, 122 Nev. 301, 303-04, 130 P.3d 650, 651-52 (2006). We therefore decline to consider that argument on appeal. Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004). We nevertheless affirm the district court's decision for the reasons stated above. See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding that a correct result will not be reversed simply because it is based on the wrong reason).

holds views that "'would prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath.'" Weber v. State, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005) (quoting Leonard v. State, 117 Nev. 53, 65, 17 P.3d 397, 405 (2001)). The juror advised the court of her prior experiences, she was questioned thoroughly by both attorneys and the court as to her potential for bias, and she stated consistently and unequivocally that she could be impartial. See generally Fields v. Brown, 503 F.3d 755 (9th Cir. 2007) (recognizing that honesty during voir dire is a critical factor where the issue of implied juror bias arises on collateral review). Moreover, because appellant has not demonstrated that the juror was biased, he fails to demonstrate a reasonable probability of a different outcome at trial had counsel challenged the juror for cause. Therefore, the district court did not err in denying this claim.[2]

Third, appellant argues that counsel was ineffective for failing to object to prosecutorial misconduct during closing arguments. The prosecutorial misconduct claim was rejected under the plain error standard on direct appeal. Urban v. State, Docket No. 47883 (Order of Affirmance, January 10, 2008). Because this court has already concluded that the underlying claim did not demonstrate prejudice sufficient to

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[2]Appellant also argues in his opening brief that appellate counsel was ineffective for failing to raise juror bias on direct appeal. The appellate-counsel argument was not raised in appellant's petition, and although the district court denied appellant's bias claim on the grounds that he had not demonstrated ineffective assistance of appellate counsel, the appellate-counsel argument was not properly before the district court below. See Barnhart, 122 Nev. at 303-04, 130 P.3d at 651-52. We therefore decline to consider that argument on appeal. Davis, 107 Nev. at 606, 817 P.2d at 1173. We nevertheless affirm the district court's decision for the reasons stated above. See Wyatt, 86 Nev. at 298, 468 P.2d at 341.

warrant reversal, appellant necessarily fails to demonstrate prejudice from counsel's failure to object to the prosecutor's statements. Therefore, the district court did not err in denying this claim.

Finally, appellant argues that counsel was ineffective pursuant to Cuyler v. Sullivan, 446 U.S. 335 (1980), because appellant was part of a federal class-action lawsuit challenging how Washoe County conflict counsel were paid. Appellant fails to demonstrate that "an actual conflict of interest adversely affected his lawyer's performance." Id. at 350. Although trial counsel testified that he had been appointed conflict counsel under the challenged system, appellant fails to demonstrate that the situation was conducive to divided loyalties. Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (citing Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)). Moreover, counsel took appellant's case to trial, appellant does not specify how the alleged conflict affected counsel's performance, and the district court found that counsel was credible when he testified that he was never made aware that appellant was a party to the lawsuit. Therefore, the district court did not err in denying this claim.

Appellant also argues that the district court erred in denying his claims of ineffective assistance of appellate counsel. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate (a) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (b) resulting prejudice in 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—and will be most effective when he does not—raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Again, both components of the inquiry must be shown, Strickland, 466 U.S. at 697.

First, appellant argues that counsel was ineffective for failing to claim on direct appeal that the district court did not comply with the informational requirements of NRS 176.0927(1). Appellant fails to demonstrate deficiency or prejudice. Appellant provides no evidence that the district court failed to comply with the statutory requirements. Moreover, appellant makes no cogent argument and cites to no authority to support his argument that such a claim would have had a reasonable probability of success on appeal. See Maresca v. State, 103 Nev. 669, 672-73, 748 P.2d 3, 6 (1987). Therefore, the district court did not err in denying this claim.[3]

Second, appellant argues that counsel was ineffective for failing to claim on direct appeal that the imposition of lifetime supervision violates the Double Jeopardy Clause. Appellant fails to demonstrate deficiency or prejudice. The Double Jeopardy Clause prevents a sentencing court from imposing greater punishment than the legislature intended; it does not prevent a state legislature from imposing cumulative punishments for a single offense. Nevada Dep't Prisons v. Bowen, 103 Nev. 477, 480, 745 P.2d 697, 699 (1987) (citing Missouri v. Hunter, 459 U.S. 359 (1983)). Further, the lifetime supervision statute explicitly provides that it shall be imposed "in addition to any other penalties provided by law," NRS 176.0931(1), thereby evidencing the legislative intent that it be a cumulative punishment for the underlying offense. Therefore, the district court did not err in denying this claim.

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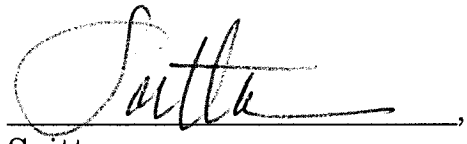
[3]Appellant also argues in his opening brief that trial counsel was ineffective for failing to ensure the district court complied with the informational requirements. However, appellant did not raise this claim below, and we decline to consider it on appeal in the first instance. Davis, 107 Nev. at 606, 817 P.2d at 1173.

Finally, appellant argues that counsel was ineffective for failing to claim on direct appeal that the imposition of lifetime supervision violates his rights under the First and Fourteenth Amendments to the United States Constitution because the conditions imposed infringe on his right of association and his rights to privacy, freedom of the press and travel. Appellant is serving a life sentence for his crime, and the specific conditions of lifetime supervision will not be imposed until he is released from parole. Palmer v. State, 118 Nev. 823, 827, 59 P.3d 1192, 1194-95 (2002). Accordingly, appellant's claims regarding the conditions of lifetime supervision would not have been ripe for review on direct appeal. Therefore, the district court did not err in denying these claims.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.



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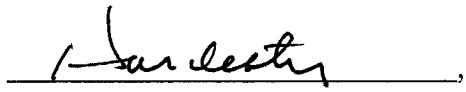

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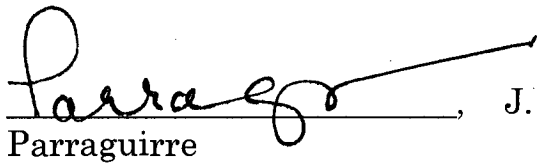

_____, J.
Parraguirre

cc: Hon. Janet J. Berry, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk