IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER SOUND O'NEILL,
Appellant,
vs.
THE STATE OF NEVADA AND WARDEN E.K. MCDANIEL,
Respondents.

No. 56495

FILED

NOV 17 2011

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 a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On appeal from the denial of his April 30, 2007, petition, appellant first argues that the district court erred in denying his claims of ineffective assistance of trial counsel. To prove ineffective assistance of trial 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 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, 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 file a timely motion to suppress the evidence gathered as a result of the probation officers' search of appellant's person and vehicle. Appellant failed to demonstrate prejudice because he failed to show that his suppression claim was meritorious. Kirksey v. State, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996). Appellant did not dispute that terms of his parole included in-person reporting or warrantless search and seizure upon suspicion of a parole violation, nor did he challenge the constitutionality of such conditions. Rather, appellant contended that his parole officer had appellant seized and searched only because appellant had failed to meet the parole officer's extortion demands and that appellant was otherwise in compliance with his parole agreement so that no warrantless search and seizure was justified. The district court found that appellant failed to present credible evidence of extortion, that Officer Summers' testimony established that appellant was in violation of his parole agreement, and that the officer was more credible than appellant. Because appellant did not prove the facts underlying his claim by a preponderance of the evidence, we conclude that the district court did not err in denying this claim.[1]

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[1]On appeal, appellant also argues that appellate counsel was ineffective for failing to raise the suppression issue on direct appeal. This

continued on next page . . .

Second, appellant argues that counsel was ineffective for not presenting to the jury his defense that he was merely holding the forged check as collateral without the intent to utter it. Specifically, appellant claimed that the roommate of the person whose checks were forged gave appellant one check to hold as collateral for work he had done at the house and that the roommate must have forged the checks. Appellant further claimed that he would have been acquitted had counsel presented to the jury fingerprint evidence that he had only touched the one check, a handwriting expert to prove the roommate—not appellant—had forged the checks, and the roommate to confirm appellant's version of events. Appellant failed to demonstrate prejudice. The district court found that appellant presented no credible evidence that he had performed any work. Moreover, appellant presented no fingerprint or handwriting experts to support his claims. Because appellant did not demonstrate by a preponderance of the evidence the facts underlying his claim, we conclude that the district court did not err in denying this claim.

Third, appellant argues that counsel was ineffective for failing to communicate with him and, as a result, counsel failed to file the motion to suppress or to present the check-as-collateral defense. For the reasons

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argument was not raised below and we therefore decline to consider it on appeal. Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means, 120 Nev. at 1012-13, 103 P.3d at 33.

stated above, appellant failed to demonstrate prejudice. We therefore conclude that the district court did not err in denying this claim.

Fourth, appellant argues that counsel was ineffective for failing to move to withdraw as counsel. This argument was not raised below and we therefore decline to consider it on appeal. Davis, 107 Nev. at 606, 817 P.2d at 1173.

Appellant also argues that the district court erred in denying his claim 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, 112 Nev. at 998, 923 P.2d at 1114. 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). Both components of the inquiry must be shown. Strickland, 466 U.S. at 697.

Appellant argues that appellate counsel was ineffective for not arguing on direct appeal that it was error to deny appellant's motion to replace trial counsel. Appellant failed to demonstrate deficiency. "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 8 (2003). Despite having been granted an evidentiary hearing, appellant presented no evidence as to the reasons appellate counsel failed to raise this claim and thus failed to overcome the strong presumption that it was for tactical reasons.

Accordingly, we conclude that the district court did not err in denying this claim.

Finally, appellant argues that the district court abused its discretion in allowing officers from the Repeat Offender Program to remain in the gallery during the evidentiary hearing. The officers were not called to testify at the hearing. Appellant did not support this claim with relevant authority or cogent argument, and we therefore need not consider it. Maresca v. State, 103 Nev. 669, 672-73, 748 P.2d 3, 6 (1987).

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

cc: Hon. Steven P. Elliott, District Judge
Mary Lou Wilson
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk