

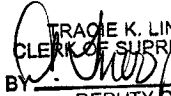
IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT ANTHONY HIGH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56892

FILED

APR 06 2011

TRACEE 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; Michelle Leavitt, Judge.

In his petition filed on June 10, 2010, appellant made several claims that he received ineffective assistance of trial and appellate counsel.² 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

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).

²To the extent that appellant raised any claims independently from his claims of ineffective assistance of counsel, appellant was required to demonstrate good cause and prejudice for not raising these claims on direct appeal. NRS 34.810(1)(b). Appellant failed to demonstrate good cause and prejudice, and therefore, the district court did not err in denying these claims.

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). To show prejudice resulting from ineffective assistance of appellate counsel, appellant must demonstrate 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). 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 claimed that trial counsel was ineffective for failing to object to the admission of the DNA evidence, the bottle of Nyquil and the victim's toxicology report. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant failed to demonstrate that an objection would have been successful, and counsel is not deficient for failing to make futile objections. See Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Therefore, the district court did not err in denying this claim.

Next, appellant claimed that trial counsel was ineffective for failing to file a motion for an independent psychological examination of the victim. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant failed to demonstrate that the motion would have been successful, see Koerschner v. State, 116 Nev. 1111, 1116,

13 P.3d 451, 455 (2000) (holding that a defendant must demonstrate that a compelling need exists for the examination); see also Abbott v. State, 122 Nev. 715, 728, 138 P.3d 462, 471 (2006) (reaffirming the test set forth in Koerschner), and counsel is not deficient for failing to file futile motions. See Donovan, 94 Nev. at 675, 584 P.2d at 711. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that trial counsel was ineffective for failing to call an expert witness regarding the DNA evidence. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Trial counsel consulted with an expert regarding the DNA evidence and decided not to present his testimony. Tactical decisions of counsel are virtually unchallengeable absent extraordinary circumstances, and appellant failed to demonstrate any such circumstances here. See Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Therefore, the district court did not err in denying this claim.

Next, appellant claimed that trial counsel was ineffective for failing to file a motion for new trial. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant failed to demonstrate that the motion would have been successful, and counsel is not deficient for failing to make futile motions. See Donovan, 94 Nev. at 675, 584 P.2d at 711. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that trial counsel was ineffective for failing to object to alleged prosecutorial misconduct. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant failed to demonstrate that the objections would have been successful, and counsel is not deficient for failing to make futile objections.

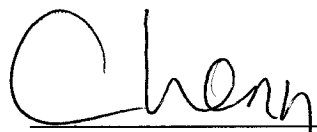
See id. Further, appellate counsel raised three claims of prosecutorial misconduct on appeal. To the extent that appellant reargued these claims in his petition as ineffective-assistance-of-trial-counsel claims, these claims were rejected on appeal under the plain error standard. Because this court already concluded that appellant's underlying claim did not demonstrate prejudice sufficient to warrant reversal, appellant necessarily failed to demonstrate prejudice from trial counsel's failure to object. Therefore, the district court did not err in denying this claim.


Next, appellant claimed that appellate counsel was ineffective for failing to raise all potential issues on appeal. Appellant failed to demonstrate that appellate counsel was deficient or that he was prejudiced. Appellant failed to demonstrate that appellate counsel should have raised other issues on appeal or that they had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

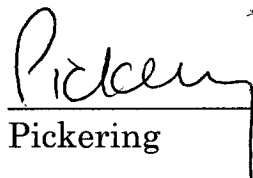
Next, appellant claimed that appellate counsel was ineffective for failing to perfect a direct appeal, to communicate with appellant, and to provide appellant with copies of the transcripts so that appellant could assist with the direct appeal. Appellant failed to demonstrate that appellate counsel was deficient or that he was prejudiced. Appellant's claim that appellate counsel did not perfect a direct appeal is belied as appellate counsel did, in fact, perfect a direct appeal. High v. State, Docket No. 53289 (Order of Affirmance, February 3, 2010). Further, appellant failed to demonstrate a reasonable probability of a different outcome on appeal had appellate counsel communicated with appellant or provided him with copies of the transcripts. Therefore, the district court did not err in denying this claim.

Finally, appellant claimed that appellate counsel was ineffective because there was a conflict of interest based on a "misrepresentation." Appellant failed to demonstrate that appellate counsel was deficient or that he was prejudiced because appellant failed to allege specific facts that, if true, entitled him to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Pickering

cc: Hon. Michelle Leavitt, District Judge
Robert Anthony High
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk