IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY MCKINLEY,
Appellant,
vs.
WARDEN BRIAN WILLIAMS,
Respondent.

No. 57345

FILED

OCT 05 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. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant Gary McKinley argues that the district court erred in denying his claims of ineffective assistance of trial and appellate counsel. McKinley has the burden of proving by a preponderance of the evidence that counsel's performance was deficient and resulted in prejudice. See Means v. State, 120 Nev. 1001, 1011-12, 103 P.3d 25, 31-33 (2004) (explaining the Strickland test for ineffective assistance of counsel). McKinley raises six errors on appeal.[1]

First, McKinley argues that the district court erred when it denied him an evidentiary hearing on counsel's failure to obtain an independent psychological examination. The district court did not err. McKinley's brief factual allegations did not entitle him to an evidentiary

[1]To the extent that McKinley's arguments incorporate issues that could have been first presented to the trial court or raised on direct appeal, we decline to consider those issues here. See NRS 34.810(1)(b).

hearing. Thomas v. State, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004) ("A petitioner . . . is entitled to an evidentiary hearing only if he supports his claims with specific factual allegations that if true would entitle him to relief.").

Second, McKinley argues that trial counsel was ineffective for failing to object to the trial court's decision to cut him off during allocution. We conclude that the district court did not err in denying McKinley's claim. The district court found that McKinley was attempting to raise issues during sentencing that should be raised on direct appeal. See Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005) (we give deference to the district court's factual findings but review the court's application of the law to those facts de novo). Because these statements were unrelated to mitigation, they are not statutorily guaranteed by NRS 176.015(2)(b). Furthermore, McKinley was given an additional opportunity to allocute at sentencing. Accordingly, we do not conclude that counsel's performance was deficient in this regard.

Third, McKinley argues that trial counsel was ineffective for failing to request a specific cautionary instruction on the limited purpose for admitting the pornographic video summary. We conclude that the more general cautionary instruction found in jury instruction nineteen was sufficient to put the jury on notice of the video summary's limited purpose. Accordingly, counsel's performance was not deficient.

Fourth, McKinley argues that trial and appellate counsel were ineffective for failing to properly challenge the trial court's admission of a summary of the pornographic videos before the trial court actually viewed the contents of the videos. Counsel's performance was not deficient. In fact, counsel successfully limited the admission of the pornographic videos

to a summary of their content and only to the extent that the summary met the requirements of NRS 48.045(2). Furthermore, McKinley has failed to present evidence that any portion of the summary was either inaccurate or inadmissible under NRS 48.045(2). Accordingly, counsel had no further grounds on which to object to the admission of the summary or request a rehearing on McKinley's direct appeal. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (explaining that in order to establish prejudice based on deficient assistance of trial or appellate counsel, defendant must show that omitted issue would have reasonable probability of success at trial or on appeal); cf. Jones v. Barnes, 463 U.S. 745, 751, (1983) (appellate counsel is not required to raise every non-frivolous issue on appeal).

Fifth, McKinley argues that appellate counsel was ineffective for failing to cite to the Federal Pattern Jury Instructions in support of his proposed cautionary instruction. Notably, McKinley argues that appellate counsel should have cited to the Tenth Circuit's broader "addict" instruction instead of the Sixth Circuit's "addict-informer" instruction that this court adopted in Crowe v. State, 84 Nev. 358, 367, 441 P.2d 90, 95 (1968), and affirmed in Champion v. State, 87 Nev. 542, 543, 490 P.2d 1056, 1057 (1971). See 1A O'Malley, et al., Federal Jury Practice and Instructions, Criminal § 15:05 (5th ed. 2000) (describing both instructions). This court has not adopted the broader "addict" instructions and therefore, appellate counsel was not deficient for failing to argue that they applied.

Sixth, McKinley argues that appellate counsel was ineffective for failing to appeal the denial of his motion for a new trial on grounds of juror misconduct. Even if counsel's performance was deficient, we

conclude that it did not result in prejudice. See McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (explaining that this court need not consider both Strickland prongs if appellant makes an insufficient showing on either prong). A review of the December 7, 2007, evidentiary hearing reveals that no jury misconduct occurred. The district court correctly concluded that the jury foreperson did not intentionally conceal prejudicial information during voir dire. See Canada v. State, 113 Nev. 938, 941, 944 P.2d 781, 783 (1997) (explaining that with juror misconduct "the relevant inquiry is whether the juror is guilty of intentional concealment"). Accordingly, an appeal of the district court's decision would not have resulted in a different outcome.

Having considered McKinley's arguments and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.[2]

Pickering, J.
Pickering

Rose, Sr. J.
Rose

Shearing, Sr. J.
Shearing

[2]The Honorables Robert Rose and Miriam Shearing, Senior Justices, participated in the decision of this matter under general orders of assignment.

cc: Hon. Michael Villani, District Judge
Potter Law Offices
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk