

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAYOMASHELL DAVID AGUILAR,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 57356 **FILED**

MAY 09 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Tracie K. Lindeman*  
DEPUTY CLERK

GILBERT DEMETRIUS AGUILAR,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 57357

ORDER OF AFFIRMANCE

These are appeals from an order of the district court denying post-conviction petitions for writs of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Appellants claim that the district court erred in denying their ineffective assistance of trial and appellate counsel claims. 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). To prove prejudice for ineffective assistance of appellate counsel claims, appellant must demonstrate 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). Further, “[t]actical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances.” Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). 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, appellants claim that trial counsel were ineffective for failing to investigate and present evidence that the weapon used to kill the victim belonged to a police officer and that the police officer may have fired the fatal shot. Appellants fail to demonstrate that trial counsel were deficient. Trial counsel testified at the evidentiary hearing that there was a tactical reason for not presenting this evidence: one of the appellants had prior convictions or arrests for dealing in stolen weapons. Trial counsel made a tactical decision that they did not want the jury to hear that evidence and make a connection that appellants stole the guns used in the crime. Therefore, the district court did not err in denying this claim.

Second, appellants claim that trial counsel were ineffective for failing to challenge the photo line-up that was admitted at trial. Specifically, appellants claim that the photo shows appellant Gilbert in his

jail clothing.<sup>1</sup> Appellants fail to demonstrate that trial counsel were deficient. At the evidentiary hearing, trial counsel testified that they did not believe they had any grounds to challenge the photo line-up because while, to a person familiar with jail clothing, the picture did show appellant Gilbert in his jail clothing, a person unfamiliar with jail clothing would have thought he was wearing a t-shirt. Trial counsel is not required to make futile objections. Donovan v. State, 94 Nev. 671, 584 P.2d 708 (1978). Further, to the extent that appellants claim that appellate counsel were ineffective for failing to raise the admissibility of the photo line-up on appeal, appellants fail, for the reasons stated above, to demonstrate that this claim had a reasonable probability of success on appeal. Therefore, the district court did not err in denying these claims.

Third, appellants claim that trial counsel were ineffective for failing to file a motion to suppress the search of David's girlfriend's apartment. Appellants fail to demonstrate that trial counsel were deficient because they failed to demonstrate that they had standing to challenge the search. The apartment belonged to David's girlfriend and there was a restraining order preventing him from entering the premises. Thus, they did not demonstrate that they had a protected privacy interest in the apartment. Rakas v. Illinois, 439 U.S. 128, 130-31 n.1 (1978) ("The

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<sup>1</sup>To the extent that appellant claims that trial counsel should have filed a pretrial motion to suppress the photo line-up because the officers may have prompted the eye witnesses, appellant failed to demonstrate that this claim had merit. Appellants failed to provide this court with a copy of the trial transcripts. The burden is on appellants to provide an adequate record enabling this court to review assignments of error. See Thomas v. State, 120 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4 (2004); see also Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980); Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975).

proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search.”); Katz v. United States, 389 U.S. 347, 352 (1967) (recognizing that the Fourth Amendment requires an inquiry into whether the person claiming the protection was entitled to assume privacy at the place and under the circumstances concerned); see also State v. Taylor, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998) (recognizing that one must have an objective and subjective expectation of privacy in the place to be searched). Further, to the extent that appellants claim that appellate counsel should have argued that the search should have been suppressed, appellants fail to demonstrate that this claim had a reasonable probability of success on appeal. Therefore, the district court did not err in denying these claims.

Fourth, appellants claim that trial counsel were ineffective for failing to prevent the admission of evidence that appellant Gilbert had a prior felony conviction. Specifically, appellant Gilbert was also charged with felon in possession of a firearm, and this charge was read to the jury. Appellants fail to demonstrate that trial counsel were deficient. This case was tried prior to this court’s decision in Brown v. State, which requires that a felon-in-possession count be bifurcated into a separate trial. 114 Nev. 1118, 1126, 967 P.2d 1126, 1131 (1998). At the evidentiary hearing, trial counsel testified that they did in fact attempt to prevent the admission that appellant Gilbert had a prior felony conviction. This was unsuccessful.<sup>2</sup> Further, appellants fail to demonstrate that they were prejudiced by appellate counsels’ failure to raise this claim on appeal.

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<sup>2</sup>Trial counsel did keep the nature of the previous conviction from being introduced a trial by stipulating that Gilbert was a felon.

First, appellants failed to provide this court with a copy of the trial transcripts. The burden is on appellants to provide an adequate record enabling this court to review assignments of error. See Thomas, 120 Nev. at 43 n.4, 83 P.3d at 822 n.4; see also Greene, 96 Nev. at 558, 612 P.2d at 688; Jacobs, 91 Nev. at 158, 532 P.2d at 1036. Second, appellants fail to demonstrate that this claim had a reasonable probability success on appeal because the error was harmless. Brown, 114 Nev. at 1126, 967 P.2d at 1131. On direct appeal, this court determined that there was overwhelming evidence of appellants' guilt. Aguilar v. State, Docket Nos. 31595 and 31811 (Order Dismissing Appeals, December 20, 1999). Therefore, the district court did not err in denying these claims.

Fifth, appellants claim that counsel were ineffective for failing to prevent a witness, appellant Gilbert's girlfriend, from testifying at trial. Specifically, appellants claim that the girlfriend was coerced and that her testimony should have been inadmissible based on marital privilege. Appellants fail to demonstrate that trial counsel were deficient. First, appellants fail to present any evidence that the girlfriend was coerced into testifying. Second, the marital privilege does not apply to girlfriends.<sup>3</sup> NRS 49.295. Further, trial counsel testified at the evidentiary hearing that they argued against allowing this witness to testify to the point that the district court threatened to hold them in contempt. Finally, to the extent that appellants claim that appellate counsel should have argued that the district court erred in allowing the girlfriend to testify, appellants

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<sup>3</sup>To the extent that appellant Gilbert appears to claim that he and his girlfriend were in a common-law marriage relationship, NRS 49.295 still would not apply. Nevada does not recognize common-law marriages. NRS 122.010.

fail to demonstrate that this claim had a reasonable probability of success on appeal. Therefore, the district court did not err in denying these claims.

Sixth, appellants claim that counsel were ineffective for failing to prevent the video from 7-11 from being admitted at trial. Specifically, they claim that trial counsel failed to question the authenticity of the tape's time stamp or the editing techniques. Further, trial counsel never filed a motion to suppress the videotape. Appellants fail to demonstrate that trial counsel were deficient. Appellants fail to demonstrate that there was reason to question the authenticity of the time stamp or editing techniques. Further, appellants fail to demonstrate that a motion to suppress would have been successful. Finally, to the extent that appellants claim that appellate counsel should have argued that the videotape should not have been admitted, appellants fail to demonstrate that this claim had a reasonable probability of success on appeal. Therefore, the district court did not err in denying these claims.

Seventh, appellants claim that counsel were ineffective for failing to prevent the admission of forensics regarding the gun that was found in appellant's girlfriend's apartment. Appellants claim that the fact that one of the guns had appellant David's palm print on it was irrelevant evidence because it could not be shown that the gun was the murder weapon. This claim lacks merit. This evidence was highly probative because shells found at the scene matched the guns found in the girlfriend's apartment.<sup>4</sup> Further, to the extent that appellants claim that

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<sup>4</sup>The victim was killed by a shot that went completely through his body. The bullet was never recovered.

appellate counsel should have argued that the forensics evidence should not have been admitted, appellants fail to demonstrate that this claim had a reasonable probability of success on appeal. Therefore, the district court did not err in denying these claims.

Eighth, appellants claim that trial counsel were ineffective for failing to investigate another defense.<sup>5</sup> Specifically, appellants claim trial counsel should have attempted to identify a man who was at the 7-11 and may have met the description of the shooter. Appellants fail to demonstrate that trial counsel were deficient. Trial counsel testified that they did not pursue this theory because it was impossible to identify who this man was. Further, trial counsel testified at the evidentiary hearing that the witness who gave the description of the shooter identified appellant Gilbert as the shooter in court. Therefore, the district court did not err in denying this claim.

Finally, to the extent that appellants attempt to incorporate by reference other ineffective-assistance-of-counsel claims that were raised in the petition below, this is not permissible under this court's rules, NRAP 28(e)(2), and they failed to present any cogent argument on appeal regarding these claims.<sup>6</sup> See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Therefore, we decline to address these claims. NRAP 28(e)(2).


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<sup>5</sup>To the extent that appellants claim that trial counsel were ineffective for failing to investigate whether the weapon had belonged to a police officer, this claim was discussed and rejected above.

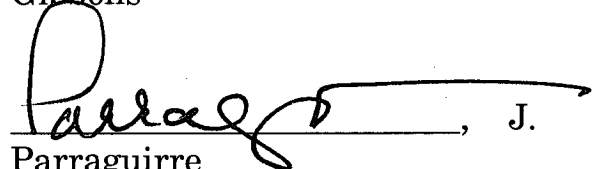
<sup>6</sup>We note that appellants did not provide this court with a copy of the petition that they were attempting to incorporate.

Having considered appellants' claims and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Jennifer P. Togliatti, Chief District Judge  
Justice Law Center  
Kristina M. Wildevald  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk