

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES FRANCIS MEEGAN, II,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57447

FILED

DEC 27 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angela*
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 September 10, 2010, appellant raised several claims of ineffective assistance of trial counsel. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate (a) that his 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, petitioner would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988,

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).

923 P.2d 1102, 1107 (1996). Both components of the inquiry must be shown. Strickland v. Washington, 466 U.S. 668, 697 (1984).

First, appellant claimed that counsel was ineffective for instructing him to commit perjury; for not being able to give appellant an unbiased opinion or ensure a fair trial; for not obtaining the personal calendar of State's witness, D. Castro; for stipulating to "reusing" of the prejudicial and fabricated" State's evidence; and for entering into a "continual stipulation" to allow into evidence a video that could have been prevented pursuant to the best evidence rule. Appellant's bare, naked claims failed to demonstrate deficiency or prejudice. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that a petitioner is not entitled to an evidentiary hearing where his claims are unsupported by specific factual allegations that, if true, would have entitled him to relief). Appellant did not state what the alleged perjury would have been, how counsel was unable to render an unbiased opinion or ensure a fair trial, how the witness's calendar would have impeached her key testimony against appellant, or what the prejudicial and fabricated evidence was. Appellant also failed to identify any inaccuracies or modifications in the video that would have implicated the best evidence rule. See Young v. Nevada Title Co., 103 Nev. 436, 440, 744 P.2d 902, 904 (1987) (providing that the best evidence rule applies where the actual contents of an original document are at issue). We therefore conclude that the district court did not err in denying these claims.

Second, appellant claimed that counsel was ineffective for not objecting to the denial of appellant's constitutional right to call witnesses at a pretrial hearing. Appellant failed to demonstrate deficiency or prejudice. Appellant's claim was bare and naked because he failed to

identify which witnesses he wanted called, the hearing at which they were to be called, or why. To the extent appellant was referring to his May 24, 2005, hearing, appellant did not have a right to call witnesses because it was not an evidentiary hearing. Moreover, appellant failed to demonstrate that but for the alleged error, he would not have pleaded guilty and would have insisted on going to trial. We therefore conclude that the district court did not err in denying this claim.

Third, appellant claimed that counsel was ineffective for not arguing that the judge was biased against him. Appellant failed to demonstrate deficiency or prejudice. Appellant claimed that his attorneys warned him that if he continued to speak out in court, the judge would place appellant in a stun belt because she hated him. Appellant inferred from this exchange that the judge had stated that she hated appellant. Appellant's inference did not demonstrate that the judge had "closed his or her mind to the presentation of all the evidence." Cameron v. State, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998). Moreover, appellant failed to demonstrate that, but for his inference, he would not have pleaded guilty and would have insisted on a trial. We therefore conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that counsel was ineffective for not objecting to the State's withholding of exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). Specifically, appellant claimed that by stating that witness M. Peet would be unable to testify at trial, the State was withholding exculpatory evidence. Appellant failed to demonstrate deficiency or prejudice. M. Peet's testimony was not withheld by the State because appellant admitted that defense investigators had spoken with M. Peet, and M. Peet had testified and was subject to cross-

examination in appellant's earlier jury trial on the same charges. See Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000) (holding that a Brady violation occurs where a defendant is prejudiced by the State's withholding of evidence favorable to the accused). Moreover, because appellant had the benefit of observing the witness's testimony and cross-examination at appellant's first trial, he did not demonstrate a reasonable probability that but for the alleged error, he would not have pleaded guilty and would have insisted on going to trial. We therefore conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that counsel was ineffective because counsel suffered from a conflict of interest because he had represented a State's witness and agreed to be "strategically aligned" with the State. This court previously held that counsel's representation of the State's witness was not a conflict of interest, Meegan v. State, Docket No. 49373 (Order of Affirmance, September 4, 2009), and that holding is the law of the case and cannot be reargued in the instant petition. Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Further, neither counsel's single alleged statement that the failure to grant a continuance would not be fair to the State nor, as discussed above, counsel's failure to make a futile objection to the assertion of witness unavailability demonstrated any "strategic alliance" between defense counsel and the State. We therefore conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that counsel was ineffective for engaging in a conspiracy with the district court and the State to reconvict him. Appellant failed to demonstrate deficiency or prejudice. Appellant's substantive factual assertions that he claimed demonstrated the conspiracy were belied by the record such that he was not entitled to

relief. Moreover, appellant did not demonstrate that, but for the alleged conspiracy, he would not have pleaded guilty and would have insisted on going to trial. To the extent appellant claimed that the appointment of post-conviction counsel and judge recusals and random reassignments were done outside his presence as a means to thwart his right to appeal such actions, we note that appellant had no right to appeal the recusal of a trial judge, Ham v. District Court, 93 Nev. 409, 412, 566 P.2d 420, 422 (1977), or to select his court-appointed counsel, Thomas v. State, 94 Nev. 605, 607, 584 P.2d 674, 676 (1978). We therefore conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that counsel was ineffective for not arguing that appellant was being vindictively prosecuted. Appellant failed to demonstrate deficiency or prejudice. Because the State pursued the same charge before a different trial judge on retrial as it had in the prior proceedings, appellant failed to make out a prima facie case of vindictiveness. See Blackledge v. Perry, 417 U.S. 21, 25-26 (1974); U.S. v. Montoya, 45 F.3d 1286, 1299 (9th Cir. 1995). We therefore conclude that the district court did not err in denying this claim.

Eighth, appellant claimed that counsel was ineffective for failing to argue that his previous sentence of life with the possibility of parole after ten years is the law of the case and that the State was collaterally estopped from arguing that it was not. Appellant failed to demonstrate deficiency or prejudice because his claims were belied by the record. Counsel in fact filed just such a motion, and the district court denied it. Moreover, because appellant was ultimately sentenced, pursuant to his guilty plea, to a term of life in prison with the possibility of parole after ten years, he failed to demonstrate that, but for the alleged

error, he would not have pleaded guilty and would have insisted on going to trial. We therefore conclude that the district court did not err in denying this claim.

Ninth, appellant claimed that counsel was ineffective for failing to advise appellant and argue to the court that the State's retrying appellant for first-degree murder violated his rights under the Double Jeopardy Clause of the United States Constitution. Appellant failed to demonstrate deficiency. This court overturned appellant's first conviction, pursuant to a jury verdict, for first-degree murder because of unconstitutional jury instructions. Meegan v. State, Docket No. 40983 (Order of Reversal and Remand, December 22, 2004). Because the conviction was overturned for trial error and not insufficient evidence, appellant's retrial for first-degree murder did not implicate the Double Jeopardy Clause. Burks v. United States, 437 U.S. 1, 15-16 (1978). We therefore conclude that the district court did not err in denying this claim.

Tenth, appellant claimed that counsel was ineffective for failing to advise appellant and argue to the court that the State's reseeking a sentence of life without the possibility of parole or the death penalty violated appellant's rights under the Double Jeopardy Clause of the United States Constitution. Appellant failed to demonstrate deficiency or prejudice. The record did not demonstrate that the State was seeking the death penalty on retrial, and the constitution does not prohibit the possibility of appellant receiving a greater sentence of life without the possibility of parole upon reconviction. See North Carolina v. Pearce, 395 U.S. 711, 723 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 803 (1989). Further, counsel argued to the district court that the only possible sentence was life with the possibility of parole after

10 years, albeit not on double jeopardy grounds. Moreover, in light of appellant's argument elsewhere in the petition that counsel had guaranteed him he could not receive a sentence greater than life with the possibility of parole after ten years, appellant failed to demonstrate that, but for the alleged errors, he would not have pleaded guilty and would have insisted on going to trial. We therefore conclude that the district court did not err in denying these claims.

Eleventh, appellant claimed that counsel was ineffective for failing to argue that the State did not prove corpus delicti. Appellant failed to demonstrate deficiency or prejudice because his claim was belied by the record. Counsel filed appellant's motion to dismiss for lack of corpus delicti, and the district court denied it. Further, the law of the case is that the State had sufficient evidence of corpus delicti. Meegan v. State, 114 Nev. 1150, 1155-56, 968 P.2d 292, 295 (1998), abrogated on other grounds by Vanisi v. State, 117 Nev. 330, 22 P.3d 1164 (2001). We therefore conclude that the district court did not err in denying this claim.

Twelfth, appellant claimed that counsel was ineffective for denying him his right to a speedy trial. Appellant failed to demonstrate deficiency or prejudice. Appellant did not demonstrate that counsel delayed the start of trial for any purpose other than to ensure defense counsel and experts could be present and prepared for trial. Further, appellant pleaded guilty the day before he was to start trial and thus did not demonstrate that, but for the delay, he would not have pleaded guilty and would have insisted on going to trial. We therefore conclude that the district court did not err in denying this claim.

Thirteenth, appellant claimed that counsel was ineffective for failing to adequately investigate and prepare for trial. Specifically,

appellant claimed that counsel should have investigated appellant's theory of accidental overdose by requesting toxicology analysis of the victim's blood and expert testimony related thereto; obtained appellant's prescription records and an expert to testify to the medications' effects on appellant's ability to form intent; consulted an expert on shaken baby syndrome; obtained police reports; and interviewed specific witnesses and experts. Appellant failed to demonstrate prejudice. Appellant did not claim that he was unaware of the alleged lack of investigation at the time he entered his guilty plea, and he failed to demonstrate that but for the lack of investigation, he would not have pleaded guilty and would have gone to trial. We therefore conclude that the district court did not err in denying this claim.

Fourteenth, appellant claimed that counsel was ineffective for not objecting when the court tried to use the same jury instructions at his new trial that this court had found unconstitutional in his first trial. Appellant failed to demonstrate deficiency or prejudice. Appellant pleaded guilty before the start of trial so that the issue of jury instructions never arose. Moreover, especially in light of appellant having already had one conviction overturned because of the use of those jury instructions, appellant failed to demonstrate that but for his belief that the instructions would be used again, he would not have pleaded guilty and would have insisted on going to trial. We therefore conclude that the district court did not err in denying this claim.

Fifteenth, appellant claimed that counsel was ineffective for failing to challenge the district court's jurisdiction because the State had not proved that the victim died in Nevada. Appellant failed to demonstrate deficiency or prejudice. The State had only to establish that

the criminal intent was formed and some act in furtherance thereof was accomplished in this state, Shannon v. State, 105 Nev. 782, 792, 783 P.2d 942, 948 (1989), and appellant's own theory described the acts leading to the victim's death as occurring in Nevada. Moreover, appellant failed to demonstrate that but for counsel not challenging jurisdiction, he would not have pleaded guilty and would have gone to trial. We therefore conclude that the district court did not err in denying this claim.

Sixteenth, appellant claimed that counsel was ineffective for tricking him into pleading guilty. Specifically, appellant claimed that he signed the guilty plea agreement without reading it, instead relying on counsel's oral assurance that he was pleading to manslaughter, would be immediately released from prison, and would be paid \$150. Appellant failed to demonstrate deficiency. Appellant answered "yes" when asked if he was pleading to first-degree murder, if he had read the guilty plea agreement, and if he understood that the possible sentences were life without the possibility of parole or life with the possibility of parole after ten years.² The guilty plea agreement makes no mention of a \$150 payment, and appellant answered "no" when asked if he had been threatened or promised with anything in exchange for his plea. We therefore conclude that the district court did not err in denying this claim.

Seventeenth, appellant claimed that counsel was ineffective for not having appellant's presentence investigation report (PSI) corrected prior to appellant appearing before the parole board, resulting in his

²The court also affirmatively stated during the plea colloquy that it would sentence appellant to life with a possibility of parole after ten years, which it did.

having been twice denied parole. Appellant failed to demonstrate deficiency or prejudice. Notably, appellant claimed that he made the request to appellate counsel after appellant was first denied parole. At that time, any such attempt would have been futile. See Stockmeier v. State, Bd. of Parole Comm'rs, 127 Nev. ___, ___, 255 P.3d 209, 211 (2011) (recognizing the lack of administrative or judicial means to correct a PSI after sentencing). Further, most of the errors alleged were not actually in the report, and counsel advised the sentencing court that appellant disagreed with the crime synopsis and the number of arrests. Moreover, because parole is an act of grace to which appellant has no right, NRS 213.10705, appellant failed to demonstrate that but for the alleged report errors, he would have been granted earlier parole. We therefore conclude that the district court did not err in denying this claim.

Eighteenth, appellant claimed that counsel Christopher Oram was ineffective for not objecting to the State's 1996 motion to continue trial and for advising him to waive his 1996 preliminary hearing. Appellant failed to demonstrate deficiency or prejudice because attorney Oram was first appointed to represent appellant in 2002. We therefore conclude that the district court did not err in denying these claims.

Nineteenth, appellant claimed that the deputy district attorney was ineffective for refusing to interview witnesses who showed up at her office from out of state and at their own expense. A defendant has no right to effective assistance of a deputy district attorney. We therefore conclude that the district court did not err in denying this claim.

Finally, appellant claimed that the cumulative errors of counsel denied him the effective assistance of counsel. Appellant's bare, naked claim failed to specify which errors accumulated into ineffective

assistance. Further, because this court has determined that appellant failed to demonstrate deficiency on all claims except, perhaps, inadequate investigation, appellant failed to demonstrate cumulative error. We therefore conclude that the district court did not err in denying this claim.

Appellant also raised several 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). Both components of the inquiry must be shown. Strickland v. Washington, 466 U.S. 668, 697 (1984).

First, appellant claimed that counsel was ineffective for failing to argue on direct appeal that appellant's presentence investigation report must be corrected, that there was no corpus delicti, that appellant was tricked into pleading guilty, that his retrial and exposure to greater sentences were barred by the Double Jeopardy Clause and collateral estoppel, that he was the victim of a conspiracy, that counsel improperly stipulated to the admission of evidence, and that the district court was going to again use unconstitutional jury instructions to convict appellant. For the reasons discussed above, we conclude that the district court did not err in denying these claims.

Second, appellant claimed that counsel suffered from a conflict of interest because he had accepted a position with the district attorney's

office. Appellant failed to demonstrate deficiency because his claim was not supported by specific facts that, if true, would have entitled him to relief. He did not state when counsel began working for the district attorney's office so that he did not demonstrate an actual conflict of interest existed during counsel's representation of appellant. Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980). We therefore conclude that the district court did not err in denying this claim.

Third, appellant claimed that counsel was ineffective because he informed this court that appellant had been charged with two counts instead of one, that the jury trial had lasted from August 5, 1996, to August 19, 1996, that appellant had been found guilty of first-degree murder, and that the jury had deadlocked during the penalty phase. Appellant failed to demonstrate deficiency or prejudice. Appellant had been convicted of first-degree murder and the jury deadlocked at the penalty phase. The remaining alleged errors were immaterial to this court's disposition of appellant's appeal, and appellant thus failed to demonstrate a reasonable probability of a success on appeal had counsel not made the alleged errors. We therefore conclude that the district court did not err in denying these claims.

Fourth, appellant claimed that counsel was ineffective for not arguing that appellant was innocent of the charges, that the victim's mother actually killed her, that the victim's cause of death was undetermined, and that this court was not to infer that appellant was guilty simply because the victim's mother entered a guilty plea. Appellant failed to demonstrate prejudice. In affirming the denial of his motion to withdraw his guilty plea, this court held that because appellant had entered a guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25

(1970), he was denying the factual allegations of the charge so that any claims of innocence were academic and did not entitle him to relief. Meegan v. State, Docket No. 49373 (Order of Affirmance, September 4, 2009). Accordingly, appellant failed to demonstrate a reasonable probability of success on appeal had counsel raised these arguments. We therefore conclude that the district court did not err in denying these claims.

Fifth, appellant claimed that counsel was ineffective for failing to argue the ineffective assistance of trial counsel on appeal. Appellant failed to demonstrate deficiency or prejudice. Such claims are generally not appropriate for direct appeal, and appellant did not demonstrate a reasonable probability of success had counsel raised the claim. See Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001). We therefore conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that counsel was ineffective for not voluntarily recusing himself since he had been involved in appellant's guilty plea and must have seen his own ineffectiveness in reviewing the transcripts. Appellant failed to demonstrate deficiency or prejudice. Appellant's claim was in part belied by the record because the attorney who became appellate counsel was not appointed until after appellant had entered his guilty plea. Appellant's claim was also bare and naked because he failed to state what "ineffectiveness" counsel should have seen. We therefore conclude that the district court did not err in denying this claim.

Finally, appellant claimed that counsel was ineffective for failing to argue that the statute of limitations had run on his charges. Appellant failed to demonstrate deficiency or prejudice. Appellant was

charged only with open murder, for which there is no statute of limitations. NRS 171.080(1). To the extent that appellant argued that the statute of limitations had run on count 2, child abuse or neglect with substantial bodily harm, we note, and appellant elsewhere in his petition conceded, that only appellant's codefendant was charged in that count. We therefore conclude that the district court did not err in denying this claim.

Appellant next claimed that the State engaged in prosecutorial misconduct; that the district court erred in appointing post-conviction counsel, should have stayed proceedings to allow appellant to litigate his double jeopardy claims, refused to provide appellant with his entire record, erred in again allowing the use of unconstitutional jury instructions, engaged in judicial misconduct, failed to canvass appellant regarding his desire to represent himself, and refused to correct appellant's presentence investigation report; that Nevada's mutilation aggravator is vague and unconstitutional as applied; and that he cannot be forced to pay an administrative fee and for genetic marker testing. These claims are outside the scope permissible in a post-conviction petition for a writ of habeas corpus where appellant has pleaded guilty. NRS 34.810(1)(a). Further, to the extent the claims could have been raised on direct appeal but were not, they were waived. Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). We therefore conclude that the district court did not err in denying these claims.

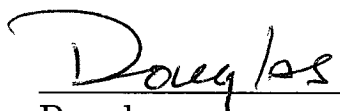
Appellant next appeared to claim that the State had violated the guilty plea agreement because someone from the district attorney's office told the parole board certain information regarding the crime and

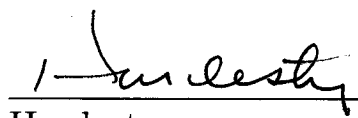
appellant's behavior while in prison. Appellant's claim was bare and naked and thus did not entitle him to relief. The State stipulated only that two specific people would not appear at any parole hearings involving appellant, and appellant did not allege that either appeared. We therefore conclude that the district court did not err in denying this claim.

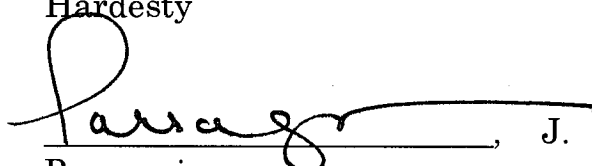
Finally, appellant's remaining claims were regarding events that occurred prior to this court's overturning of his conviction pursuant to a jury verdict and thus did not entitle him to relief. Because appellant already received the only possible relief for the errors complained of—reversal of his conviction—those claims were moot. We therefore conclude that the district court did not err in denying these claims.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.³


_____, J.
Douglas


_____, J.
Hardesty


_____, J.
Parraguirre

³On July 19, 2011, this court ordered the production of transcripts from hearings held on February 24, 2005; March 17, 2005; June 7, 2005; and February 28, 2006. We have since determined that those transcripts are not necessary to the disposition of this appeal and hereby rescind the order as it pertains to those hearings.

cc: Hon. Michelle Leavitt, District Judge
James Francis Meegan, II
Stacy L. Briggs, Court Reporter
Gina Shrader, Court Reporter
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk