

IN THE SUPREME COURT OF THE STATE OF NEVADA

CAMERONE COLE REPASS A/K/A
CAMERON COLE REPASS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58363

FILED

JAN 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
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; Jessie Elizabeth Walsh, Judge.

In his petition filed on October 20, 2010, appellant raised seven claims that he received ineffective assistance of trial counsel. 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

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).

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 claimed that trial counsel was ineffective for failing to put the original plea agreement on the record at the hearing on the waiver of his preliminary hearing. Appellant failed to demonstrate that he was prejudiced. Both trial counsel and counsel for the State testified at the pretrial evidentiary hearing on the motion to enforce the agreement that appellant was supposed to provide the State with fifteen to twenty firearms in exchange for reduced charges.² Appellant only provided eight. The district court determined, and this court agreed, that because appellant breached the agreement, the agreement was not enforceable. Repass v. State, Docket No. 53221 (Order of Affirmance, November 5, 2009). Because appellant breached the plea agreement, he failed to demonstrate that he would have been able to plead guilty under

²At the pretrial evidentiary hearing on the motion to enforce, trial counsel and counsel for the State agreed that the deal required appellant to turn over fifteen to twenty firearms, however, they disagreed as to what the reduced charges were to be.

the original plea agreement had counsel put the agreement on the record.³ Therefore, the district court did not err in denying this claim.

Second, appellant claimed that counsel was ineffective for failing to request and review the police inventory property reports and evidence photos which show that thirty items were recovered, not just the eight items mentioned at the evidentiary hearing on the motion to enforce. Appellant failed to demonstrate that he was prejudiced. While the police may have found thirty items, the plea agreement required that appellant provide fifteen to twenty firearms, not just items. Therefore, appellant failed to demonstrate a reasonable probability of a different outcome had counsel reviewed the reports and photos. Accordingly, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to challenge alleged hearsay evidence that was submitted by the State at the pretrial evidentiary hearing on the motion to enforce the plea agreement. This claim lacks merit. Both instances of alleged hearsay that appellant cites to were offered by appellant's counsel and not the State. Therefore, the district court did not err in denying this claim.

³To the extent that appellant claims that counsel was ineffective for failing to negotiate a legally binding plea agreement, this claim lacks merit. The district court determined, and this court agreed, that trial counsel did negotiate a legally binding plea agreement and the reason it was not enforced was because appellant breached the agreement. Further, appellant's claim that he would have insisted on having his preliminary hearing and that several of the charges would have been dropped is without merit as appellant was convicted of all the counts he was originally charged with.

Fourth, appellant claimed that trial counsel was ineffective for failing to subpoena witnesses for the pretrial evidentiary hearing on the motion to enforce the plea agreement. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate what the witnesses would have testified to or that it would have changed the outcome of the proceeding. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to file a motion to suppress the evidence discovered pursuant to a search warrant because the items seized were not listed in the warrant and the police searched several hours prior to obtaining the search warrant. Appellant failed to demonstrate that counsel was deficient. First, it is not clear which items appellant claimed were recovered but not listed in the warrant. Further, because the telephonic search warrant included a generic "firearms" provision in addition to a specific list of firearms, it was not improper to seize firearms that were not specifically listed. Second, nothing in the record suggests that the police officers searched any of the locations prior to obtaining the telephonic search warrant. Further, to extent that the officers may have searched the locations prior to obtaining the telephonic search warrant, appellant failed to demonstrate that a motion to suppress would have been successful. For a search warrant to be untainted by an earlier unlawful search, what was learned during the unlawful search must not be what prompted the decision to seek the warrant, U.S. v. Hill, 55 F.3d 479, 480 (9th Cir. 1995), and it could not have affected the magistrate's decision to grant the search warrant. Murray v. United States, 487 U.S. 533, 537-43 (1988). In this

case, it is clear that the decision to search the three locations was based on appellant having sold the stolen firearms to a witness and not the fact that the police may have searched the three locations prior to obtaining a warrant. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective for failing to interview the security guards at the Luxor and the ATF agents who were present when he was arrested. Appellant claimed that interviewing these witnesses would have helped the motion to suppress. Appellant failed to demonstrate that he was prejudiced because he failed to demonstrate that there was a reasonable probability that a motion to suppress would have been successful had trial counsel interviewed these witnesses. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that counsel was ineffective for failing to challenge the photographic line-up at trial because a witness was unable to identify appellant when first showed the photos but identified him at trial. This claim is belied by the record. Counsel did challenge the witness' in-court identification with the fact that the witness was not able to identify appellant in the photographic lineup. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that he received ineffective assistance of appellate counsel. To prove ineffective assistance of appellate 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 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 raise every non-frivolous

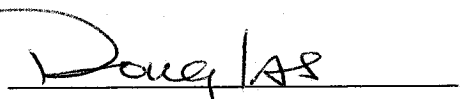
issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Both components of the inquiry—deficient performance and prejudice—must be shown. Strickland, 466 U.S. at 697.


Appellant claimed that appellate counsel was ineffective because appellate counsel misstated the facts regarding how many firearms were recovered and failed to use the police photos that showed that fourteen firearms were found. Appellant failed to demonstrate that counsel was deficient. Appellant failed to demonstrate that counsel misstated the facts or that the photos demonstrate that fourteen firearms were recovered. Therefore, the district court did not err in denying this claim.

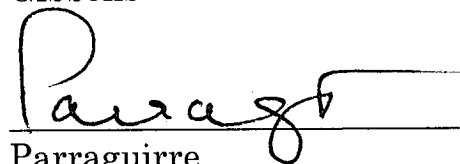
Finally, appellant claimed that the State withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). This claim should have been raised on direct appeal and, absent a demonstration of good cause or prejudice, is procedurally barred. NRS 34.810(1)(b). Appellant did not argue that he had good cause to raise this claim, and he would not have been able to demonstrate prejudice because he failed to demonstrate that the evidence was withheld or that it was favorable or material. See Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). Appellant claims that the photos attached to his petition were withheld by the State and demonstrate that he provided over thirty items, and therefore, complied with the terms of the oral plea agreement. First, it is not clear that the photos were withheld as appellant's only claim is that they were not presented at the evidentiary hearing. Further, appellant

does not state when or how he came into possession of the photos. Second, the photos are not favorable or material. Appellant argues that they show that over thirty items were located. However, the terms of the oral plea agreement required fifteen to twenty firearms, not just "items." The fact that the photos show other items were recovered does not demonstrate that he complied with the plea agreement. Therefore, the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. Jessie Elizabeth Walsh, District Judge
Camerone Cole Repass
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk