

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD DEE MARTIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58437

FILED

OCT 05 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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 24, 2010, appellant claimed that he received ineffective assistance of trial counsel. To prove ineffective assistance of trial 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 such that there is a reasonable probability that, but for counsel's errors, the outcome of the

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).

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). 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 counsel was ineffective for failing to object to an improper in-court identification and for not objecting when the jury was not instructed to return a not-guilty verdict if there was reasonable doubt as to appellant's guilt. Appellant's claims were belied by the record as counsel raised several objections to the identification and the jury was instructed to return a not-guilty verdict if there was reasonable doubt as to appellant's guilt. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that a petitioner is not entitled to relief where his claims are belied by the record). We therefore conclude that the district court did not err in denying these claims.

Next, appellant claimed that counsel was ineffective for not objecting to the jury instruction defining "reasonable doubt" on the

grounds that it was unconstitutional. Appellant failed to demonstrate deficiency or prejudice. The reasonable-doubt instruction given to the jury was that mandated by NRS 175.211, which this court has repeatedly upheld as constitutional. Buchanan v. State, 119 Nev. 201, 221, 69 P.3d 694, 708 (2003). We therefore conclude that the district court did not err in denying this claim.

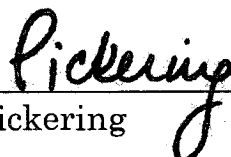
Appellant also claimed that he received ineffective assistance of appellate counsel. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate (a) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (b) resulting prejudice 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, 466 U.S. at 697.


First, appellant claimed that counsel was ineffective for failing to argue on direct appeal that the reasonable-doubt jury instruction was unconstitutional. For the reasons stated above, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that counsel was ineffective for failing to forward to him his entire case file so that he could include all possible claims in the instant petition. Appellant failed to demonstrate prejudice because this claim would not have affected the outcome of his appeal.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.²


_____, J.
Pickering


_____, Sr. J.
Rose


_____, Sr. J.
Shearing

cc: Hon. Michelle Leavitt, District Judge
Donald Dee Martin
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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