IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL J. SMITH, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 57813
MICHAEL J. SMITH A/K/A MICHAEL JAMES SMITH, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 58510

FILED

SEP 15 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY H. Ingersoll
DEPUTY CLERK

ORDER OF AFFIRMANCE AND ORDER ADMINISTRATIVELY CLOSING APPEAL IN DOCKET NO. 58510

These are proper person appeals 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.

Docket No. 57813

In his petition, filed on October 25, 2010, appellant first claimed that he received ineffective assistance from trial counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate (a) that counsel's performance was deficient in that it fell below an objective

[1]This 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 Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

standard of reasonableness and (b) resulting prejudice in 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). 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).

First, appellant claimed that counsel were ineffective for failing to investigate his competency before allowing him to waive his right to a trial by jury and to testify on his own behalf. Appellant failed to demonstrate deficiency or prejudice. Appellant failed to state facts that, if true and not belied by the record, would have entitled him to relief. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Appellant claimed that counsel should have investigated his competency because they knew appellant had been diagnosed with, and at some point treated for, a mental illness. However, such bare facts do not necessarily indicate incompetence.[2] See Indiana v. Edwards, 554 U.S. 164, 175-76 (2008); Ybarra v. State, 103 Nev. 8, 13, 731 P.2d 353, 356-57 (1987). We therefore conclude that the district court did not err in denying this claim.

Second, appellant claimed that counsel were ineffective for failing to argue his history of mental illness to the sentencing court.

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[2]Attached to appellant's petition was a proper person motion for mistrial in which appellant indicated that his mental illness caused him to be "easily influenced" by counsel's pressuring him not to testify on his own behalf. Even were this true, appellant failed to demonstrate that his malleability affected his ability to understand the nature of the proceedings or the charges against him or to aid counsel in his defense. See NRS 178.400(2) (defining "incompetent").

Appellant failed to demonstrate deficiency or prejudice. Appellant's bare, naked claim did not state how his illness had affected him at the time of the crime or how it might have affected his future actions. Moreover, the sentencing judge was aware of appellant's mental health issues, because they were mentioned in the presentence investigation report and because 20 days prior to sentencing, the judge had presided over an evidentiary hearing in which appellant's mental health was an issue. Thus appellant failed to demonstrate a reasonable probability of a different outcome had counsel presented such arguments at the sentencing hearing. We therefore conclude that the district court did not err in denying this claim.

Third, appellant claimed that counsel was ineffective for coercing him into waiving his rights to a trial by jury and to testify on his own behalf. Appellant failed to demonstrate deficiency or prejudice. Appellant, who was convicted pursuant to a bench trial, failed to describe any coercive actions by counsel. Candid advice regarding potential legal repercussions of a defendant's actions is not evidence of deficient performance. We therefore conclude that the district court did not err in denying this claim.

Appellant also claimed that he received ineffective assistance from 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 "properly present" his claim regarding the denial of his motion for a new trial. Appellant failed to demonstrate deficiency or prejudice. Appellant claimed that counsel should have argued that he was incompetent such that his waivers of constitutional rights were involuntary and that the district court should have sua sponte conducted a competency hearing. Appellant failed to state facts that, if true, would demonstrate that counsel's manner of challenging the denial was objectively unreasonable. Moreover, appellant failed to demonstrate a reasonable probability of success on appeal even had counsel incorporated appellant's desired arguments. Appellant did not claim that he was unable to understand the nature of the proceedings or the charges against him or to aid counsel in his defense. NRS 178.400(2); see also Calvin v. State, 122 Nev. 1178, 1182-83, 147 P.3d 1097, 1100 (2006) (adopting the federal standard for competency announced in Dusky v. United States, 362 U.S. 402 (1960)). Further, appellant has not cited to any evidence that would have created a reasonable doubt as to his competency such that the district court was obligated to sua sponte conduct a competency hearing. See Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983). We therefore conclude that the district court did not err in denying this claim.

Second, appellant claimed that counsel was ineffective for failing to raise on direct appeal appellant's incompetence. Appellant failed to demonstrate deficiency or prejudice. As discussed above, appellant made only a bare, naked claim of incompetence, unsupported by specific facts that, if true, would have entitled him to relief. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. We therefore conclude that the district court did not err in denying this claim.

Third, appellant claimed that counsel was ineffective for not filing a certified transcript on direct appeal to support his claim of judicial

bias. Appellant failed to demonstrate prejudice. Even if the transcript included in the appendix on direct appeal was not certified, the record on appeal now before this court does contain a certified transcript of the relevant hearing, and it does not reflect the language that appellant asserted was missing from the transcript in his appendix. Thus appellant failed to demonstrate a reasonable probability of success on appeal had counsel included a certified transcript in the appendix. We therefore conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that counsel was ineffective for failing to argue on direct appeal that trial counsel was ineffective. 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.

Finally, appellant claimed that insufficient evidence supported his conviction. Appellant had raised this issue on direct appeal, and this court denied the claim on the merits. Smith v. State, Docket No. 52119 (Order Affirming in Part, Vacating in Part, and Remanding, November 13, 2009). Appellant's claim was thus barred by the doctrine of the law of the case. Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). We therefore conclude that the district court did not err in denying this claim.

Docket No. 58510

Appellant's appeal from the district court's order was previously docketed in this court in Docket No. 57813. The clerk of this court inadvertently docketed an appeal in Docket No. 58510 as a separate matter when appellant filed a second, duplicative notice of appeal. Accordingly, we direct the clerk of this court to administratively close the

instant appeal and transfer to Docket No. 57813 all documents filed or received in this matter.[3]

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.[4]

Douglas, J.

Hardesty, J.

Parraguirre, J.

cc: Hon. Michelle Leavitt, District Judge
Michael J. Smith
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[3]On June 23, 2011, this court directed the clerk of the district court to transmit the record on appeal in Docket No. 58510. In light of this court's decision, we rescind the order directing transmission of the record on appeal.

[4]We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.