

IN THE SUPREME COURT OF THE STATE OF NEVADA

ASHTON CACHO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58797

FILED

MAR 07 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; Douglas W. Herndon, Judge.

In his petition, filed on January 12, 2011, 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 standard of reasonableness and (b) 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). Both components of the inquiry must be shown. Strickland, 466 U.S. at 697.

First, appellant claimed counsel was ineffective for not raising at trial that the State failed to prove beyond a reasonable doubt that

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).

appellant had the necessary intent to commit the crime of lewdness with a child under the age of 14. Appellant failed to demonstrate deficiency or prejudice. The defense theory at trial was that the State did not prove every element beyond a reasonable doubt. Further, because this court held on direct appeal that sufficient evidence supported each count of lewdness, Cacho v. State, Docket No. 51647 (Order Affirming in Part, Reversing in Part, and Remanding, May 27, 2010), appellant failed to demonstrate a reasonable probability of a different outcome had counsel focused his argument on intent. We therefore conclude that the district court did not err in denying this claim.

Second, appellant claimed counsel was ineffective for failing to investigate appellant's case, to communicate with him, or to be prepared for trial. Appellant failed to demonstrate deficiency or prejudice as he did not support these claims with specific facts that, if true, would have entitled him to relief. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that "bare" or "naked" claims are insufficient to grant relief). We therefore conclude that the district court did not err in denying these claims.

Third, appellant claimed that counsel was ineffective for failing to call defense witnesses who could have rebutted the State's portrayal of him or called into question the victim's veracity. Appellant failed to demonstrate deficiency or prejudice. Counsel called two defense witnesses who called into question the victim's veracity, and that claim is thus belied by the record. See id. The remaining claim is bare and naked as appellant failed to say who counsel should have called or what they would have said. We therefore conclude that the district court did not err in denying these claims.

Appellant also claimed that the district court improperly admitted hearsay evidence and irrelevant evidence that was more prejudicial than probative, the jury did not represent a fair cross section of the community, the prosecutor engaged in misconduct, the jury instructions lowered the State's burden of proof and lessened the presumption of innocence, the State withheld evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), and the cumulative errors violated his right to a fair trial. Each of these claims could have been raised in his direct appeal,² and appellant's petition was therefore procedurally barred absent a demonstration of good cause and actual prejudice. NRS 34.810(1)(b).

While acknowledging that he raised all but the jury-composition claim on direct appeal, appellant argued that he had good cause to re-raise those claims here because he needed to federalize them. Federalization of claims is not an impediment external to the defense. Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Further, although a Brady violation can provide good cause to excuse a procedural bar, State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003), this court's rejection of appellant's Brady claim on direct appeal is the law of the case, Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975), and Brady thus cannot provide good cause in this instance.


To the extent that appellant claimed that ineffective assistance of appellate counsel provided good cause to excuse raising his jury-composition claim, this argument also fails. To prevail, appellant

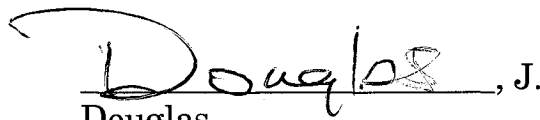
²Cacho v. State, Docket No. 51647 (Order Affirming in Part, Reversing in Part, and Remanding, May 27, 2010).

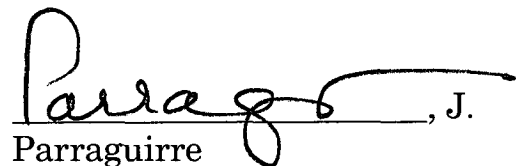
would have had to demonstrate both that counsel's performance was deficient in that it fell below an objective standard of reasonableness and resulting prejudice in that the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996); Strickland, 466 U.S. at 697. Appellant failed to demonstrate deficiency or prejudice. A defendant "is entitled to a venire selected from a fair cross section of the community," not a jury panel that itself represents a cross section of the community. Williams v. State, 121 Nev. 934, 939-40, 125 P.3d 627, 631 (2005). Appellant did not claim that the venire did not represent the necessary cross section nor that any class of veniremen were improperly excluded from the panel. Accordingly, appellant failed to demonstrate a reasonable probability of success on appeal had counsel raised this claim.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


Gibbons


Douglas


Parraguirre

cc: Hon. Douglas W. Herndon, District Judge
Ashton Cacho
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk