

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT MICHAEL REIGER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 58986

FILED

MAR 07 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY: *A. Anderson*  
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.<sup>1</sup> Eighth Judicial District Court, Clark County; Michael Villani, Judge.

In his petition filed on October 23, 2009, appellant claimed that he received ineffective assistance of trial counsel.<sup>2</sup> 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

<sup>1</sup>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 Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>2</sup>To the extent that appellant raised any of the underlying claims independently from his claims of ineffective assistance of counsel, those claims were waived because they were not raised on direct appeal and appellant failed to demonstrate good cause and prejudice for his failure to do so. NRS 34.810(1)(b).

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 his trial counsel was ineffective for failing to move to strike K. Souther's testimony at the preliminary hearing because it was in appellant's opinion unworthy of belief and for failing to adequately cross-examine Officers Tlockowski, Barrera and Jackson. Appellant failed to demonstrate that he was prejudiced. The alleged problems with the testimony identified by appellant would not have affected the admissibility of that testimony at the preliminary hearing. A magistrate's duty at the preliminary hearing is not to determine the guilt or innocence of the defendant but rather to determine whether probable cause has been presented that a crime was committed and that appellant committed the crime; probable cause may be based on slight or marginal evidence. NRS 171.206; Parsons v. State, 116 Nev. 928, 933, 10 P.3d 836, 839 (2000). Appellant failed to demonstrate that the State did not meet its burden of presenting probable cause to bind appellant over for trial. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to conduct an adequate pretrial investigation into K. Souther's background, the other employees from Boot Barn, and Souther's alleged false statement to Officer Barrera. Appellant failed to demonstrate that he was prejudiced as he failed to demonstrate that further investigation would have led to evidence that would have had a reasonable probability of altering the outcome at trial because the evidence presented at trial was

strong. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that trial counsel failed to adequately cross-examine K. Souther about inconsistencies in his testimony about the “stop.” Appellant failed to demonstrate that he was prejudiced because he failed to demonstrate that any further questions regarding the “stop” would have had a reasonable probability of altering the outcome at trial. Trial counsel exhaustively questioned Souther about his story and his ability to observe the bag being thrown from the van. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to file a motion to dismiss based on K. Souther’s alleged perjury. Appellant failed to demonstrate that he was prejudiced because he failed to demonstrate that a motion to dismiss would have been successful as he failed to demonstrate that Souther committed perjury. Any inconsistencies or improbabilities in the testimony went to the weight of the testimony and not the admissibility of the testimony; it was for the jury to determine the weight and credibility of the witnesses and testimony presented. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). Therefore, we conclude that 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 dismiss based on sufficiency of the evidence as the forensic chemist testified that she tested only 9 of the 11 baggies and there was no testimony on the weight of the 9 baggies tested. Appellant failed to demonstrate that he was prejudiced as he failed to demonstrate a

motion to dismiss would have been successful. The evidence adduced at trial indicated that appellant was found to be in the possession of 28 grams or more of methamphetamine. Therefore, we conclude that the district court did not err in denying his claim.<sup>3</sup>

Sixth, appellant claimed that trial counsel was ineffective for failing to object to the presentation of expert testimony by two police officers, failing to object to the district court's open disparagement of defense counsel, and failing to object to the mention of 24 bottles of Viagra found in appellant's possession as he was not charged with any crime relating to the Viagra. Appellant failed to demonstrate he was prejudiced by trial counsel's failure to object as the underlying claims were considered and rejected on direct appeal. Reiger v. State, Docket No. 49359 (Order of Affirmance, October 22, 2008). Appellant failed to demonstrate that had trial counsel objected there was a reasonable probability of a different outcome in the proceedings. Therefore, we conclude that the district court did not err in denying these claims.

Seventh, appellant claimed that trial counsel was ineffective for failing to impeach Officer Barrera with his arrest report, which contradicted his testimony about where the Viagra was found. Appellant failed to demonstrate that he was prejudiced as any impeachment on the alleged discrepancy regarding the location of the 24 bottles of Viagra did not have a reasonable probability of altering the outcome of trial—guilty

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<sup>3</sup>To the extent that appellant claimed that his appellate counsel was ineffective for failing to argue the evidence was insufficient because of the forensic chemist's failure to test all of the baggies found, appellant failed to demonstrate that there was a reasonable probability of a different outcome on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).



verdicts for trafficking in a controlled substance (methamphetamine) and possession of a controlled substance with intent to sell (heroin). Therefore, we conclude that the district court did not err in denying this claim.

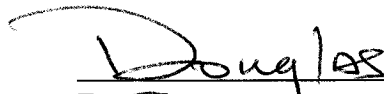
Eighth, appellant claimed that trial counsel was ineffective for failing to object to the State's failure to properly provide notice of the forensic scientist pursuant to NRS 174.234(2). Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced as he failed to demonstrate any bad faith on the part of the State. See NRS 174.234(3)(b) (providing that the court should prohibit an expert from testifying if the court determines that the party acted in bad faith by not disclosing the information required pursuant to NRS 174.234(2)). The record indicates that the first forensic chemist to analyze the drugs was unavailable to testify. The State informed the court and opposing counsel that a different forensic chemist would be analyzing the drugs and testifying at trial. Therefore, we conclude that the district court did not err in denying this claim.

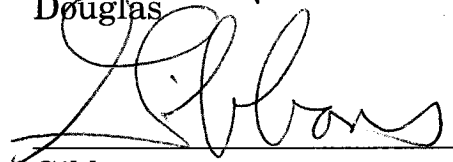
Ninth, appellant claimed that his trial counsel was ineffective for failing to request a jury instruction for possession of a controlled substance as an alternative to the trafficking count. Appellant failed to demonstrate that he was prejudiced because he failed to demonstrate a reasonable probability of a different outcome had such a jury instruction been offered. The evidence presented at trial that appellant committed the crime of trafficking in 28 grams or more of methamphetamine was strong. Therefore, we conclude that the district court did not err in denying this claim.


Finally, appellant claimed that trial counsel was ineffective in misstating evidence during his closing argument. Appellant failed to

demonstrate that he was prejudiced as he failed to demonstrate that there was a reasonable probability of a different outcome absent the misstatement about the evidence. Therefore, we conclude that 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. Michael Villani, District Judge  
Robert Michael Reiger  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk