

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN N. MURRAY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 59067

FILED

MAR 07 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Tracie K. Lindeman*  
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; Michelle Leavitt, Judge.

In his petition filed on April 4, 2011, appellant claimed 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 504, 505 (1984) (adopting the test in Strickland). Both components of the inquiry must be shown. Strickland, 466 U.S. at 697.

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<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).

First, appellant claimed that his trial counsel failed to file a motion to suppress, file a pretrial petition for a writ of habeas corpus, or otherwise challenge the validity of his detention and his statements to the police. Appellant failed to demonstrate that his trial counsel were deficient or that he was prejudiced. Appellant's trial counsel filed and litigated a motion to suppress evidence of the blood draw and Officer Lemley's drug evaluation because appellant was allegedly detained longer than the statutorily authorized 60 minutes. Trial counsel further filed a motion to dismiss the indictment. Appellant failed to demonstrate that any further arguments on these motions, or any additional pretrial motions, would have been successful such that there was a reasonable probability of a different outcome in the proceedings. Therefore, we conclude that the district court did not err in denying this claim.<sup>2</sup>

Second, appellant claimed that his trial counsel failed to file a motion to change venue due to the extensive media coverage. Appellant failed to demonstrate that his trial counsel were deficient or that he was prejudiced. Potential jurors were questioned about pretrial publicity and jurors who had indicated that they were aware of pretrial publicity were individually canvassed. Appellant failed to demonstrate that a fair and impartial jury could not be had in Clark County. See NRS 174.455(2).

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<sup>2</sup>To the extent that appellant claimed that his trial counsel was ineffective in filing a motion to dismiss the indictment because such a motion is not available, appellant failed to demonstrate that he was prejudiced as he was permitted to litigate the merits of the motion. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel appended a different label to his motion.

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

Third, appellant claimed that his trial counsel failed to perform adequate pretrial investigation. Specifically, appellant claimed that trial counsel failed to investigate the facts as relayed by appellant and failed to find and review video of the accident. Appellant failed to demonstrate that his trial counsel were deficient or that he was prejudiced. The defense theory at trial was that appellant was behind the wheel of the truck when it crashed into the bus stop, killing one woman and substantially injuring a second woman, but that appellant was not impaired at the time of the accident and had swerved to avoid another car. Several witnesses testified that there was no reason for appellant to swerve onto the sidewalk. The driver behind appellant testified that appellant was weaving in his lane immediately prior to the accident and hit the curb a few times before driving over the curb and into the bus stop. The detective who evaluated the scene as an accident-reconstruction specialist testified that there was no evidence of a second vehicle causing appellant to swerve and noted in his testimony that appellant never applied the brakes. Both sides presented expert testimony regarding the issue of impairment.<sup>3</sup> Appellant failed to demonstrate that further investigation would have uncovered evidence that would have had a

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<sup>3</sup>The record belies appellant's assertion that his trial counsel failed to utilize an expert to refute the impairment testimony.

reasonable probability of altering the outcome at trial.<sup>4</sup> Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel failed to investigate an alternative defense. Appellant did not identify the alternative defense, and thus, he failed to demonstrate that his trial counsel were ineffective.

Fifth, appellant claimed that trial counsel failed to have an independent analysis done of appellant's blood. Appellant failed to demonstrate that trial counsel were deficient or that he was prejudiced. Appellant failed to demonstrate that there was anything at fault with the analysis performed that would warrant an independent analysis. Appellant's own expert relied on the analysis to form an opinion that appellant was able to drive safely based on appellant's prescription history and the results of the blood analysis. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel failed to object to the blood drawn 4 hours after the accident contrary to the 2-hour requirement set forth in former NRS 484.37955(1).<sup>5</sup> Appellant failed to demonstrate that his trial counsel were deficient or that he was prejudiced. Appellant's trial counsel filed a motion to suppress the blood evidence based on an alleged violation of NRS 171.123(4). The 2-hour

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<sup>4</sup>To the extent that appellant claimed that his trial counsel failed to present their own accident reconstruction specialist, appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel presented their own accident reconstruction specialist given the testimony presented at trial.

<sup>5</sup>NRS 484C.130 was substituted for former NRS 484.37955 in 2009.

provision alluded to by appellant applies to driving under the influence of alcohol, not prescription drugs like Valium and Percocet. Therefore, we conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel were ineffective for advising him not to testify because he had prior convictions for driving under the influence. Appellant believed it would have been helpful for the jury to hear his side of the story. Appellant failed to demonstrate that his trial counsel were deficient in advising him not to testify as the jury would have learned of appellant's prior convictions for driving under the influence had he testified, and such information would have been damaging to appellant where he was being prosecuted for driving under the influence causing substantial bodily harm and/or death in the instant case.<sup>6</sup> Appellant further failed to demonstrate that he was prejudiced as he failed to demonstrate that there was a reasonable probability of a different outcome at trial had he testified. Therefore, we conclude that the district court did not err in denying this claim.

Eighth, appellant claimed that trial counsel failed to call his boss or wife to testify. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had his boss or wife testified. Therefore, we conclude that the district court did not err in denying this claim.<sup>7</sup>

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<sup>6</sup>We further note that appellant was personally canvassed about his right to testify and was informed it was his decision.

<sup>7</sup>To the extent that appellant claimed that his trial counsel were ineffective for failing to call additional witnesses, appellant failed to identify these witnesses or their potential testimony, and thus, he failed to demonstrate that trial counsel were deficient or that he was prejudiced.

Ninth, appellant claimed that trial counsel failed to object to the State's experts (Detective Redfairn, Officers Conaway and Lemley) because the State did not properly provide notice. Appellant failed to demonstrate that trial counsel were deficient or that he was prejudiced. Appellant's counsel objected to Detective Redfairn providing expert testimony regarding appellant's impairment. On direct appeal, this court considered and rejected appellant's claim relating to Detective Redfairn's testimony. Murray v. State, Docket No. 54115 (Order of Affirmance, February 3, 2011). Under these circumstances, appellant failed to demonstrate prejudice. Further, as noted on direct appeal, Officers Conaway and Lemley did not testify in an expert capacity. Therefore, the district court did not err in denying this claim.

Tenth, appellant claimed that trial counsel entered into an illegal stipulation with the State. The State had charged appellant alternatively with driving under the influence causing death and vehicular homicide.<sup>8</sup> The parties stipulated to treating the vehicular homicide count as a sentencing enhancement. The State agreed not to present proof of appellant's prior convictions during its case-in-chief absent an occurrence that would cause their introduction to be proper; rather, if appellant was

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<sup>8</sup>Notably, the State's burden of proof was slightly different for each of these offenses. Compare NRS 484C.430 (formerly NRS 484.3795) (providing that a defendant commits DUI causing death if a defendant under the influence of a controlled substance performs an act or neglects a duty imposed by law while driving if performing the act or neglecting the duty is the proximate cause of the death of another person) with NRS 484C.130 (providing that a person commits vehicular homicide if the person drives a vehicle under the influence of a controlled substance, proximately causes the death of another person while driving, and has been convicted of at least three prior DUI convictions).

found guilty of driving under the influence, the State would present proof of the prior convictions for sentencing and request a finding that appellant had committed vehicular homicide. Appellant failed to demonstrate that his trial counsel were deficient or that he was prejudiced. The stipulation prevented the jury from being presented with appellant's prior convictions for driving under the influence as such information would have been damaging to appellant at trial. Appellant was personally canvassed about the stipulation and appellant indicated that he understood the stipulation and had discussed it with his attorneys. Therefore, we conclude that the district court did not err in denying this claim.<sup>9</sup>

Eleventh, appellant claimed that trial counsel failed to object to prejudicial testimony used to inflame the minds of the jurors. It appears that appellant was referring to a statement made by the forensic scientist that there was an insignificant amount of morphine in appellant's blood. Appellant failed to demonstrate that his trial counsel were deficient or that he was prejudiced. Appellant's trial counsel objected, belatedly, and moved for a mistrial. This court considered and rejected appellant's claim that the district court abused its discretion in refusing to grant a mistrial based on this statement. Murray v. State, Docket No. 54115 (Order of Affirmance, February 3, 2011). Because this court rejected the merits of the underlying claim, appellant cannot demonstrate prejudice. Therefore, we conclude that the district court did not err in denying this claim.

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<sup>9</sup>To the extent that appellant claimed that his trial counsel failed to adequately argue a motion to sever the vehicular homicide count, appellant failed to demonstrate that he was prejudiced. The stipulation was entered into as a result of defense counsel's motion to sever.

Twelfth, appellant claimed that trial counsel was ineffective for failing to impeach the testimony of P. Hughes, the victim who lost her legs, that she looked appellant in the eyes and that he accelerated as he drove the vehicle into the bus stop. Appellant asserted that he was wearing sunglasses and the windows of his truck were tinted. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel questioned or challenged the victim about her observations of the accident. Therefore, we conclude that the district court did not err in denying this claim.

Thirteenth, appellant claimed that trial counsel failed to object to the eyewitnesses being asked about whether appellant aided the victims after the accident. Appellant failed to demonstrate that his trial counsel was deficient in failing to object to K. Lucas being asked that question as the record reflects that trial counsel did object. Appellant failed to demonstrate that trial counsel was ineffective for failing to object to A. Ullrich being asked that question as he failed to demonstrate that he was prejudiced. Therefore, we conclude that the district court did not err in denying this claim.

Fourteenth, appellant claimed that trial counsel failed to take action when he learned that the court services officer knew one of the jurors. On the final day of trial, the court indicated on the record that she had been advised that the newly assigned correctional officer knew one of the jurors. Appellant failed to demonstrate that the results of the proceedings would have been different had trial counsel taken any further action. Therefore, we conclude that the district court did not err in denying this claim.



Fifteenth, appellant claimed that defense counsel Mr. Steve Immerman engaged in unprofessional "antics" throughout the trial and failed to listen to appellant. Appellant failed to demonstrate that he was prejudiced. While Mr. Immerman engaged in several verbal tussles with the State, the examples provided by appellant occurred during bench conferences or during times when the jury was not in the courtroom. Further, advising appellant not to speak during the trial and warning him that he could go to prison for the rest of his life was sound advice. Given the substantial evidence presented, appellant failed to demonstrate that more circumspect behavior by counsel and further conversations with appellant would have had a reasonable probability of altering the outcome at trial. Therefore, we conclude that the district court did not err in denying this claim.<sup>10</sup>

Sixteenth, appellant claimed that trial counsel failed to object to the fact that the presentence report indicated more than one trip to prison. Appellant failed to demonstrate that he was prejudiced as there was no indication that the district court relied on this alleged misstatement from the presentence investigation report. Therefore, we conclude that the district court did not err in denying this claim.

Seventeenth, appellant claimed that trial counsel failed to object that he was convicted of driving under the influence charges when he was not found guilty of these charges due to insufficient verdict forms.

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<sup>10</sup>To the extent that appellant claimed that Mr. Immerman rested his head on the defense table and appeared to be asleep through the State's closing argument, this is not noted in the record. Further, as appellant was represented by two attorneys and appellant did not claim that both were asleep, he failed to demonstrate that he was prejudiced.

On direct appeal, this court considered and rejected appellant's argument that his sentences could not stand because "impairment" was not set forth on the verdict forms. Murray v. State, Docket No. 54115 (Order of Affirmance, February 3, 2011). As the underlying claim was already considered and rejected, appellant failed to demonstrate that he was prejudiced. Therefore, we conclude that the district court did not err in denying this claim.

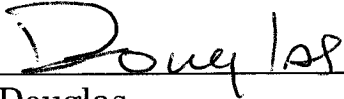
Next, appellant claimed that he received ineffective assistance of appellate counsel because appellate counsel failed to argue his trial counsel were ineffective and failed to point to issues of merit in his briefs. Appellant failed to demonstrate that appellate counsel were ineffective for failing to raise issues of ineffective assistance of trial counsel on direct appeal as these issues would not have been permitted in the instant case. Jones v. Barnes, 463 U.S. 745, 751 (1983); Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996); Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995). Appellant failed to demonstrate that further arguments on appeal would have resulted in a different outcome. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that the trial court erred in denying the motion to suppress without an evidentiary hearing. This claim was waived as it could have been raised on direct appeal, and appellant failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b).

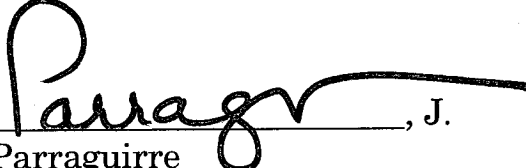
Finally, appellant claimed that cumulative errors required relief. Appellant failed to demonstrate that any such relief was required.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>11</sup>

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Michelle Leavitt, District Judge  
Steven N. Murray  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>11</sup>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.