

IN THE SUPREME COURT OF THE STATE OF NEVADA

BOBBY JEHU STROUP,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59256

FILED

MAY 09 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
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 Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

In his petition filed on March 30, 2004, appellant claimed that he received ineffective assistance of trial and appellate counsel.² To prove

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 filed his petition in proper person and requested the appointment of counsel. The district court appointed Mr. Scott Edwards to represent appellant in the post-conviction proceedings. Mr. Edwards filed a notice that no supplement would be filed. Subsequently, Mr. Edwards unsuccessfully sought to withdraw as counsel. Later, appellant filed a motion seeking to have counsel withdraw, which the district court granted. After the district court determined that an evidentiary hearing should be conducted on 2 of the 12 claims, the district court inquired if appellant wanted to have counsel represent him at the hearing. Appellant responded that he wished to represent himself. Mr. Edwards was appointed as standby counsel.

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); Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996); 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 his trial counsel failed to challenge, in a pretrial petition for a writ of habeas corpus, allegedly false statements made in the affidavit of probable cause for arrest. Appellant

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²To the extent that appellant raised any claims independently of his ineffective assistance of counsel claims, those claims were waived because they 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). To the extent that appellant claimed that his appellate counsel was ineffective for failing to raise claims of ineffective assistance of trial counsel on appeal, such claims would not have been available to be raised on direct appeal. Fezell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

further claimed that his appellate counsel should have challenged the false statements on direct appeal.

Appellant failed to demonstrate that his counsels' performances were deficient or that he was prejudiced. Trial counsel litigated a pretrial petition for a writ of habeas corpus, challenging the sufficiency of the evidence presented at the preliminary hearing for bind over purposes. Trial counsel extensively questioned the detective about the alleged false statements during the defense case-in-chief. Appellant failed to demonstrate that any further arguments regarding the affidavit of arrest would have had a reasonable probability of altering the outcome in the proceedings. Appellant likewise failed to demonstrate that this claim had a reasonable probability of success on appeal because an allegedly illegal arrest would not divest the district court of jurisdiction. See United States v. Alvarez-Machain, 504 U.S. 655 (1992) (holding that the forcible abduction of the defendant did not prohibit a trial on criminal charges). Therefore, we conclude that the district court did not err in denying this claim.

Second, in a similar vein, appellant claimed that appellate counsel failed to argue that there was insufficient evidence to bind him over for trial and that the prosecutor made false statements in its argument to bind appellant over for trial.

Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant's suggestion that there was no probable cause is belied by the fact that a jury found him guilty beyond a reasonable doubt. See United States v. Mechanik, 475 U.S. 66, 70 (1986) (any error in grand jury proceedings was

harmless where defendants were found guilty beyond a reasonable doubt at trial); Lisle v. State, 114 Nev. 221, 224-25, 954 P.2d 744, 746-47 (1998) (citing Mechanik). Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that trial counsel failed to challenge the testimony of Deputy Duncan, S. Herron, G. Cox, and D. Sloan as perjured testimony. Appellant further claimed that appellate counsel should have raised an issue of perjured testimony on direct appeal.

Appellant failed to demonstrate that his counsels' performances were deficient or that he was prejudiced. Alleged inconsistent statements or lack of corroborating surveillance video or fingerprint evidence 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). The witnesses were extensively cross-examined at trial and the jury was provided information about the surveillance video. Appellant failed to demonstrate that any argument about perjured testimony would have had a reasonable probability of success on appeal. Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel failed to object to the prosecutor's violation of his wife's invocation of the marital privilege. Specifically, appellant claims that the prosecutor should not have asked him if his wife relayed his son's message to him, "I want my Dad. I want my guns," because appellant's wife had invoked the marital privilege at the preliminary hearing. Appellant further claimed that his appellate

counsel was ineffective for failing to argue a violation of the privilege on appeal.

Appellant failed to demonstrate that his counsels' performances were deficient or that he was prejudiced. Two witnesses heard appellant's son's (a co-conspirator) statements about his father and guns. Appellant, himself, volunteered during his direct examination that his wife had told him about his son's message and what actions he took as a result. Thus, appellant opened the door to the State questioning him about his receipt of his son's message. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel should have challenged the conspiracy theory because appellant was never charged with conspiracy and the statute of limitations for conspiracy had expired before he was charged. Appellant further appeared to claim that appellate counsel should have raised this argument on direct appeal.

Appellant failed to demonstrate that his counsels' performances were deficient or that he was prejudiced. Appellant was charged with two counts of murder under alternative theories of liability: direct responsibility for killing the victims; aided, abetted, encouraged or counseled another to kill the victims; or in joint participation with his son and others (named and unnamed) as co-conspirators in furtherance of an unlawful agreement between and among them to kill the victims. There is no statute of limitations for the crime of murder. NRS 171.080(1). Nothing in NRS 171.080(1) provides a limitation on the time to prosecute a defendant for the crime of murder based on the theory of liability alleged. Further, the prosecutor is not required to charge a

defendant with a separate offense of conspiracy in order to seek liability as a co-conspirator in a murder prosecution. Therefore, we conclude that the district court did not err in denying this claim.³

Sixth, appellant claimed that his trial counsel failed to challenge the violation of his speedy trial rights because of the allegedly false statements made in the affidavit of probable cause for arrest and because trial counsel failed to allege there was a tactical advantage to the State's pre-accusation delay. Appellant also claimed that his appellate counsel was ineffective for making these arguments.

Appellant failed to demonstrate that his counsels' performances were deficient or that he was prejudiced. Trial counsel litigated a speedy trial violation claim in a pretrial petition. Appellate counsel further litigated a speedy trial violation claim and a claim based on pre-accusation delay. This court considered and rejected those arguments on appeal. Stroup v. State, Docket No. 37743 (Order of Affirmance, March 17, 2003). Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial or appellate counsel made appellant's additional, suggested arguments. Therefore, we conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel failed to object to numerous instances of improper argument in the State's opening

³We note that appellant's trial counsel did argue strenuously, but unsuccessfully, against the conspiracy theory in a pretrial petition for a writ of habeas corpus. Further, we note that appellate counsel argued unsuccessfully that it was error to admit appellant's son's statements because a conspiracy had allegedly not been established.

statements and closing arguments. Appellant further claimed that his appellate counsel was ineffective for failing to raise this argument on appeal.

Appellant failed to demonstrate that his counsels' performances were deficient or that he was prejudiced. The vast majority of instances cited to by appellant involved proper comment on the evidence presented and the inferences that could be made from that evidence. To the extent that any statements leaned towards vouching for the credibility of a particular witness, appellant failed to demonstrate that there was a reasonable probability of a different outcome in the proceedings as the error was harmless. Therefore, we conclude that the district court did not err in denying this claim.

Eighth, appellant claimed that his trial counsel failed to file a motion to dismiss at the conclusion of trial based on insufficient evidence. Appellant further claimed that appellate counsel failed to raise an argument of insufficient evidence on appeal.

Appellant failed to demonstrate that his counsels' performances were deficient or that he was prejudiced because sufficient evidence was presented at trial to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); Jackson v. Virginia, 443 U.S. 307, 319 (1979). In particular we note: testimony regarding appellant's son's fight with one of the victims and subsequent threats and phone calls made after the fight (including a phone call from appellant's son relating the message, "I want my Dad. I want my guns,") testimony

regarding the victims' unpaid debts to appellant's son, testimony regarding appellant picking up his son on the day of the murders, testimony regarding the abduction of one of the victims at the 7-11 convenience store by appellant's son, testimony and evidence linking appellant to one of the murder weapons, testimony regarding the suspected vehicle used in the abduction and seen at the crime scene, testimony that the suspected vehicle was owned by a friend of appellant's, testimony and evidence regarding the evidence found in the suspected vehicle (which was discovered burned on a rural road), testimony regarding a van associated with appellant seen on the victim's street after the murders (the same street where another person threatened by appellant's son lived), testimony regarding appellant's request to a friend to drive to Mt. Rose Highway to look for a gun on the side of the road, testimony that after the crime appellant's son asked a friend to burn an item of clothing but later said he did not want to involve his friend, testimony and evidence of a phone call from appellant's son to the same friend asking about what he had told police and subsequent statement "See, Dad, I told you he wouldn't roll over on us," testimony that the friend received what he considered "hush" money from appellant's wife after the crime, testimony regarding the circumstances of appellant's arrest on unrelated charges in California days after the murder, testimony from two inmates that appellant made admissions to committing the crimes, and appellant's own testimony that he received the message from his son and had conversations with the two inmates who testified against him. Based on this evidence we conclude that the district court did not err in denying this claim.

Ninth, appellant claimed that his trial counsel failed to investigate L. Nicholson (a jailhouse informant), failed to share with appellant transcripts and video of L. Nicholson's interview with the police before trial, failed to cross-examine L. Nicholson about an inconsistent statement at trial that he had never "snitched" before because Nicholson indicated that he had worked with other law enforcement agencies in his interview with the police, and failed to ask L. Nicholson if he had been promised parole in exchange for his testimony. Appellant claimed that his appellate counsel should have challenged L. Nicholson's testimony.⁴

Appellant failed to demonstrate that his counsels' performances were deficient or that he was prejudiced. Substantial evidence supports the district court's finding that the video and transcripts were not withheld from the defense team. Appellant failed to demonstrate what evidence a further investigation of L. Nicholson would have revealed that would have had a reasonable probability of altering the outcome at trial. Appellant further failed to demonstrate that counsel had a duty to share the information they received about L. Nicholson or that

⁴At the evidentiary hearing, a letter sent by another inmate indicating that L. Nicholson had recanted at least a portion of his testimony—that he did not receive a promise of parole in exchange for his testimony—was presented by appellant. However, no such recantation claim had been raised in the petition. The State objected, and the district court declined to consider the recantation claim. We conclude that the district court did not abuse its discretion in declining to consider the recantation claim in light of the fact that it was not raised in the petition and was not supported by competent evidence (the letter alluding to the recantation was hearsay and not authenticated). No competent evidence of recantation was presented at the evidentiary hearing.

sharing information about L. Nicholson with appellant before trial would have had a reasonable probability of altering the outcome at trial. The attorney in charge of L. Nicholson's cross-examination testified at the evidentiary hearing that he made a tactical decision not to cross-examine L. Nicholson about his prior "work" with law enforcement as it may have made it seem that L. Nicholson was reliable. Trial counsel aggressively cross-examined L. Nicholson about any benefit he was offered in exchange for his testimony.⁵ Substantial evidence supports the district court's findings regarding this claim. Therefore, we conclude that the district court did not err in denying this claim.

Tenth, appellant claimed that trial counsel failed to ask for a continuance when B. Muir (a jailhouse informant) was noticed as a witness after trial had started, failed to investigate B. Muir, failed to call three other inmates (the counter-snitches) housed in the same unit who would have testified that appellant never made any admissions to B. Muir and that B. Muir was a serial "snitch," and accepted the representations of the attorneys who represented the counter-snitches that they would invoke their Fifth Amendment privilege if called to testify. Appellant claimed that his appellate counsel was ineffective for not challenging B. Muir's testimony on appeal.

Appellant failed to demonstrate that his counsels' performances were deficient or that he was prejudiced. B. Muir was a

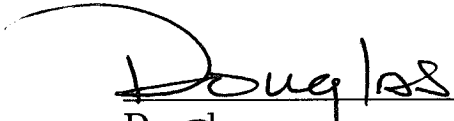
⁵No evidence was presented that any offer of leniency, beyond a letter to the parole board indicating L. Nicholson's cooperation, was made. L. Nicholson testified at trial that he received the maximum sentence in his case and was unhappy that he received the maximum sentence.

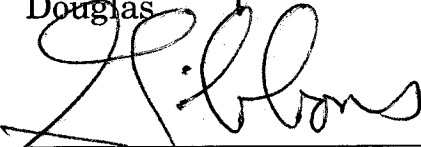
surprise witness to all concerned as he did not come forward until after the trial had begun, appellant's counsel objected to his testimony given the late notice, and the district court provided counsel with their requested day to prepare for his testimony. Appellant failed to demonstrate that had trial counsel investigated they would have found information about B. Muir that would have had a reasonable probability of altering the outcome at trial. B. Muir testified that he was not promised anything in exchange for his testimony. B. Muir's trial counsel, Ms. Karla Butko, testified that no formal deal had been offered, that B. Muir hoped to benefit from his testimony, and that B. Muir's pending case was in federal court and any information about cooperation would go in a memorandum with a hope for leniency and downward departure in sentencing. Two of the attorneys for the counter-snitches appeared in court and invoked the Fifth Amendment on their client's behalf, with representations from the third attorney that his client was also invoking the privilege. Even though the three counter-snitches testified at the evidentiary hearing that they would have testified on behalf of appellant despite their attorneys' representations to the contrary, appellant failed to demonstrate that he was prejudiced by his counsels' failure to investigate or pursue the matter further. Trial counsel testified at the evidentiary hearing that they would not have presented testimony from the counter-snitches as they could not be sure of what the witnesses would say on the stand.⁶ Appellant failed to demonstrate that

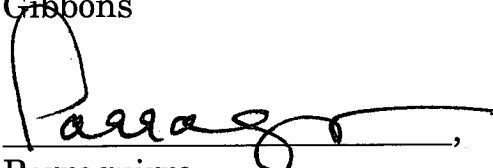
⁶We note that the counter-snitches' testimony was also somewhat inconsistent with appellant's testimony at trial as they indicated that appellant did not have conversations with L. Nicholson and B. Muir and
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further testimony regarding B. Muir would 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.

Having determined that the district court did not err, we
ORDER the judgment of the district court AFFIRMED.⁷


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

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would not have discussed his case with them, while appellant testified at trial that he did discuss his case with both L. Nicholson and B. Muir.

⁷We 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.

cc: Hon. Janet J. Berry, District Judge
Bobby Jehu Stroup
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk