

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW MCNEIL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59613

FILED

OCT 08 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Malow*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order denying a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Jerome T. Tao, Judge.

In his petition filed on April 7, 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

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).

(1984) (adopting the test in Strickland). Both components of the inquiry must be shown. Strickland, 466 U.S. at 697.

First, appellant claimed that trial counsel convinced appellant to “plead” guilty to the battery count in order to prevent the photographs of the victim’s injuries being shown to the jury, but at trial, the photographs were admitted without counsel’s objection. Appellant failed to demonstrate that he was prejudiced. Appellant did not enter a “plea” to the battery count but rather strategically conceded guilt to the battery count, in an attempt to avoid a guilty verdict on attempted murder, the more serious charge.² Photographs of the victim’s injuries would have been relevant to the charge of attempted murder. NRS 48.025(1). Appellant failed to demonstrate that there was a reasonable probability of a different result had trial counsel not made the concession and had trial counsel objected to the photographs.

Second, appellant claimed that trial counsel failed to properly question Officer Dudley about false information in the police report. Appellant claimed that questioning Officer Dudley about the mistakes would show that he was a liar and throw into doubt his testimony that appellant did not appear to be intoxicated.³ Appellant failed to

²Appellant affirmatively indicated his assent to the concession when the district court inquired during opening statements. The battery charge was presented as an alternative, lesser charge to the attempted murder charge.

³The defense theory at trial was that appellant’s level of intoxication was such that he could not form the specific intent to kill.

demonstrate that his counsel's performance was deficient or that he was prejudiced. Trial counsel questioned the victim about the incident and questioned Officer Dudley about preparing the report—as the primary officer he prepared the report with information from other officers. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had counsel questioned Officer Dudley about the alleged mistakes.

Third, appellant claimed that trial counsel failed to properly cross-examine the victim about her alleged perjurious account of the incident. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate the victim committed perjury. Trial counsel questioned the victim about the events that occurred the night she was injured. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had counsel asked additional questions of the victim.

Fourth, appellant claimed that trial counsel failed to present two witnesses to his alleged intoxication: the paramedic who treated him at the scene and the doctor who saw him at the hospital. Appellant claimed that the paramedic was informed by appellant that he had been doing cocaine for 36 hours prior to the incident and had been drinking alcohol as well. Appellant noted that the doctor's report indicated that he suffered cocaine-psychosis. Appellant failed to demonstrate that he was prejudiced. Trial counsel presented evidence that appellant had been drinking that night, the victim witnessed him drinking and appellant had reported to her drinking earlier, and the victim testified about the various drugs appellant had favored in the past. Trial counsel further elicited


information relating to a family court case against appellant in which the victim accused appellant of being an addict. Trial counsel presented an expert witness regarding the effects of cocaine and alcohol and the expert mentioned appellant's positive test for cocaine usage at the hospital. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had counsel presented the additional witnesses in light of the testimony of the victim and officers who testified that appellant showed no signs of intoxication.

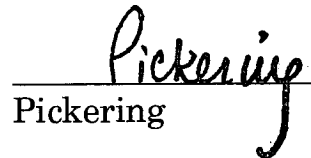
Fifth, appellant noted that counsel failed to object to the child abuse jury instruction which conflated two statutory provisions. Although this court determined that the instruction was error on appeal and ordered the conviction for child abuse vacated, McNeil v. State, Docket No. 52944 (Order Affirming in Part, Reversing in Part and Remanding, March 26, 2010), appellant alleged that this showed that counsel was incompetent in his representation. Appellant failed to demonstrate that this error rendered the entirety of counsel's performance deficient. Appellant further failed to demonstrate that there was a reasonable probability of a different outcome in the proceedings relating to the remaining counts.

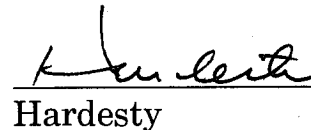
Next, appellant claimed that the State failed to collect evidence of his intoxication and that there was insufficient evidence of attempted murder. These claims were raised and rejected on direct appeal. McNeil v. State, Docket No. 52944 (Order Affirming in Part, Reversing in Part and Remanding, March 26, 2010). The doctrine of the law of the case prevents further litigation of these issues. Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

Finally, appellant claimed that the prosecutor suborned perjury. 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), (3). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Saitta


_____, J.
Pickering


_____, J.
Hardesty

cc: Hon. Jerome T. Tao, District Judge
Matthew McNeil
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk