

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD RAY THOMAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59780

FILED

NOV 15 2012

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge; Eighth Judicial District Court, Clark County; Doug Smith, Judge.

Appellant argues that the district court erred by denying several claims of ineffective assistance of counsel without conducting an evidentiary hearing. To succeed on his claims, appellant was obligated to demonstrate that counsel's performance was deficient and that prejudice resulted. Strickland v. Washington, 466 U.S. 668, 687 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996). Appellant is entitled to an evidentiary hearing "only if he supports his claims with specific factual allegations that if true would entitle him to relief." Thomas v. State, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004); Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

First, appellant argues that the district court erred by summarily denying his claim that the counts of robbery with the use of a deadly weapon and grand larceny auto were improperly joined and that trial counsel was ineffective for not requesting a limiting instruction to guide the jury in considering the two counts as separate and distinct offenses. This court rejected his claim of improper joinder on direct appeal and therefore this claim is barred from further consideration by the law-of-the-case doctrine. See Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Further, because joinder of the challenged offenses was proper, appellant failed to show that counsel was ineffective for not seeking a limiting instruction. Therefore, the district court properly denied this claim without an evidentiary hearing.

Second, appellant contends that the district erred by summarily denying his claim that trial counsel was ineffective for not (1) arguing against the sentence imposed, which exceeded the minimum parole date by more than 60%; (2) uncovering the district court's reasoning for imposing a sentence that was "so disproportionate to the possible parole date"; and (3) arguing for the sentence imposed for grand larceny to be served first. Appellant's arguments are speculative and unsupported by specific allegations or the record before us. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. Accordingly, the district court properly denied these claims without an evidentiary hearing.

Third, appellant contends that the district court erred by summarily denying his claim that trial and appellate counsel were

ineffective for not challenging the State's failure to prove the corpus delicti of grand theft auto. Although not entirely clear, it appears that appellant argues that the State failed to establish before trial that an offense of grand theft auto had occurred and that trial and appellate counsel were ineffective for not challenging that omission. Appellant advances a bare allegation unsupported by the record before us. Therefore, the district court did not err by denying this claim without an evidentiary hearing.

Fourth, appellant contends that the district court erred by summarily denying his claim that trial counsel was ineffective for conceding his guilt to grand theft auto without his consent. During opening statement, counsel related to the jury that appellant "did it, [the police caught him]" but that the State would be unable to prove that he intended to take the vehicle from the victim because the State would be unable to establish that appellant "wanted to go and sell the parts to somebody else, that he wanted to go and sell the vehicle to somebody else," or that "he didn't want maybe to give it back after he had some food." Counsel reiterated this contention during closing arguments by telling the jury that "[appellant] did do it. He took the vehicle. But has the State proven to you, have they been able to prove to you that he took the county vehicle with the intent to permanently deprive the county of that vehicle?"

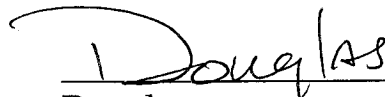
"A concession of guilt involves the waiver of a constitutional right that must be voluntary and knowing." Hernandez v. State, 124 Nev. 978, 990, 194 P.3d 1235, 1243 (2008). Counsel's nonconsensual concession of guilt at trial may support a claim of ineffective assistance of counsel.


See Jones v. State, 110 Nev. 730, 736-39, 877 P.2d 1052, 1056-57 (1994) (concluding that counsel's concession of defendant's guilt at trial constituted ineffective assistance of counsel when concession contradicted defendant's earlier testimony denying the charges). Considering counsel's statements as a whole, we conclude that counsel did not concede appellant's guilt but rather contended that the State failed to prove the offense because it could not establish that appellant had the requisite intent to permanently deprive the victim of the vehicle, see NRS 205.228; Grant v. State, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001). See U.S. v. Swanson, 943 F.2d 1070, 1075-76 (9th Cir. 1991) (recognizing that in some instances attorney might find it strategic to concede certain element of offense or guilt of one or several charges); United States v. Bradford, 528 F.2d 899, 900 (9th Cir. 1975) (concluding that counsel was not incompetent for conceding that evidence identifying defendants as perpetrators was overwhelming but that other elements of crime were not proved in attempt to persuade jury to find defendants guilty of lesser offense); Conrad v. State, 747 N.E.2d 575, 590 (Ind. Ct. App. 2001) ("Simply because defense counsel concedes one element of an offense does not necessarily mean there is a presumption that counsel was ineffective."); Christian v. State, 712 N.E.2d 4, 6 (Ind. Ct. App. 1999) (recognizing that counsel's concession to certain elements of charge or of entire charge may constitute reasonable trial strategy, observing that concession to particular fact or charge supported by overwhelming evidence may enhance defendant's credibility on remaining trial issues).

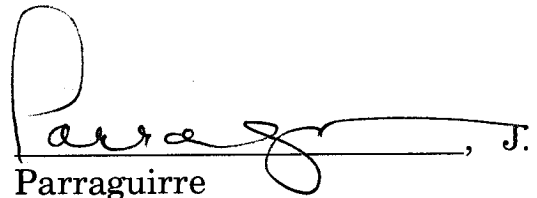
Because appellant failed to show that counsel was ineffective in this regard, we conclude that the district court properly denied this claim without an evidentiary hearing.

Having considered appellant's arguments and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.¹


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. Doug Smith, District Judge
Hon. Michael Villani, District Judge
Robert G. Lucherini, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

¹Appellant argues that the district court erred by denying his claim that the cumulative effect of counsel's deficiencies rendered his trial unfair. Because we conclude that appellant failed to establish that trial and appellate counsel were ineffective on any of the grounds he asserted, there are no deficiencies to cumulate. Therefore, the district court did not err by denying this claim without an evidentiary hearing.