

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEMIAN DOMINGUEZ A/K/A DAMIAN
V. DOMINGUEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59966

FILED

JUL 25 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Angers*
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 Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

In his petition filed on August 17, 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.

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 Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

First, appellant claimed that trial counsel was ineffective for failing to file a motion to dismiss counts 2 and 6. Appellant argued that he could not be convicted of conspiracy to commit murder or murder based upon a “transferred intent” doctrine. Appellant failed to demonstrate that his trial counsel’s performance was deficient or that he was prejudiced. Appellant misused the term “transferred intent.” Appellant’s claim related to his belief that there was an intervening cause of death—pneumonia. A claim challenging medical error as an intervening cause was raised and rejected on appeal. Dominiguez v. State, Docket No. 55061 (Order of Affirmance, December 10, 2010). Appellant cannot demonstrate prejudice for counsel’s failure to file a motion to dismiss based on an intervening cause in this case. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that trial counsel failed to have a psychiatric evaluation performed to determine whether appellant formed the requisite intent to commit murder. Appellant failed to demonstrate that his trial counsel’s performance was deficient or that he was prejudiced. Appellant failed to provide any specific facts regarding a psychiatric condition that would have prevented appellant from forming the requisite intent. Notably, the State included felony murder in its theories of murder in the charging documents. Appellant failed to provide any argument regarding his lack of culpability for the crime of robbery, the basis of the felony-murder theory. Thus, appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel had a psychiatric evaluation performed. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that trial counsel failed to conduct an investigation or interviews of the State's witnesses. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. While appellant listed the witnesses, appellant failed to indicate what evidence or testimony investigations or interviews would have uncovered that 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.

Fourth, appellant claimed that trial counsel failed to object to jury instruction 30 based on his argument that "transferred intent" was not applicable in his case or codified in a statute. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. As discussed earlier, appellant misused the term "transferred intent" to refer to an intervening cause of death. On direct appeal, this court determined that appellant was a substantial factor in the victim's death. Dominiguez v. State, Docket No. 55061 (Order of Affirmance, December 10, 2010). Jury instruction 30 informed the jury that a defendant is liable for the death of a victim due to medical treatment when the wound inflicted upon the victim necessitated the treatment. Nothing requires that a particular definition of cause be codified in a statute to be applicable. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel objected to jury instruction 30. See Lay v. State, 110 Nev. 1189, 1192-93, 886 P.2d 448, 450 (1994). Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel failed to object to jury instruction 39, which defined reasonable doubt. Appellant failed to

demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Jury instruction 39 contained the statutory definition of reasonable doubt as set forth in NRS 175.211, and NRS 175.211 has been previously determined to be constitutional. Lord v. State, 107 Nev. 28, 40, 806 P.2d 548, 556 (1991). Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that his appellate counsel was ineffective. To prove ineffective assistance of appellate 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 the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

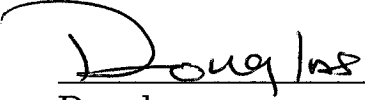
First, appellant claimed that appellate counsel was ineffective for failing to argue that his trial counsel was ineffective. Claims of ineffective assistance of counsel should be raised in post-conviction proceedings in the district court in the first instance and are generally not appropriate for review on direct appeal. Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995). Appellant failed to demonstrate that any issues of ineffective assistance of counsel would have been appropriate for direct appeal in the instant case. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that appellate counsel was ineffective for failing to argue that jury instructions 30 and 39 should not have been given. Appellant failed to demonstrate that he was prejudiced as he failed to demonstrate that the omitted issues would have had a


reasonable probability of success on appeal. Therefore, we conclude that the district court did not err in denying this claim.

Finally, appellant's claim that cumulative errors required relief lacks merit. Accordingly, we

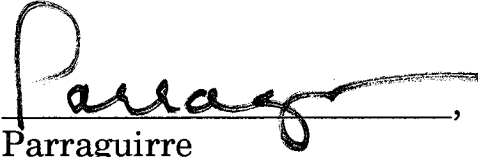
ORDER the judgment of the district court AFFIRMED.

 _____, J.

Douglas

 _____, J.

Gibbons

 _____, J.

Parraguirre

cc: Hon. Valorie J. Vega, District Judge
Demian Dominguez
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk