

IN THE SUPREME COURT OF THE STATE OF NEVADA

KYLE JESSE RODNEY A/K/A DEVIN P.  
BROZEY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 60206

FILED

SEP 12 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; Douglas W. Herndon, Judge.

In his petition filed on November 9, 2011, appellant claimed that his trial counsel was ineffective. 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

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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).

Strickland). Both components of the inquiry must be shown. Strickland, 466 U.S. at 697.

First, appellant claimed that trial counsel was ineffective for failing to object to the victim's perjured testimony. Appellant's claim is belied by the record, as trial counsel did object and moved to strike the victim's testimony. Furthermore, counsel cross-examined the victim thoroughly about the discrepancies in the victim's testimony at the preliminary hearing and at trial. Any inconsistencies or improbabilities in the testimony 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. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Thus, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to object when the State played recordings of telephone calls that appellant made while in jail. Appellant failed to demonstrate deficiency or prejudice. Appellant failed to demonstrate that an objection would have been successful, and counsel is not deficient for failing to make futile objections. See Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Therefore, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to request a jury instruction regarding the victim's perjured testimony or the "clean hands doctrine." Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. The jury was instructed as follows: "If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not

proved by other evidence.” Thus, contrary to appellant’s claim, the jury was instructed on their duty to weigh the credibility of the victim. The “clean hands doctrine” is a doctrine of equity and does not apply in criminal proceedings. Accordingly, counsel was not ineffective for failing to request such an instruction, and the district court did not err in denying this claim.

Fourth, appellant claimed that trial counsel was ineffective for failing to present expert witness testimony as to fingerprints, blood, or the victim’s wounds. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced because appellant failed to support this claim with specific facts that, if true, entitled him to relief. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Appellant did not identify any expert witnesses who would have testified, nor did appellant explain what testimony the experts would have provided at trial. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel was ineffective for failing to object to or impeach the victim’s identification of appellant. This claim is belied by the record, as counsel cross-examined both the victim and the investigating detective about the victim’s description of the perpetrators and about the photographic lineup from which the victim identified appellant. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel was ineffective at sentencing for failing to object to the factual inaccuracies in the presentence investigation report, raise mitigating factors, or “present meaningful arguments and character witnesses” to the district court. Appellant failed to demonstrate deficiency or prejudice, as he did not

support these claims with specific facts that, if true, entitled him to relief. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. The record reflects that counsel argued at sentencing that appellant was young, had not previously committed violent crimes, and had family support. Appellant failed to specify what additional arguments and mitigation evidence counsel should have presented or how it would have affected his sentence. To the extent that he claimed that counsel should have objected to the presentence investigation report, he failed to show that he was prejudiced, as he himself informed the district court about his criminal history at sentencing, and the district court expressly stated that the sentence was based on the brutality of the instant offenses and not the number of prior convictions of appellant. Thus, the district court did not err in denying these claims.

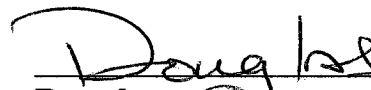
Next, appellant claimed that his due process rights were violated when the State failed to prove that he used a dangerous weapon. On direct appeal, this court rejected appellant's claim that there was insufficient evidence to convict him of conspiracy to commit murder and attempted murder with a deadly weapon. The doctrine of the law of the case prevents further litigation of this claim and cannot be avoided by a more detailed and focused argument. Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Therefore, the district court did not err in denying this claim.


Appellant also claimed that (1) the district court abused its discretion by allowing the victim to testify and by allowing recordings of appellant's telephone calls to be played to the jury, (2) his right to due process was violated because his presentence investigation report contained factual inaccuracies and the district court failed to canvass him

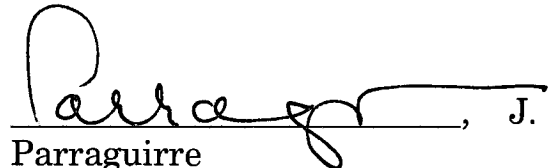
about the accuracy of the report, and (3) his sentence constituted cruel and unusual punishment because the district court failed to consider his age, background, family support, or whether he was under the influence of controlled substances. These claims could have been raised on direct appeal, and appellant failed to demonstrate or even allege cause for his failure to do so. See NRS 34.810(1)(b). Furthermore, to the extent that appellant sought to modify his sentence, he failed to demonstrate that the district court relied upon mistaken assumptions regarding his criminal record that worked to his extreme detriment. See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). Therefore, the district court did not err in denying these claims.

For the foregoing reasons, we conclude that the district court did not err in denying the petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Douglas W. Herndon, District Judge  
Kyle Jesse Rodney  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk