

IN THE SUPREME COURT OF THE STATE OF NEVADA

LANCE REBERGER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60210

FILED

DEC 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY H. Anderson
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; Elissa F. Cadish, Judge.

In his petition, filed on January 30, 1996, appellant raised several claims of ineffective assistance of trial counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate (a) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (b) 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, and the petitioner

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).

must demonstrate the underlying facts by a preponderance of the evidence, Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

First, appellant claimed counsel were ineffective for failing to locate and call at trial two alibi witnesses. Appellant failed to demonstrate deficiency or prejudice. At the evidentiary hearing on the instant petition, counsel testified and appellant presented a report demonstrating that defense investigators attempted to locate the alibi witnesses. Counsel further testified that they did not call any alibi witness because appellant had confessed to the crimes and counsel would not suborn perjury. We therefore conclude that the district court did not err in denying this claim.

Second, appellant claimed counsel were ineffective for failing to call C. Kemp as a witness to impeach the credibility of the jailhouse informant. Appellant failed to demonstrate deficiency or prejudice. Kemp testified at the evidentiary hearing that she arrived at the courthouse too late to testify, was high on heroin when she arrived, and would not have gone into the courtroom so “loaded.” We therefore conclude that the district court did not err in denying this claim.

Third, appellant claimed counsel were ineffective for failing to call appellant’s handwriting expert at trial to prove appellant did not write certain incriminating letters. Appellant failed to demonstrate deficiency or prejudice. Appellant failed to demonstrate that he had requested counsel to retain a specific handwriting expert or that the expert would have concluded that appellant did not author the letters. The expert that counsel did retain opined that appellant had authored the letters and was thus not called at trial. We therefore conclude that the district court did not err in denying this claim.

Fourth, appellant claimed counsel were ineffective for failing to explain to him his right to testify at the preliminary hearing, at a hearing on his motion to suppress evidence, and at trial. Appellant failed to demonstrate deficiency or prejudice because his claims were largely belied by the record. Counsel stated on the record and in appellant's presence at the preliminary hearing that he had discussed with appellant his right to testify and that appellant waived the right; appellant did not object at that time. Further, appellant conceded at the evidentiary hearing that counsel had discussed with him his right to testify at trial but that he later regretted following counsel's advice. Finally, appellant failed to state what other information counsel should have provided him or demonstrate how testifying at any of the hearings or trial would have changed the outcome at trial. We therefore conclude that the district court did not err in denying this claim.

Fifth, appellant claimed counsel were ineffective for waiving his right to a speedy trial without discussing it with him. Appellant failed to demonstrate deficiency. Counsel testified at the evidentiary hearing that they did discuss appellant's right, how counsel could not be ready in 60 days, and that appellant agreed to waive the right. We therefore conclude that the district court did not err in denying this claim.

Sixth, appellant claimed counsel were ineffective for failing to interview the State's handwriting expert prior to calling him as a defense witness. Appellant failed to demonstrate prejudice. The expert testified at trial that appellant likely changed one word in each of two letters written by the codefendant to appellant. Appellant failed to demonstrate that, but for this testimony, there was a reasonable probability of a different outcome at trial. The State's case against appellant was based

primarily on the testimony of the codefendant, who had already been convicted and sentenced for the crime and had not been promised anything to induce her testimony, and was corroborated by appellant's own incriminating writings. We therefore conclude that the district court did not err in denying this claim.²

Seventh, appellant claimed counsel were ineffective for failing to further examine a witness who alleged jury misconduct or to request that the jurors be examined. Appellant failed to demonstrate prejudice. Appellant failed to demonstrate what further examination of the witness or jurors would have revealed and thus failed to demonstrate a reasonable probability of a different outcome at trial. We therefore conclude that the district court did not err in denying this claim.

Eighth, appellant claimed counsel were ineffective for failing to videotape the deposition of D. Custer. Appellant failed to demonstrate deficiency or prejudice. Appellant presented no evidence that Custer was deposed or was a witness at trial, and appellant did not state how videotaping a deposition would have affected the outcome at trial. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that claims must be supported by specific factual allegations that, if true and not repelled by the record, would entitle a petitioner to relief). We therefore conclude that the district court did not err in denying this claim.

²Appellant also claimed that counsel were ineffective for failing to follow the procedures in NRS 175.271(4) regarding expert testimony. That section applies only to court-appointed experts. The expert here was not appointed by the court but was selected by the parties, and that provision therefore did not apply.

Ninth, appellant raised numerous bare, naked claims of ineffective assistance of trial counsel that, even if true, would not have entitled him to relief. See id. Appellant claimed counsel failed to cite proper law in pretrial motions, but he did not state what law should have been cited. Appellant claimed counsel failed to call other defense witnesses, but he did not identify the witnesses and/or their proposed testimony. Appellant claimed counsel failed to interview prosecution witnesses, but he did not identify the witnesses or what additional information counsel would have gleaned. Appellant claimed counsel did not impeach a police officer at a hearing on a motion to suppress, but he failed to state what counsel should have done to impeach the officer. Appellant claimed that counsel failed to investigate the policies and procedures of various local and national agencies, the physical characteristics of the incriminating letters, the search warrant for his vehicle, and the veracity of his codefendant's statements, but he failed to state what the results of such investigations would have been. Further, appellant failed to state in each of these claims how the outcome at trial would have changed had counsel acted differently. We therefore conclude that the district court did not err in denying these claims.

Appellant also raised several claims of ineffective assistance of appellate counsel. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate (a) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (b) resulting prejudice in that the omitted issue would have had a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both components of the inquiry must be shown. Strickland, 466 U.S. at 697. Appellate counsel is not required to—and will

be most effective when he does not—raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, appellant claimed counsel was ineffective for failing to claim ineffective assistance of trial counsel on direct appeal. Appellant failed to demonstrate deficiency or prejudice. Appellant did not specify which ineffective-assistance claims should have been raised, and such claims are generally inappropriate to raise on direct appeal. Pellegrini v. State, 117 Nev. 860, 882-83, 34 P.3d 519, 534 (2001). We therefore conclude that the district court did not err in denying this claim.

Second, appellant claimed counsel was ineffective for failing to file a post-conviction petition for a writ of habeas corpus. Appellant failed to demonstrate deficiency or prejudice. Appellant presented no evidence that counsel had been appointed to represent him in post-conviction proceedings prior to his filing the instant petition.³ See NRS 34.750(1) (providing for the appointment of counsel only after a petition has been filed). Further, appellant filed his petition in a timely manner. We therefore conclude that the district court did not err in denying this claim.

Third, appellant claimed counsel was ineffective for failing to file a petition for rehearing from the denial of his direct appeal. Appellant's bare, naked claim failed to demonstrate deficiency or prejudice. Appellant did not identify any material fact or law that the court overlooked, misapprehended or failed to consider. See NRAP

³We note that on the same date appellant filed the instant post-conviction habeas petition, he also filed a motion in which he acknowledged that he had previously fired appellate counsel and was now seeking to have him appointed as post-conviction counsel.

40(c)(2); Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. We therefore conclude that the district court did not err in denying this claim.

Fourth, appellant claimed counsel was ineffective by counsel's own admission and for a reason that the State would not allow counsel to disclose. Appellant failed to demonstrate deficiency or prejudice. Appellant's claim is belied by the record as counsel disclosed the alleged error at the evidentiary hearing: he did not request a new jury trial during oral arguments before this court as an alternative to the immediate release of appellant. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Further, because this court denied appellant's direct appeal on the merits and not because of the relief requested, he failed to demonstrate a reasonable probability of a different outcome on appeal had counsel made the alternate request for relief. We therefore conclude that the district court did not err in denying this claim.

Fifth, appellant raised numerous bare, naked claims of ineffective assistance of appellate counsel that, even if true, would not have entitled him to relief. See id. Appellant claimed that counsel filed a motion to send trial exhibits to this court and failed to claim appellant's innocence or challenge the State's factual assertions. Appellant also claimed that counsel filed an imperfect appeal but did not state how it was imperfect. Appellant failed to state in each of these claims how, had counsel acted differently, it would have resulted in a reasonable probability of success on appeal. We therefore conclude that the district court did not err in denying these claims.

Finally, appellant claimed that the district court erred in denying his arguments that his arrest and the seizure and search of his mail were illegal, the jailhouse informant's testimony was unreliable, his

codefendant was incompetent to testify and her testimony was uncorroborated, the jury engaged in misconduct, and two proposed jury instructions should have been given and that the prosecution engaged in prejudicial misconduct when it claimed original letters were destroyed but then produced them at trial, withheld exculpatory evidence, placed unadmitted evidence where the jury could see it, elicited evidence that appellant had been pulled over in a traffic stop, disparaged the theory of defense, and introduced evidence at trial that had not been disclosed to the defense.⁴ Appellant also claimed that the district court erred in giving part of jury instruction no. 16 and denying his argument that his vehicle was subject to an illegal search and seizure and that the prosecution engaged in prejudicial misconduct when it reviewed three letters with the codefendant, allowed a witness to identify appellant in a photo line-up while on the witness stand, elicited testimony about appellant needing money for commissary, and showed the jury a diagram that had not been admitted into evidence. Each of the above claims could have been raised in appellant's direct appeal,⁵ and his petition was therefore procedurally barred absent a demonstration of good cause and actual prejudice. NRS


⁴These claims were barred by the doctrine of the law of the case as this court held on direct appeal that they lacked merit. Reberger v. State, Docket No. 25521 (Order Dismissing Appeal, May 26, 1995); Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Appellant made only a bare, naked claim that this court should not adhere to the law of the case because doing so would result in a manifest injustice. See Hsu v. County of Clark, 123 Nev. 625, 630-31, 173 P.3d 724, 728-29 (2007) (discussing when the doctrine of the law of the case should not be applied); Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

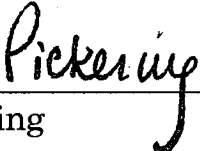
⁵Reberger v. State, Docket No. 25521 (Order Dismissing Appeal, May 26, 1995).

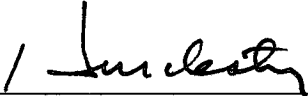
34.810(1)(b). Appellant made no cogent argument of good cause or actual prejudice, and we therefore conclude that the district court did not err in denying these claims as procedurally barred.⁶

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.⁷


_____, J.
Saitta


_____, J.
Pickering


_____, J.
Hardesty

cc: Hon. Elissa F. Cadish, District Judge
Lance Reberger
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁶To the extent appellant claimed that the ineffective assistance of appellate counsel provided good cause to challenge jury instruction no. 16, appellant did not identify the challenged portion of the instruction or explain why it was erroneous and thus failed to demonstrate good cause. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

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.