

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROMMIE MOSS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60271.

FILED

DEC 12 2012

TRAGIE K. LINDEMAN
CLERK OF SUPREME COURT
BY Angela
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; Donald M. Mosley, Judge. Eighth Judicial District Court, Clark County; J. Charles Thompson, Senior Judge.

In his petition filed on September 29, 2011, appellant claimed that he received ineffective assistance of trial counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate (1) that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) 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, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We give deference to the district court's factual findings regarding ineffective assistance of counsel but review the court's application of the law to those facts de novo. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant claimed that trial counsel was ineffective for failing to object to the admission of recorded jail telephone calls because they improperly revealed his custodial status. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. The record shows that trial counsel did in fact object to references to his custodial status, including the in-custody salutation and the background noise in the recordings. Furthermore, this court concluded on direct appeal that any error in the prosecutor's introduction of the recordings as "jail calls" was harmless. See Moss v. State, Docket No. 54712 (Order of Affirmance, July 19, 2010), (Order Denying Rehearing, November 5, 2010). Thus, in light of this court's ruling, appellant cannot show that he was prejudiced. Accordingly, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel was ineffective for failing to impeach the testimony of State witness Vickey Powell and for failing to subpoena Demetrius Powell. Specifically, he asserted that Vickey provided inconsistent statements about whether she actually saw appellant in the car on the night of the shooting, and Demetrius told the police that Quintin Lark was not at Vickey's house that evening, which

would have contradicted both Vickey's and Quintin's testimony that he was there. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Counsel cross-examined Vickey about her inconsistent statements, and appellant failed to show that any further cross-examination would have had a reasonable probability of changing the outcome of the trial. Appellant also failed to demonstrate that Demetrius's testimony would have affected the outcome of the trial, as another witness provided the same testimony at trial. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel was ineffective for failing to adequately argue in favor of his motion to sever his trial from his codefendant's. Specifically, appellant claimed that counsel should have argued that the codefendant had a criminal history involving violence and had no connections to southern Nevada. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. Counsel moved to sever the joint trial both before trial and during trial based on antagonistic defenses. The codefendant did not testify at trial, so evidence regarding the codefendant's criminal history and background was neither admitted nor admissible. Thus, appellant failed to demonstrate a reasonable probability that the outcome of the trial would have been different had counsel made further arguments in support of the motion to sever. See Marshall v. State, 118 Nev. 642, 648, 56 P.3d 376, 380 (2002) (holding that joinder was not prejudicial where appellant failed to show that the joint trial "compromised a specific trial right or prevented the jury from making a reliable judgment regarding guilt or innocence"). Accordingly, the district court did not err in denying this claim. To the extent that appellant raised the joinder issue independently from the

ineffective-assistance claim, we conclude that the doctrine of the law of the case bars further litigation of this issue, as it was raised and rejected on direct appeal. Moss v. State, Docket No. 54712 (Order of Affirmance, July 19, 2010); Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

Next, appellant claimed that his appellate counsel was ineffective for failing to include the self-defense instruction on direct appeal, which precluded meaningful review of this claim.² To prove ineffective assistance of appellate counsel, a petitioner must demonstrate (1) that counsel's performance was deficient, and (2) 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). Appellant failed to demonstrate that he was prejudiced. The proffered instruction was largely subsumed into the self-defense instructions given at trial. See Runion v. State, 116 Nev. 1041, 1050, 13 P.3d 52, 58 (2000) ("[T]he district court may refuse a jury instruction on the defendant's theory of the case which is substantially covered by other instructions."). Thus, appellant failed to show that this claim would have had a reasonable probability of success had the jury instruction been included in the appendix on direct appeal. Accordingly, the district court did not err in denying this claim.


Next, appellant claimed that the cumulative effect of the ineffective assistance of trial and appellate counsel prevented him from

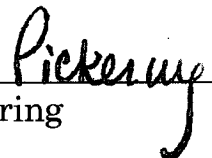
²To the extent that appellant raised a claim independent of ineffective assistance, the claim was waived for the reasons discussed above and appellant did not demonstrate good cause and prejudice. See NRS 34.810(1)(b), (3).


receiving a fair trial. Because appellant's ineffective-assistance claims lacked merit, he failed to demonstrate any cumulative error. Therefore, the district court did not err in denying this claim.

Appellant also claimed that his sentence is cruel and unusual punishment in violation of the Eighth Amendment. Appellant waived this claim, as he could have raised it on direct appeal and did not demonstrate good cause for his failure to do so. NRS 34.810(1)(b), (3). Thus, the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Saitta


_____, J.
Pickering


_____, J.
Hardesty

cc: The Eighth Judicial District Court, Dept. 14
Hon. J. Charles Thompson, Senior Judge
Rommie Moss
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk