

IN THE SUPREME COURT OF THE STATE OF NEVADA

IVAN MICHEL DOMINGUEZ A/K/A
ARMANDO TORRESNAVA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60316

FILED

JUL 25 2012

TRAGIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angela*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order 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 October 31, 2011, appellant claimed that he received ineffective assistance of trial counsel.² 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

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).

²To the extent that appellant raised any claims independently from his claims of ineffective assistance of counsel, these claims were waived as they could have been raised on direct appeal, and appellant failed to demonstrate good cause and prejudice for his failure to do so. NRS 34.810(1)(b).

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.

First, appellant claimed that his trial counsel failed to file a pretrial motion to dismiss or pretrial petition for a writ of habeas corpus challenging the sufficiency of the evidence and alleged errors in the charging document. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The grand jury does not determine the guilt or innocence of the defendant but rather determines whether probable cause has been presented that a crime was committed and that the defendant committed the crime, and probable cause may be based on slight or marginal evidence. NRS 172.155(1); Sheriff v. Burcham, 124 Nev. 1247, 1257-58, 198 P.3d 326, 332-33 (2008). Appellant failed to demonstrate that the State did not meet its burden of establishing probable cause to bind appellant over for trial. Further, appellant failed to demonstrate that the charging document did not set forth a plain, concise, and definite written statement of the essential facts constituting the offenses charged. NRS 173.075(1). Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel failed to object to jury instructions 23 and 25, defining first-degree murder and felony murder. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that the jury instructions set forth incorrect statements of law. See Rose v. State, 127 Nev. ___, ___, 255 P.3d 291, 295 (2011) ("The felony-murder rule makes a killing committed in the course of certain

felonies murder, without requiring the State to present additional evidence as to the defendant's mental state."); Byford v. State, 116 Nev. 215, 236-37, 994 P.2d 700, 714-15 (2000) (setting forth the premeditation and deliberation jury instruction, which recognizes that premeditation may be as instantaneous as successive thoughts of the mind). Appellant failed to demonstrate that there was a reasonable probability of a different outcome had his trial counsel objected to these jury instructions. Therefore, we conclude that the district court did not err in denying this claim.

Third, 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.

Fourth, appellant claimed that trial counsel failed to object to jury instruction 33, setting forth the deadly weapon enhancement instruction for the unarmed participant. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that jury instruction 33 did not adequately define an unarmed participant's liability for the use of a deadly weapon by another during the commission of an offense, as exercise of control by the unarmed participant is not required. Nelson v. State, 123 Nev. 534, 549-50, 170 P.3d 517, 528 (2007). Appellant failed to demonstrate that there was a reasonable probability of a different

outcome had his trial counsel objected to this jury instruction. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel failed to object that there was insufficient evidence of use of a deadly weapon. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The cause and manner of the victim's death was homicide due to multiple stab wounds. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel raised an objection to the sufficiency of the evidence relating to the deadly weapon. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel failed to object that there was insufficient evidence that he aided and abetted the crime. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant was found guilty of conspiracy to commit murder, conspiracy to commit a crime (burglary), and first-degree murder with the use of a deadly weapon. Appellant's fingerprints were found in the laundry room where the victim was attacked. Appellant made inculpatory statements to the police. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel objected to the sufficiency of the evidence regarding his participation in the attack on the victim. Therefore, we conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel failed to put in writing a request to dismiss the case after the State's presentation of evidence. Appellant failed to demonstrate that he was prejudiced as the request made at the hearing was considered and rejected by the district

court on the merits. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had his request been reduced to writing. Therefore, we conclude that the district court did not err in denying this claim.

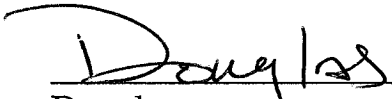
Eighth, appellant claimed that his trial counsel was ineffective for refusing to allow him to testify. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant was personally canvassed and elected not to testify. Therefore, we conclude that the district court did not err in denying this claim.


Ninth, appellant claimed that his trial counsel failed to hire a fingerprint expert to testify as to the direction and manner in which his fingerprints were left in the laundry room and a forensic pathologist to testify regarding the cause of death—medical errors relating to the exploratory surgery. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that it was unreasonable not to call a fingerprint expert in this case, and he further failed to demonstrate that any testimony regarding the direction or manner of the fingerprint would have had a reasonable probability of altering the outcome at trial. This court has previously determined that appellant was a substantial factor in the victim's death. Dominiguez v. State, Docket No. 55699 (Order of Affirmance, December 10, 2010). Appellant failed to demonstrate that further testimony regarding the victim's medical treatment, necessitated by the attack on the victim, would have had a reasonable probability of altering the outcome at trial. 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.

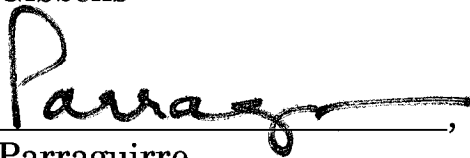
Next, appellant claimed that his appellate counsel was ineffective for failing to argue the underlying issues set forth above. For the reasons discussed above, appellant failed to demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that any of the omitted issues would have had a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). 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.³


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

³We 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.

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