

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY RAY COCHRANE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60699

FILED

JAN 16 2013

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; Valorie J. Vega, Judge.

In his December 19, 2011, petition, appellant claimed that he received ineffective assistance of trial counsel. To prove ineffective assistance of trial 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

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).

First, appellant claimed that his trial counsel was ineffective for failing to assert that the traffic stop was not justified because a moped was not required to use turn signals. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel filed a motion to suppress arguing the stop was not proper and the district court denied the motion. Appellant cannot demonstrate prejudice because this court upheld the district court's decision to deny the motion to suppress on direct appeal. Cochrane v. State, Docket No. 56835 (Order of Affirmance, September 19, 2011). Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to object to leading questions the State posed to a testifying police officer, failing to argue that the officer's testimony was contradicted by physical evidence about the moped, and failing to object to the State's vouching for the credibility of the police officer and when the State committed prosecutorial misconduct for admitting this testimony and evidence. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to identify any questions which his counsel should have objected to and therefore failed to demonstrate deficiency. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Moreover, review of the

testimony at trial reveals that the officer's testimony regarding the condition of the moped was substantially similar to that of the other witnesses and appellant failed to identify any improper vouching for witnesses by the State. Given the overwhelming evidence of appellant's guilt, appellant failed to demonstrate a reasonable probability of a different outcome at trial had his counsel objected during the officer's testimony. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was conflicted. However, appellant provides no facts regarding this claim and bare and naked claims are insufficient to demonstrate that appellant is entitled to relief. See id. Accordingly, appellant failed to meet his burden to establish that his counsel was conflicted. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel failed to object to jury instructions that did not define every element of the charged crimes and for failing to object to the reasonable doubt instruction. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The jury instructions properly defined the charged crimes. NRS 205.080; 1997 Nev. Stat., ch. 150, § 17, at 344. Further, the statutorily-prescribed reasonable doubt instruction was used at trial. NRS 175.211; see, e.g., Chambers v. State, 113 Nev. 974, 982-83, 944 P.2d 805, 810 (1997); Milton v. State, 111 Nev. 1487, 1492, 908 P.2d 684, 687 (1995). Appellant failed to demonstrate a reasonable probability

of a different outcome had counsel argued that the jury instructions were not proper. Therefore, the district court did not err in denying this claim.²

Fifth, appellant claimed that his trial counsel was ineffective for failing to object when the State improperly asserted that the certificate of origin for the moped was actually the title. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. At trial, testimony was presented that the challenged exhibit was the title to the vehicle and appellate failed to demonstrate that that testimony was inaccurate. Given the overwhelming evidence of appellant's guilt of possession of a stolen vehicle, appellant failed to demonstrate a reasonable probability of a different outcome had counsel challenged the authenticity of the challenged exhibit. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to obtain a judicial order for the State to produce the officer's handwritten report. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The State produced a type-written report which the officer testified was an exact

²Appellant also claimed that his appellate counsel was ineffective for failing to argue the jury instructions did not define the charged crimes and the reasonable doubt instruction was incorrect. As these instructions were proper, appellant failed to demonstrate his appellate counsel was ineffective for failing to raise the underlying claim on direct appeal. See Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996); Strickland, 466 U.S. at 697.

reproduction of the information contained in the handwritten report. At the request of counsel, the district court ordered the State to disclose the handwritten report to the defense if possible. The following day, the State informed the district court that the handwritten report had been destroyed after it was transcribed. Counsel did request the handwritten report and the district court ordered the State to produce it if it existed, and therefore, appellant failed to demonstrate counsel acted in a deficient manner. Given the officer's testimony that the type-written report contained the same information as the handwritten one, appellant failed to demonstrate a reasonable probability of a different outcome at trial had counsel raised additional arguments concerning the handwritten report. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel was ineffective for failing to find witnesses who could testify that appellant drove the moped prior to the victim's report of its theft to show that appellant actually purchased the vehicle. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. At a pretrial hearing, counsel informed the court that an investigator had attempted to locate these witnesses, but was unable to do so. Given the evidence demonstrating that the vehicle was not purchased by appellant, that the vehicle was in the possession of the owner when appellant asserted other persons viewed him driving it, and that the vehicle was hotwired when the police stopped appellant driving the vehicle, appellant failed to demonstrate a reasonable probability of a different outcome at

trial had counsel conducted further investigation into witnesses. Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that trial counsel was ineffective for failing to investigate appellant's innocence and his mental illness. Appellant makes only bare and naked claims for these issues, and therefore, failed to demonstrate that he was entitled to relief. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. Therefore, the district court did not err in denying these claims.³

Ninth, appellant claimed that his trial counsel failed to investigate whether sentencing as a habitual criminal was appropriate and for failing to file a sentencing memorandum. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate what investigation reasonable counsel should have undertaken that his counsel did not. Counsel made a lengthy argument at the sentencing hearing that appellant should only receive a sentence of 12 to 36 months and that sentencing as a habitual criminal was not appropriate. The district court stated on the record that the State had demonstrated that appellant's prior felonies were constitutional and that sentencing appellant as a

³We note that appellant failed to demonstrate that he did not have the ability to consult with his attorney with a reasonable degree of rational understanding and that he did not have a factual understanding of the proceedings against him. See Melchor-Gloria v. State, 99 Nev. 174, 179-80, 660P.2d 109, 113 (1983) (citing Dusky v. United States, 362 U.S. 402, 402 (1960)).

habitual criminal was appropriate. Appellant failed to demonstrate that further investigation or a sentencing memorandum would have had a reasonable probability of altering the outcome of the sentencing hearing. Therefore, the district court did not err in denying this claim.

Tenth, appellant claimed that his trial counsel was ineffective for failing to cross-examine witnesses. Appellant cannot demonstrate deficiency or prejudice because his trial counsel did cross-examine the State's witnesses. Therefore, the district court did not err in denying this claim.

Eleventh, appellant claimed that his trial counsel was ineffective for failing to object to introduction of evidence that appellant possessed methamphetamine paraphernalia when stopped by police. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Counsel filed a motion in limine, arguing that the district court should exclude evidence related to the methamphetamine pipe. Appellant cannot demonstrate prejudice because this court determined on direct appeal that admission of that evidence, while error, was harmless. Cochrane v. State, Docket No. 56835 (Order of Affirmance, September 19, 2011). Therefore, the district court did not err in denying this claim.

Twelfth, appellant claimed that his trial counsel was ineffective for failing to argue he should have been found guilty of a lesser-included offense of possession of stolen property. Given the evidence that appellant was arrested driving a hotwired moped, appellant failed to demonstrate that reasonable counsel would have requested any lesser-

included offense instructions. As there was overwhelming evidence of appellant's guilt of possession of a stolen vehicle, appellant failed to demonstrate a reasonable probability of a different outcome at trial had his counsel requested instruction on lesser-included offenses. Therefore, the district court did not err in denying this claim.

Thirteenth, appellant claimed that his trial counsel was ineffective for failing to challenge an error in the presentence investigation report regarding his involvement in the Aryan Warriors. Appellant failed to demonstrate that he was prejudiced. The district court discussed only the facts of this crime and appellant's lengthy criminal history when it imposed sentence. The district court made no reference to his purported involvement in the Aryan Warriors. Appellant failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel argued he was not involved in the Aryan Warriors. Therefore, the district court did not err in denying this claim.

Fourteenth, appellant claimed that his counsel was ineffective for failing to object during the State's closing arguments. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel did raise objections during the State's arguments. Given the overwhelming evidence of appellant's guilt, appellant failed to demonstrate a reasonable probability of a different outcome had counsel raised additional objections. Therefore, the district court did not err in denying this claim.

Next, appellant argues that the district court erred in denying his claims of ineffective assistance of appellate counsel. 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, 112 Nev. at 998, 923 P.2d at 1114. Both components of the inquiry must be shown. Strickland v. Washington, 466 U.S. 668, 697 (1984). Appellate counsel is not required to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983), as limited by Smith v. Robbins, 528 U.S. 259, 288 (2000). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, appellant claimed that his appellate counsel was ineffective for failing to argue he was not present when the clerk entered the judgment of conviction. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant was present for the sentencing hearing, but was not present when the clerk conducted the ministerial duty of filing the judgment of conviction. Appellant failed to demonstrate that reasonable counsel would have argued that appellant was not present at a meaningful portion of the district court proceedings. See Gallego v. State, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001), abrogated on other grounds by Nunnery v. State, 127 Nev. ___, 263 P.3d 235 (2011), cert. denied ___ U.S. ___, 132 S.Ct. 2774 (2012). Appellant failed to demonstrate that this issue had a reasonable likelihood of success on appeal. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his appellate counsel failed to argue that the past convictions used to adjudicate him a habitual criminal were invalid as they were stale, remote, nonviolent, and that they were unconstitutional. Appellant also claimed that the district court did not find that sentencing as a habitual criminal was just and proper. Appellant failed to demonstrate that his trial counsel's performance was deficient because the habitual criminal statute makes no special allowance for nonviolent crimes or for remoteness of the prior convictions; these are merely considerations within the discretion of the district court. Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992). Further, the district court stated on the record that it felt the State had proven that adjudication as a habitual criminal was appropriate and that the prior convictions were constitutional. Appellant failed to identify why those rulings were in error. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Appellant failed to demonstrate that these issues had a reasonable likelihood of success on appeal. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his appellate counsel was ineffective for failing to argue that the habitual criminal enhancement violated double jeopardy. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. Sentencing as a habitual criminal under NRS 207.010 allows for an increased sentence on the charged offense for recidivist criminals and is not an additional punishment for the prior offense, see Carr v. State, 96 Nev. 936, 940, 620 P.2d 869, 871 (1980), and therefore, does not violate the Double Jeopardy


Clause. Appellant failed to demonstrate that this issue had a reasonable likelihood of success on appeal. Therefore, the district court did not err in denying this claim.

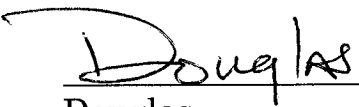
Fourth, appellant claimed that his appellate counsel failed to argue that he was detained for more than 48 hours prior to his arraignment. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. "Failure to bring a defendant before a magistrate without unnecessary delay does not warrant reversal absent a showing of prejudice to the defendant's constitutional rights." Elvik v. State, 114 Nev. 883, 895, 965 P.2d 281, 289 (1998) (citing Huebner v. State, 103 Nev. 29, 32, 731 P.2d 1330, 1333 (1987)). Appellant failed to demonstrate that any delay was unnecessary and appellant failed to identify any prejudice that stemmed from any delay. Accordingly, appellant failed to demonstrate that reasonable counsel would have raised the underlying claim on appeal or that it had a reasonable likelihood of success on appeal. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his appellate counsel was ineffective for failing to file a "First Amendment Petition," refusing to raise all of the claims appellant wished, and for only raising two claims on direct appeal. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. Appellant failed to identify any issues that reasonable counsel would have raised that would have had a reasonable likelihood of success on appeal. Therefore, the district court did not err in denying this claim.

Having considered appellant's contentions and concluded they are without merit, we

ORDER the judgment of the district court AFFIRMED.⁴


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Saitta

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

⁴We 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.