

IN THE SUPREME COURT OF THE STATE OF NEVADA

FARRELL VICTOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60742

FILED

JAN 16 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Ingersoll*
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; Douglas W. Herndon, Judge.

In his September 15, 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 (1984) (adopting the test in Strickland). Both components of the inquiry must be shown, Strickland, 466 U.S. at 697, and the petitioner must

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).

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 failed to cross-examine the State's informant to ascertain his motive for implicating appellant and show that the informant's testimony was not credible. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel did cross-examine the informant and questioned him regarding the bargain he made with the State to become an informant providing information on criminal activity in exchange for dismissal of gun possession charges. Appellant failed to demonstrate a reasonable probability of a different outcome had counsel inquired further into this issue. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel failed to investigate the State's informant, which would have revealed that the informant did not know appellant. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The informant testified that he was merely acquainted with appellant, but knew that appellant sold drugs. Given the evidence that appellant sold drugs to an undercover officer after the informant introduced the officer to appellant, appellant failed to demonstrate a reasonable probability of a different outcome at trial had counsel performed further investigation regarding the relationship between appellant and the informant. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel failed to object and request a mistrial based upon improper admission of a prior bad act regarding earlier drug dealing. Appellant failed to demonstrate that his


trial counsel's performance was deficient or that he was prejudiced. Trial counsel did object to the admission of this testimony and moved for a mistrial. Given the evidence that appellant sold drugs to an undercover officer, appellant failed to demonstrate a reasonable probability of a different outcome at trial had counsel raised additional arguments regarding admission of this evidence. Therefore, the district court did not err in denying this claim.

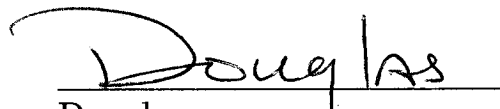
Next, appellant claimed that his appellate counsel was ineffective. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. Kirksey 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 raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). 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).

Appellant claimed that his appellate counsel was ineffective for failing to argue that he was improperly adjudicated as a habitual criminal because his prior convictions were nonviolent and remote. Appellant also claimed that appellate counsel failed to argue that the district court did not find that adjudication as a habitual criminal was just and proper. Appellant failed to demonstrate that his appellate counsel was deficient or that he was prejudiced. Because the habitual criminal statute makes no special allowance for nonviolent crimes or remoteness of

the prior convictions as these are merely considerations within the discretion of the district court, Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992), appellant failed to demonstrate reasonable counsel would have argued that the district court erred for those reasons. The district court stated that sentencing appellant as a habitual criminal was appropriate due to appellant's criminal activity in the past and so that appellant would understand that he would have to stop committing crimes. 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.

Having concluded that appellant is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Saitta

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