IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN MICHAEL FERGUSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62193

FILED

JAN 16 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

On appeal from the denial of his August 4, 2010, petition, appellant argues that the district court erred in denying his claims of ineffective assistance of trial counsel.[1] 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 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 demonstrate the underlying facts

[1]The district court also denied the single claim of ineffective assistance of appellate counsel, but appellant does not raise that claim on appeal.



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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 if supported by substantial evidence and not clearly erroneous 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 argues that counsel was ineffective for failing to file a motion to suppress because officers lacked reasonable suspicion to stop the vehicle he was in and because there was no nexus between appellant and the stolen property. Appellant failed to demonstrate deficiency or prejudice. The district court's finding that officers articulated several facts justifying the stop is supported by substantial evidence in the record: An officer testified at appellant's preliminary hearing that he was responding to an early-morning burglary in progress at a dentist's office, as he approached he saw the only vehicle in the dentist's parking area drive out of it, and he and his partner stopped the vehicle. Where officers have articulated reasonable suspicion, the stop does not amount to an unconstitutional seizure. *Somee v. State*, 124 Nev. 434, 442, 187 P.3d 152, 158 (2008). Further, appellant failed to make any cogent argument or cite to any authority to support his argument that there must be some nexus between himself and the stolen property discovered on his person and in the vehicle in order for the stop to pass constitutional muster. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). We therefore conclude that the district court did not err in denying this claim.

Second, appellant argues that counsel was ineffective for failing to file a motion to sever the joint trial because he suffered manifest injustice from being tainted by his codefendant's highly publicized murder-

for-hire plot against the trial judge. Appellant failed to demonstrate deficiency or prejudice. Because the trial court excluded all evidence of the murder-for-hire plot, counsel was not objectively unreasonable in not filing a motion to sever on this basis. Further, appellant failed to present any evidence that the jurors had knowledge of the plot or that, if they had, it affected the outcome at trial where, as here, there was overwhelming evidence of guilt. We therefore conclude that the district court did not err in denying this claim.

Third, appellant argues that counsel was ineffective for failing to file a motion to sever the joint trial because he suffered manifest injustice by the admission of a jailhouse phone call between the codefendant and a third party. Appellant failed to demonstrate deficiency or prejudice. Despite bearing the burden of proof in these proceedings, appellant failed to identify any portion of the conversation that incriminated him and thus failed to demonstrate a reasonable probability of a different outcome at trial had a motion to sever been filed and granted. We therefore conclude that the district court did not err in denying this claim.

Fourth, appellant argues that counsel was ineffective for failing to adequately communicate with appellant or investigate his case. Appellant failed to demonstrate prejudice. Again, despite bearing the burden of proof, he failed to present any evidence of what better communication or a more thorough investigation would have revealed, *see Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004), and, thus, how it would have changed the outcome at trial. We therefore conclude that the district court did not err in denying this claim.

Finally, appellant argues that counsel was ineffective for failing to ensure that appellant received 238 days' presentence credit. Appellant failed to demonstrate deficiency or prejudice. Appellant concedes that he was on parole when the instant crime was committed, and

> [a] defendant who is convicted of a subsequent offense which was committed while the defendant was [on] parole from a Nevada conviction is not eligible for any credit on the sentence for the subsequent offense for *the time the defendant has spent in confinement which is within the period of the prior sentence*.

NRS 176.055(2)(b) (emphasis added). Contrary to appellant's implicit argument, this section applies regardless of whether he was confined pursuant to the prior sentence or pursuant to the subsequent offense. We therefore conclude that the district court did not err in denying this claim.

For the foregoing reasons, we conclude that appellant's arguments lack merit, and we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Cherry

cc: Hon. Carolyn Ellsworth, District Judge
Matthew D. Carling
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk