IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAN RODNEY ORTH,
Appellant,
vs.
E.K. MCDANIEL, WARDEN; AND ELY STATE PRISON,
Respondents.

No. 62423

FILED

DEC 22 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER GRANTING REHEARING, REINSTATING APPEAL AND AFFIRMING

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On July 30, 2014, this court entered an order of affirmance in the above captioned case that affirmed the district court's denial of appellant's post-conviction petition for a writ of habeas corpus. On September 15, 2014, appellant filed a petition for rehearing arguing that this court misapprehended material facts and controlling case law regarding the State's withholding of the police interview with a witness, Eric Meyer. Having reviewed the petition for rehearing, we have determined that rehearing of this matter is warranted.[1] Accordingly, we grant the petition for rehearing and reinstate this appeal.

[1]To the extent that appellant argued for rehearing on his other claims, appellant failed to demonstrate that rehearing is warranted. *See* NRAP 40(c).

In the July 30, 2014, order of affirmance, this court affirmed the district court's denial of appellant's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), regarding a police interview with a witness named Eric Meyer. *Orth v. State*, Docket No. 62423 (Order of Affirmance, July 30, 2014). This court affirmed based on the doctrine of law of the case because this claim had previously been raised on direct appeal and it appeared that appellate counsel had provided this court with a copy of the interview between Meyer and police. *Id.* After reviewing the appendix, we have determined that the interview provided on direct appeal was an interview between Meyer and defense experts rather than the interview with police.[2]

Because this claim was raised on direct appeal, it is still subject to the doctrine of law of the case. To overcome the application of this doctrine, appellant must demonstrate the discovery of substantially new or different evidence. *See Hsu v. Cnty of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 729 (2007). The interview with police was substantially different than the interview that occurred with defense investigators, and therefore, appellant has overcome the doctrine of law of the case.

However, in addition to being subject to the doctrine of law of the case, appellant's *Brady* claim was also procedurally barred by NRS 34.810(1)(b) because it was a claim that could have been raised on direct appeal. Because this claim is subject to NRS 34.810(1)(b), appellant was

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[2]We note that appellant never cited to the police interview with Meyer anywhere in his opening or reply brief. *See* NRAP 28(a)(9)(A) (the brief must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which appellant relies").

required to demonstrate good cause and prejudice to overcome the procedural bar. A violation of *Brady v. Maryland*, 373 U.S. 83 (1963), may provide good cause to overcome the procedural bars. *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). A *Brady* violation occurs when "the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material." *Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). "[P]roving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice." *Bennett*, 119 Nev. at 599, 81 P.3d at 8. Evidence is material where there is a reasonable probability that the omitted evidence would have affected the outcome at trial. *Jimenez v. State*, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996).

Appellant fails to demonstrate good cause to overcome the procedural bar because he failed to demonstrate that the interview was withheld at the time of his appeal from either trial counsel or appellate counsel. Trial counsel knew at the time of the hearing on the motion for new trial that a recording of the interview existed, therefore, he should have made a diligent investigation and received those recordings from the police. *See Steese v. State*, 114 Nev. 479, 494, 960 P.2d 321, 331 (1998). Appellate counsel further complicated matters when she provided this court on direct appeal with the wrong interview.[3] Therefore, had trial and

[3]Not only was this court provided with the wrong interview, the first page of the interview was missing. The interview was merely labeled "Recorded Interview of Eric Meyer." Therefore, it was impossible for this court to determine who was speaking with Meyer, and it was not unreasonable for this court to believe that this was the interview between police and Meyer as was represented by appellate counsel.

appellate counsel been more diligent, this claim could have been properly raised on appeal. Appellant did not make any claims of ineffective assistance of counsel in regard to trial and appellate counsel failing to provide this court with the interview on appeal. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) ("A claim of ineffective assistance of counsel may also excuse a procedural default"). Therefore, appellant failed to demonstrate good cause.

In addition to failing to demonstrate good cause, appellant also failed to demonstrate prejudice. The evidence presented at trial demonstrated that appellant was the person with control over the vehicle and that appellant was with Meyer when he put "something" in the trunk. Had Meyer testified, a phone call recorded at the jail could have been used to impeach Meyer as it appears to show that appellant was coaching Meyer regarding the guns. Further, trial counsel testified at the evidentiary hearing that his investigators informed him that Meyer did not know how the guns got into the bag in the trunk and could not describe the bag. If Meyer did not know how the guns got into the bag, then that would create substantial credibility issues as the guns were found in a bag in the trunk. Therefore, appellant fails to demonstrate prejudice because he fails to demonstrate that the omitted evidence would have affected the outcome at trial. Accordingly, he fails to overcome the procedural bar, and the district court did not err in denying this claim.

Next, appellant claims that the district court erred in denying his claims that he received ineffective assistance of trial counsel. To prove ineffective assistance of trial counsel, a petitioner must demonstrate that trial 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 trial 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 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 claims that trial counsel was ineffective for failing to object to the exclusion of all of the DNA evidence. Appellant fails to demonstrate that he was prejudiced. Because the DNA evidence that appellant claims should not have been excluded was neutral at best, appellant fails to demonstrate a reasonable probability of a different outcome at trial had the DNA evidence been admitted. Therefore, the district court did not err in denying this claim.

Second, appellant claims that trial counsel was ineffective for failing to timely notice Meyer as a witness. Appellant fails to demonstrate that counsel was deficient. At the evidentiary hearing, trial counsel testified that appellant refused to inform him of what Meyer would testify about. It was not until the night before the first day of trial that trial counsel learned what Meyer would testify about. Therefore, trial counsel was not deficient for failing to timely notice Meyer as a witness. Accordingly, the district court did not err in denying this claim.

Third, appellant claims that trial counsel was ineffective for failing to object to several instances of prosecutorial misconduct during closing arguments. Appellant fails to demonstrate that counsel was deficient or that he was prejudiced. Trial counsel testified at the evidentiary hearing that he could not pay attention to the State's closing argument because appellant would not stop talking to him. Therefore, trial counsel was not deficient for failing to object to the alleged instances of prosecutorial misconduct. Further, appellant fails to demonstrate a reasonable probability of a different outcome at trial had trial counsel objected because sufficient evidence was presented that appellant possessed the drugs and guns. Further, the jury was instructed that the statements, arguments, and opinions of counsel were not to be considered as evidence. Therefore, the district court did not err in denying this claim.

Fourth, appellant claims that trial counsel was ineffective for failing to cross-examine Barker with her inconsistent statements. Appellant fails to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant fails to demonstrate that Barker's statements were inconsistent. Further, he fails to demonstrate a reasonable probability of a different outcome at trial had trial counsel asked her about those statements. Therefore, the district court did not err in denying this claim.

Next, appellant claims that the district court erred by 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 v.*

State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (21996). 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). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. We give deference to the 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*, 121 Nev. At 686, 120 P.2d at 1166.

First, appellant claims that appellate counsel was ineffective for failing to raise claims on appeal that the State committed prosecutorial misconduct during closing arguments. Appellant fails to demonstrate that the claims had a reasonable probability of success on appeal for the reasons discussed above. Therefore, the district court did not err in denying this claim.

Second, appellant claims that appellate counsel was ineffective for failing to provide this court with a pretrial hearing transcript that demonstrates that the State agreed not to introduce bad act evidence that appellant was wanted for other crimes. Appellant claims that had appellate counsel provided this transcript, his claim that the State improperly introduced bad act evidence would have been granted on appeal. Appellant fails to demonstrate that appellate counsel was deficient or that he was prejudiced. The transcript cited by appellant only demonstrates that the State agreed not to introduce evidence that appellant was being followed by the Repeat Offender Program officers. There is no indication that the State agreed not to inform the jury that appellant was wanted for a misdemeanor, which was the basis for the stop

of appellant.[4] Therefore, appellant fails to demonstrate a reasonable probability of success on appeal had appellate counsel provided the transcript, and the district court did not err in denying this claim.

Third, appellant claims that appellate counsel was ineffective for failing to appeal the district court's decision to exclude all of the DNA evidence. As discussed above, the DNA evidence was at best neutral, and appellant fails to demonstrate that there was a reasonable probability of success on appeal had appellate counsel raised this claim. Therefore, the district court did not err in denying this claim.

Fourth, appellant claims that appellate counsel was ineffective for failing to argue on appeal that the evidence of trafficking in a controlled substance and being a felon in possession of a firearm was insufficient. Appellant fails to demonstrate that appellate counsel was deficient or that he was prejudiced because the evidence supporting the convictions, when viewed in the light most favorable to the State, was sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. NRS 453.3385(1); NRS 202.360; *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *McNair v. State*, 108 Nev. 53, 56, 835 P.2d 571, 573 (1992). Therefore, the district court did not err in denying this claim.

Fifth, appellant claims that appellate counsel was ineffective for failing to consult with him about the appeal. Appellant fails to demonstrate that he was prejudiced because he failed to demonstrate that there were any claims that appellate counsel should have raised that had

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[4]Appellant's claim that trial counsel was ineffective for failing to object to the State's use of the prior bad acts fails for the same reason. The State never agreed not to mention that appellant was wanted for a misdemeanor.

a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

Finally, appellant claims that the State committed prosecutorial misconduct when it argued in closing arguments that no one else could have put the duffel bag in the car and that Meyer had no connection whatsoever to the car and evidence found there. Appellant failed to allege this claim in terms of him receiving ineffective assistance of counsel. Therefore, to the extent that appellant attempted to raise this claim as an ineffective-assistance-of-counsel claim, he failed to provide cogent argument. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Further, to the extent that he raised this as strictly a prosecutorial misconduct claim, this claim should have been raised on direct appeal from his judgment of conviction and sentence and appellant failed to demonstrate good cause for his failure to do so. *See* NRS 34.810(1)(b)(2). Accordingly, we

ORDER the petition for rehearing granted, the appeal reinstated and the judgment of the district court AFFIRMED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Second Judicial District Court Dept. 10
Janet S. Bessemer
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk