IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN E. HICKEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62898

FILED

MAR 1 1 2014

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

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; Michelle Leavitt, Judge.

In his petition filed on November 1, 2012, appellant claimed that he received ineffective assistance of counsel throughout the proceedings.[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

[1]This 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 Luckett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[2]Appellant was represented by several attorneys throughout the proceedings, including Mr. William Terry, Mr. John Parris, and Mr. Carl Arnold. Mr. Terry represented appellant at the time of the original complaint and grand jury proceedings. Mr. John Parris represented appellant for a portion of the pretrial proceedings and again after entry of the plea. Mr. Arnold represented appellant for a period of the pretrial proceedings and for entry of the plea.

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*). To demonstrate prejudice regarding the decision to enter a guilty plea, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). 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 claimed that Mr. Terry was ineffective for failing to advise him of the date and time of the grand jury proceedings and failing to secure and present exculpatory evidence for one of the eleven crimes. Appellant failed to demonstrate that he was prejudiced as he failed to demonstrate that there was a reasonable probability of a different outcome in the grand jury proceedings had trial counsel advised him of the date and time of the grand jury proceedings or secured and presented the alleged exculpatory evidence. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that Mr. Terry and Mr. Parris were ineffective for failing to file a motion to dismiss the grand jury indictment. Appellant failed to demonstrate that his trial counsel were deficient or

that he was prejudiced. While the notice served by the State was likely untimely,[3] there was no impediment to the State seeking to re-file the indictment during Mr. Terry's representation and during the pretrial representation of Mr. Parris. Thus, a decision not to file a motion to dismiss the indictment was objectively reasonable. *See Cullen v. Pinholster*, 563 U.S. ___, ___, 131 S. Ct. 1388, 1403, 1407 (2011) (recognizing that counsel is strongly presumed to have rendered adequate assistance and a reviewing court must entertain the range of possible reasons for counsel's action or inaction); *Harrington v. Richter*, 562 U.S. ___, ___, 131 S. Ct. 770, 790 (2011) (recognizing that the deficiency inquiry is an objective one that focuses not on the subjective state of mind of counsel but the objective reasonableness of counsel's performance); *Strickland*, 466 U.S. at 690 (recognizing that deficient performance is evaluated as of the time of the conduct and that there is a wide range of professionally competent assistance). The other errors complained of would not have rendered the grand jury proceedings invalid. Appellant further failed to demonstrate that there was a reasonable probability that he would not have entered a guilty plea but for counsel's failure to file a motion to dismiss as appellant entered his guilty plea knowing of the alleged timing issues related to the grand jury proceedings. Therefore, we conclude that the district court did not err in denying this claim.[4]

---

[3]The district court's finding that the notice was sufficient is not supported by the record as NRS 172.241(2)(a) measures the timing of the notice of the grand jury proceedings by judicial days and the State's first attempt at notice for the first hearing provided only 2 judicial days of notice. The second notice failed to provide any judicial days of notice as it was served on the same date as the second proceedings. However, the first notice was served more than five days before the second hearing.

[4]To the extent that appellant claimed that during subsequent proceedings on a motion to dismiss the indictment Mr. Terry was

continued on next page...

Fourth, appellant claimed that Mr. Parris was ineffective for failing to secure and present exculpatory evidence for one of the thirteen incidents. Appellant failed to demonstrate that his counsel's performance was deficient because he failed to demonstrate that the video was able to be secured during the time of Mr. Parris' representation. Appellant further failed to demonstrate there was a reasonable probability of a different outcome had trial counsel secured the video as the video and bank records (which were in appellant's possession) related to only one of the thirteen incidents. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that Mr. Parris was ineffective for failing to file a motion for bail reduction, which would have allowed appellant to be free to investigate his case himself. Appellant failed to demonstrate that there was a reasonable probability of a different outcome in the proceedings. Appellant failed to demonstrate that such a motion would have had a reasonable likelihood of success. *See* NRS 178.498. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that Mr. Parris was ineffective for failing to file a motion for discovery to assess the strength of the State's case and failing to share the discovery with appellant. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Multiple discovery motions and requests were made by

---

...continued
ineffective for informing the State that appellant had not intended to testify at the grand jury proceedings and that exculpatory evidence did not exist, appellant failed to demonstrate that there was a reasonable probability of a different outcome in the proceedings absent these revelations.

his various attorneys throughout the proceedings and several hearings were conducted on discovery matters. Mr. Parris indicated that he had received most of the discovery, would meet with the State in securing any missing items, and he had shared most of the discovery with appellant. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel filed further discovery motions or shared more discovery information with appellant. Therefore, we conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that Mr. Parris was ineffective for failing to file a motion to sever the counts because appellant believed the link between the counts was not strong enough and he may have had an alibi for one of the crimes and there were potential co-defendant issues. Appellant failed to demonstrate that his trial counsel's performance was deficient as he did not provide any specific facts that would support this claim. Appellant further failed to demonstrate that there was a reasonable probability of a different outcome in the proceedings had trial counsel filed a motion to sever the counts. Therefore, we conclude that the district court did not err in denying this claim.

Eighth, appellant claimed that Mr. Parris was ineffective for failing to file a motion for medical records which would provide mitigating information at sentencing and possibly a defense to the charges. Appellant claimed that he became incompetent during the pretrial proceedings after he stopped taking his medications.

Appellant failed to demonstrate that his trial counsel's performance was deficient. First, appellant does not provide any specific information about the medical records. Appellant further informed the court himself at the first sentencing hearing that he had stopped taking his medications. Mr. Parris, however, testified at the evidentiary hearing that he had no reason to question appellant's competency to enter a guilty

plea and described appellant's lucidity in his interactions with counsel. The record indicates that appellant filed several proper person motions and participated in court hearings after he allegedly became incompetent, and there was nothing in those interactions indicating appellant was having difficulties understanding the nature of the proceedings. Under these circumstances, appellant failed to demonstrate that he was incompetent—that he did not understand the proceedings or charges and was unable to assist his counsel during trial and sentencing in this case. *See* NRS 178.400(2); *Melchor-Gloria v. State*, 99 Nev. 174, 180, 600 P.2d 109, 113 (1983); *see also Dusky v. United States*, 362 U.S. 402 (1960). Thus, appellant failed to demonstrate that his trial counsel was deficient or that there was a reasonable probability of a different outcome at sentencing had trial counsel obtained his mental health records. Likewise, appellant failed to demonstrate that investigation of an insanity defense would have had a reasonable probability of a different outcome as appellant failed to demonstrate legal insanity. *See Finger v. State*, 117 Nev. 548, 576, 27 P.3d 66, 84-85 (2001). Therefore, we conclude that the district court did not err in denying this claim.

Ninth, appellant claimed that Mr. Arnold was ineffective for advising him to accept the plea negotiations before fully litigating the motion to dismiss the indictment based on the problems with the grand jury proceedings. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. As stated above, there was no impediment to the State seeking to re-file the indictment during Mr. Arnold's representation. Appellant received a substantial benefit by entry of his guilty plea as he avoided 29 additional counts. Appellant entered his guilty plea knowing that the motion to dismiss the grand jury indictment had not been fully litigated, and thus, he failed to demonstrate that there was a reasonable probability that he would not

have entered a guilty plea and would have insisted on going to trial. Therefore, we conclude that the district court did not err in denying this claim.[5]

Tenth, appellant claimed that Mr. Arnold was ineffective for failing to secure the alibi evidence, failing to obtain his mental health records, and failing to seek a competency hearing. For the reasons discussed previously in regards to Mr. Parris, appellant failed to demonstrate that his counsel was ineffective. Therefore, we conclude that the district court did not err in denying this claim.

Eleventh, appellant claimed that Mr. Arnold was ineffective for failing to file a presentence motion to withdraw a guilty plea after appellant informed him that he had stopped taking his medications. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Mr. Arnold represented to the court that he did not believe there was a basis to withdraw the plea. The district court allowed Mr. Arnold to withdraw and appointed Mr. Parris to review the motion and for the sentencing hearing. Mr. Parris further felt there was no basis for the motion. As discussed previously, appellant failed to demonstrate that he was incompetent. Under these facts, appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel filed the motion. Therefore, we conclude that the district court did not err in denying this claim.

---

[5]We note that the district court found that the motion to dismiss had been fully litigated when the records unequivocally show that the motion to dismiss was not fully litigated prior to entry of the plea. Despite this error, we conclude that the district court reached the correct result in denying this claim.

Twelfth, appellant claimed that Mr. Parris failed to file a direct appeal despite the fact that trial counsel knew appellant was dissatisfied with his conviction and sentence.

Based upon our review of the record on appeal, we conclude that the district court erred in denying this claim. Trial counsel has a duty to file a direct appeal when a client requests one or when the client expresses dissatisfaction with his conviction and sentence. *See Toston v. State*, 127 Nev. ___, ___, 267 P.3d 795, 800 (2011). In evaluating dissatisfaction, this court has indicated the district court should consider whether the defendant received the sentence bargained-for, whether the defendant reserved any issues for appeal, whether defendant indicated a desire to challenge his sentence within the period for filing an appeal, and whether the defendant sought relief from the plea before sentencing. *Id.* at ___, 267 P.3d at 801. At the evidentiary hearing, Mr. Parris testified that he knew appellant was dissatisfied with the conviction and that he knew appellant had wanted to withdraw his plea before sentencing. Under these circumstances, we conclude that counsel had a duty to file a direct appeal and acted unreasonably in failing to file an appeal. Because prejudice is presumed, *see id.* at ___, 267 P.3d at 799, appellant demonstrated that he received ineffective assistance of counsel. Thus, we reverse the decision of the district court to deny this claim, and we remand this matter to the district court to provide appellant with the remedy set forth in NRAP 4(c).[6]

---

[6]The district court shall enter specific findings of fact and conclusions of law that appellant was deprived of a direct appeal and is entitled to a direct appeal with the assistance of counsel. *See* NRAP 4(c)(1)(B)(i). If appellant is indigent, the district court shall appoint appellate counsel. *See* NRAP 4(c)(1)(B)(ii). The district court shall also direct the clerk of the district court to prepare and file within 5 days of

continued on next page...

Finally, appellant claimed that cumulative error required reversal of his conviction. However, appellant failed to demonstrate that any error, singly or cumulatively, required reversal of his conviction. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[7]

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Cherry

cc: Hon. Michelle Leavitt, District Judge
John E. Hickey
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

...*continued*
entry of the district court's order a notice of appeal from the judgment of conviction and sentence. *See* NRAP 4(c)(1)(B)(iii).

[7]We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein.