

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAWSON GUY STEVE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63053

FILED

JAN 16 2014

TRACE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Sixth Judicial District Court, Lander County; Richard Wagner, Judge.¹

In his November 18, 2011, petition, appellant raised numerous claims of ineffective assistance of trial counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that his 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-

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).

88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). To demonstrate prejudice sufficient to invalidate a judgment of conviction based on a guilty plea,² the petitioner must show that, but for trial 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. 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 trial counsel was ineffective for filing pretrial motions utilizing *Brady v. Maryland*, 373 U.S. 83 (1963), a post-conviction remedy, to address ongoing discovery violations and speedy trial violations. Appellant claimed that counsel should have challenged the State's failure to turn over discovery as prosecutorial misconduct because the State tainted and fabricated evidence, abandoned its role as prosecutor, misrepresented evidence, and became a witness in

²While appellant entered a nolo contendere plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), "[a] nolo contendere plea is equivalent to a guilty plea in that it 'authorizes the court to treat the defendant' as if the defendant had pleaded guilty." *State v. Lewis*, 124 Nev. 132, 133 n.1, 178 P.3d 146, 147 n.1 (2008) (quoting *State v. Gomes*, 112 Nev. 1473, 1479, 930 P.2d 701, 705 (1996)).

the chain of custody. Appellant failed to demonstrate deficiency or prejudice. From the onset, counsel filed numerous motions compelling discovery and challenging the delay in receiving laboratory results. Appellant failed to demonstrate prejudice by counsel's filing of motions to ensure all pertinent discovery was completed prior to trial. To the extent he claimed counsel should have alleged prosecutorial misconduct, appellant failed to demonstrate deficiency or prejudice as he failed to demonstrate that such a challenge would have been successful, and counsel is not deficient for failing to make futile motions. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Therefore, the district court did not err in denying this claim.

Second, appellant claimed that trial counsel failed to challenge the jail's policies that limited his communication with counsel and that prevented him from preparing for the initial trial date. Appellant failed to demonstrate deficiency or prejudice. Counsel raised the issue before the district court on at least two separate occasions and obtained an order specifically directing the jail to allow appellant to communicate with persons outside the jail in furtherance of trial preparation. Additionally, the initial trial date was continued and appellant was eventually released on house arrest during the pretrial proceedings. Appellant did not claim that he was subsequently denied communication with counsel in order to prepare for the rescheduled trial. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that trial counsel failed to object to judicial coercion regarding the district court's involvement in the negotiation process. Appellant failed to demonstrate prejudice, as the

underlying claim of judicial coercion was considered on appeal and we concluded that appellant failed to demonstrate that any reversible error occurred. *Steve v. State*, Docket No. 56550 (Order of Affirmance, June 8, 2011). Appellant failed to demonstrate his counsel was ineffective in this regard. Therefore, the district court did not err in denying this claim.

Appellant also claimed that trial counsel (1) failed to contact any witness prior to a pretrial conference for the initial trial date, (2) failed to file the second motion to dismiss in a timely manner so that it could be argued at a hearing, (3) failed to make a motion to strike the three remaining counts as defective for failing to include a factual basis after successfully arguing to strike the first two counts of the information, (4) failed to require the State to give appellant notice of any unlawful act constituting a crime, and (5) failed to do anything to prevent the State from convicting him of pistol-whipping the victim. Appellant failed to demonstrate prejudice as he failed to indicate what difference the actions would have made in his decision to plead guilty. As to appellant's claims regarding the lack of a factual basis, the State offered what it could prove if appellant chose to proceed to trial, and the district court determined it had an adequate factual basis to accept the plea. *See Tiger v. State*, 98 Nev. 555, 558, 654 P.2d 1031, 1033 (1982). After listening to the State's presentation of the evidence, appellant indicated that he was entering his plea to avoid the possibility of being convicted of greater offenses and facing harsher penalties. *See id.* We therefore conclude that the district court did not err in denying this claim.

Next, appellant claimed that he received ineffective assistance from his 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*, 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).

First, appellant claimed that appellate counsel failed to properly challenge the district court's involvement during negotiations in violation of *Cripps v. State*, 122 Nev. 764, 137 P.3d 1187 (2006), and to demonstrate how the district court's involvement prejudiced appellant by providing a complete record on appeal. Appellant failed to demonstrate deficiency or prejudice. Appellate counsel raised the issue on appeal, and while we established that the district court erred by not recording its discussion with counsel, we concluded that the participation could not reasonably have been viewed as having a material effect on appellant's decision to plead guilty. *Steve v. State*, Docket No. 56550 (Order of Affirmance, June 8, 2011). Appellant failed to identify an omitted part of the record that would have altered this conclusion. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that appellate counsel failed to raise numerous issues pertaining to discovery and *Brady* violations. Appellant claimed that the State failed to surrender certain evidence for

testing, to disclose the results from original testing, and to gather and test all the blood evidence. Appellant failed to demonstrate deficiency or prejudice. While there was a delay in the processing of certain evidence, tests and reports had been completed by the State and the defense at the time appellant entered his plea. At sentencing, the defense presented evidence that appellant sustained a defensive gunshot wound to the hand and that appellant's blood was present on the victim's jacket, supporting appellant's theory that the victim shot him in the hand during a struggle. Furthermore, the defense presented evidence that the object removed from the victim's head was part of a gun sight, as opposed to a bullet, thereby demonstrating that appellant did not shoot the victim in the head. Appellant failed to demonstrate that the State withheld reports or evidence. Furthermore, appellant failed to demonstrate that but for the evidence having been withheld, he would not have pleaded guilty but would have insisted on going to trial. *See generally State v. Huebler*, 128 Nev. ___, 275 P.3d 91 (2012) (applying in the context of a guilty plea the three elements of a successful *Brady* claim: the evidence is favorable, it was withheld by the State, and it was material), *cert. denied*, ___ U.S. ___, 133 S. Ct. 988 (2013). To the extent appellant claimed that the State failed to gather and test all blood evidence from the scene, appellant failed to demonstrate deficiency or prejudice as he failed to demonstrate that a challenge would have been successful. *See Daniels v. State*, 114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998) (agreeing that law enforcement generally has no duty to collect all potential evidence and providing that the defendant must establish the evidence was likely to have been material and the failure to gather the evidence was a result of negligence, gross

negligence, or bad faith); *Donovan*, 94 Nev. at 675, 584 at 711. We therefore conclude that the district court did not err in denying this claim.

Third, appellant claimed that appellate counsel failed to (1) assert that the two counts to which appellant pleaded had a factual basis that was not bound over by the justice court, (2) assert that appellant was denied adequate notice of the nature and cause of the accusations against him, and (3) challenge the jail's policies that limited appellant's communication with trial counsel. Appellant failed to demonstrate deficiency or prejudice as he failed to demonstrate that a challenge to any of the claims would have been successful. Accordingly, we conclude the district court did not err in denying the claims.

Next, appellant claimed that his plea was not entered knowingly and voluntarily. Specifically, appellant claimed that his plea was a result of coercion, ineffective assistance of trial counsel, and a deficient plea canvass. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently. *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); *see also Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). "This court will not invalidate a plea as long as the totality of the circumstances, as shown by the record, demonstrates that the plea was knowingly and voluntarily made and that the defendant understood the nature of the offense and the consequences of the plea." *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000).

Appellant failed to demonstrate that his plea was invalid. At the plea canvass, the district court informed appellant of the charges against him, the elements of the offenses, and the possible penalties. The

State provided a factual basis, and the district court determined it was adequate and accepted the nolo contendere plea. The district court verified the parties' negotiations and confirmed with appellant that his attorney had carried out a reasonable investigation, had researched the law of the case, and had done everything he could do. Further, appellant acknowledged that he read and understood the plea agreement and that he was entering his plea freely, voluntarily, and without threat or force. Therefore, we conclude the district court did not err in denying this claim.³

Next, appellant claimed that: (1) the State failed to disclose material, exculpatory evidence; (2) he did not waive his right to a speedy trial; (3) the State destroyed or failed to gather potential exculpatory evidence; (4) he was treated differently because of his race; (5) the charging document did not apprise him of the criminal acts he was alleged to have committed and he was denied the right to be informed of the nature and cause of the criminal accusations; (6) he was deprived of a meaningful right to prepare his case for trial; (7) he was convicted based on a factual basis that was not bound over by the justice court; (8) his conviction violates the double jeopardy clause of the United States and Nevada constitutions; (9) his sentence constitutes cruel and unusual punishment; and (10) he is actually innocent of the offenses. These claims

³We note that appellant made a presentence motion to withdraw his plea and that the district court, after allowing appellant a chance to argue his reasons for the withdrawal, concluded that appellant's plea was knowingly and voluntarily made.

fall outside the scope of claims permissible in a post-conviction habeas petition challenging a judgment of conviction based upon a guilty plea. See NRS 34.810(1)(a). Therefore, the district court did not err in denying these claims.

Having considered appellant's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.⁴

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Cherry, J.
Cherry

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.

cc: Hon. Richard Wagner, District Judge
Lawson Guy Steve
Lander County District Attorney
Attorney General/Carson City
Clark County District Attorney
Lander County Clerk