

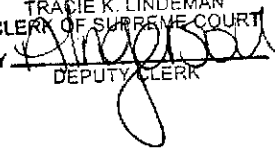
IN THE SUPREME COURT OF THE STATE OF NEVADA

VICKIE LEAVITT DURAN A/K/A
VICKIE LEAVITT SITTLE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63063

FILED

FEB 27 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
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; Michael Villani, Judge.

In her petition filed on June 12, 2012, and her supplemental petition filed on December 11, 2012, appellant claimed that she received ineffective assistance of trial counsel. 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*,

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).

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. To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations that are not belied by the record and, if true, would entitle her to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, appellant claimed that counsel failed to remove a juror who indicated that he had heard about the case on the news and had felt sympathy towards the woman whose child had been killed in the car accident. Appellant failed to demonstrate deficiency or prejudice. The juror stated that he could be fair and impartial in deciding appellant's guilt or innocence, and none of his statements indicated otherwise. See *Murphy v. Florida*, 421 U.S. 794, 799-800 (1975) (holding that exposure to news accounts of the crime does not automatically disqualify juror). Counsel cannot be deemed ineffective for failing to make a futile objection. See *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Thus, the district court did not err in denying this claim.

Second, appellant claimed that counsel failed to advise her of the trial strategy and provide her with discovery. Appellant failed to demonstrate deficiency or prejudice, as she did not allege any specific facts to support this claim. See *Hargrove*, 100 Nev. at 502, 686 P.2d at 225. She did not explain what discovery counsel should have provided or how appellant's knowledge of the trial strategy and discovery would have impacted the outcome of the proceedings. Thus, the district court did not err in denying this claim.

Third, appellant claimed that counsel failed to investigate the chain of custody of the blood draw and failed to have the blood tested for DNA. Appellant failed to demonstrate deficiency or prejudice. Appellant's conclusory assertion that the blood sample was not hers was a bare and naked claim that was not supported by specific factual allegations. *See id.* Furthermore, counsel thoroughly cross-examined the State's witnesses about the chain of custody for the blood samples. Thus, the district court did not err in denying this claim.

Fourth, appellant claimed that counsel failed to call R. McComb as a witness. Appellant failed to demonstrate deficiency or prejudice. Her bare assertion that R. McComb's testimony would have been exculpatory is unsupported by any specific factual allegations. *See id.* Thus, the district court did not err in denying this claim.

Fifth, appellant claimed that counsel failed to impeach the victim's testimony that, before making a left turn onto Nellis Boulevard, she could see the stoplights at the intersections to the left and right of her and did not see any cars coming from the right. Appellant failed to demonstrate deficiency. Counsel elicited testimony from State witnesses and a defense expert that the curvature of Nellis made it difficult or impossible to see all the way to the stoplights from where the victim made her turn. Appellant failed to identify any further actions counsel should have taken, and thus failed to demonstrate that counsel's performance was unreasonable. Further, the victim testified that she could see cars to the right of her but they were far away when she turned left. Thus, this part of the claim was belied by the record. Accordingly, the district court did not err in denying this claim.

Sixth, appellant claimed that counsel failed to elicit a more accurate depiction of appellant's speed at the time of the accident and failed to point out the inconsistencies in G. McComb's testimony as to how fast appellant was driving. Appellant failed to demonstrate deficiency. G. McComb testified that he was driving at the speed limit of 45 mph when appellant passed him in the left lane going about 60 mph. Counsel thoroughly cross-examined G. McComb and elicited testimony that G. McComb and appellant may have been going slower at the time appellant passed him and that he was unsure exactly how far ahead of him appellant was when she hit the victim. Appellant failed to demonstrate that counsel could have further impeached this testimony. To the extent that appellant claimed that trial counsel should have tested the "black box" inside her vehicle, which may have negated testimony about appellant's speed, this assertion was purely speculative without any factual support. *See id.* Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that counsel failed to present to the jury an accident reconstruction report stating that the damage to the victim's car would have been the same whether appellant was speeding or driving at the speed limit. Appellant failed to demonstrate prejudice, as she failed to show that this information would have had a reasonable probability of changing the outcome of the trial. Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that counsel failed to investigate or present evidence that the victim was neglectful of her child. Appellant asserted that the victim did not always put the infant in a car seat and the

infant's head trauma may have been caused by something other than the collision. Appellant failed to demonstrate deficiency or prejudice, as her claim was bare and naked without any factual support. *See id.* The evidence at trial showed that the infant was belted into a car seat at the time of the collision, and appellant failed to provide any support for her speculative assertion about the cause of the infant's death. Therefore, the district court did not err in denying this claim.

Ninth, appellant claimed that counsel was ineffective for calling Dr. Baker as an expert witness because his testimony was too technical. Appellant failed to demonstrate prejudice, as she did not show a reasonable probability that, but for Dr. Baker's testimony, the outcome of the trial would be different. Therefore, the district court did not err in denying this claim.

Tenth, appellant claimed that counsel coerced appellant into waiving her right to testify at trial. Appellant failed to demonstrate deficiency or prejudice. The record shows that the district court canvassed appellant about her right to testify, counsel advised appellant not to testify, and appellant accepted counsel's advice and chose not to testify. There is no indication that her decision was involuntary or coerced. Therefore, the district court did not err in denying this claim.

Eleventh, appellant claimed that counsel allowed the victim to be characterized as an "intervening" or "superseding" cause of the accident when the victim was actually the primary cause. Appellant failed to demonstrate deficiency or prejudice, as her claim was belied by the record. During closing argument, counsel argued that the victim was the primary cause of the accident. Appellant failed to identify any other actions

counsel should have taken. Therefore, the district court did not err in denying this claim.²

Twelfth, appellant claimed that counsel failed to object to the jury instruction on proximate cause, which was a misstatement of the law and shifted the burden of proof. Appellant failed to demonstrate deficiency or prejudice. Appellant challenged the proximate cause instruction on direct appeal, and this court concluded that the instruction was a correct statement of the law and did not shift the burden of proof. *Duran v. State*, Docket No. 56728 (Order of Affirmance, July 14, 2011). Thus, because the instruction was correct, any objection by trial counsel would have been futile. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Therefore, the district court did not err in denying this claim.

Thirteenth, appellant claimed that counsel failed to object to the State's explanation of proximate cause during closing argument. Specifically, appellant claimed that counsel should have corrected the State's argument that appellant was not guilty of DUI causing death if "the victim was the sole and only cause of this collision, Vickie Duran was not even one percent." Appellant failed to demonstrate deficiency or

²To the extent that appellant claimed that her appellate counsel was ineffective for failing to argue about the victim's characterization, appellant failed to demonstrate a reasonable probability of a different outcome on direct appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

prejudice. The jury was instructed that the “negligence of another does not exonerate the defendant unless the other’s negligence was the sole cause of injury.” This court concluded on direct appeal that this instruction was a proper statement of the law. *Duran v. State*, Docket No. 56728 (Order of Affirmance, July 14, 2011). Thus, the State’s argument was not improper and trial counsel was not ineffective for failing to make a futile objection. *See Ennis*, 122 Nev. at 706, 137 P.3d at 1103. Accordingly, the district court did not err in denying this claim.

Fourteenth, appellant claimed that counsel conceded appellant’s guilt by failing to seriously challenge appellant’s intoxication and by stipulating that the victim’s child died from blunt head trauma as a result of the collision. Appellant failed to demonstrate deficiency or prejudice. Appellant failed to explain what actions counsel should have taken or demonstrate that challenges to appellant’s intoxication and the cause of the infant’s death would have had a reasonable probability of changing the outcome of the trial. Further, appellant’s claim that counsel conceded her guilt was belied by the record, as counsel’s theory of the case was that the victim was the sole cause of the accident and appellant would not have been able to avoid hitting the victim regardless of appellant’s speed or level of intoxication. Therefore, the district court did not err in denying this claim.

Fifteenth, appellant claimed that counsel failed to adequately cross-examine witnesses and correct the record about the distance that appellant traveled after hitting the victim’s car. Specifically, appellant contended that an officer testified that appellant drove for a half-mile past the accident, when appellant actually drove only 0.2 miles (or 1,065 feet)

beyond the point of impact. Appellant failed to demonstrate deficiency or prejudice. Counsel thoroughly cross-examined the police officer and other witnesses about the distance appellant traveled and whether she stopped immediately after the accident. While the officer testified that appellant traveled "about a half-mile" before stopping, counsel elicited from another State witness that appellant pulled into a parking lot about 500 to 700 feet down the road from the victim's car. Appellant failed to demonstrate that any further questioning by counsel would have had a reasonable probability of a different outcome at trial because the actual distance traveled was not an element of the offense of leaving the scene of an accident. *See* NRS 484E.010. Therefore, the district court did not err in denying this claim.

Sixteenth, appellant claimed that counsel failed to move for a mistrial after Detective Lethbridge stated that appellant "fled the scene" and "kept going and drove away." Appellant failed to demonstrate deficiency or prejudice. Counsel objected to both comments, and the objections were sustained. Appellant failed to demonstrate a reasonable probability that a mistrial would have been granted had counsel moved for one. There was additional testimony at trial that appellant did not stop at the scene but instead continued down the road and pulled into a parking lot. There was also testimony that appellant tried to start her damaged vehicle while in the parking lot and then got out of the vehicle and told her son that they were going to leave and walk home. Therefore, the district court did not err in denying this claim.

Seventeenth, appellant claimed that counsel failed to explore evidence that appellant's car was operable after the collision, which would

have contradicted the State's theory that she did not continue to flee only because her car was immobilized. Appellant also claimed that counsel should have presented a cogent theory of defense that appellant stopped at the first available break in the median from which a left turn was possible and that her fender was jammed into her tire which prevented her wheels from operating properly. Appellant failed to demonstrate deficiency or prejudice. At trial, there was testimony that appellant made the first available left turn after the collision site and, while in the parking lot, she started her car but it made a lot of noise and the fender was jammed into the tire. Thus, these facts were presented to the jury. Appellant failed to explain how any further investigation by counsel would have altered the outcome of the trial. Therefore, the district court did not err in denying these claims.

Eighteenth, appellant claimed that counsel failed to object to the State's argument that the jury should disregard NRS 484E.010(2) and convict appellant based solely on the fact that she did not immediately stop. Appellant failed to demonstrate deficiency or prejudice. The State did not misstate the elements of the offense of leaving the scene of an accident but rather focused on the fact that appellant did not stop immediately or as close as possible. Counsel could not be deemed ineffective for failing to file a futile objection. *See Ennis*, 122 Nev. at 706, 137 P.3d at 1103. Therefore, the district court did not err in denying this claim.

Nineteenth, appellant claimed that counsel failed to request a jury instruction on a lesser-included charge of gross misdemeanor child endangerment because there was no proof of willful intent to cause harm

to or endanger her 10-year-old son. Appellant failed to demonstrate prejudice. As this court concluded on direct appeal, there was sufficient evidence that appellant “willfully” placed her son in a situation where he could suffer physical pain or mental suffering when appellant put her son in the backseat of the car and then drove in excess of the speed limit with a blood alcohol content nearly four times the legal limit. *See Duran v. State*, Docket No. 56728 (Order of Affirmance, July 14, 2011); NRS 200.508(1). Thus, appellant failed to demonstrate a reasonable probability that, but for counsel’s alleged deficient performance, the outcome of the trial would have been different. Accordingly, the district court did not err in denying this claim.

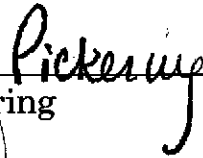
Next, appellant claimed that she is actually innocent and the State failed to prove the offenses of felony DUI, leaving the scene of an accident, and child endangerment. Appellant challenged the sufficiency of the evidence for all three convictions on direct appeal. *Duran v. State*, Docket No. 56728 (Order of Affirmance, July 14, 2011). Thus, further litigation of these claims is barred by the doctrine of the law of the case. *See Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). To the extent that appellant claimed actual innocence, this claim is based solely on her assertions that the State failed to prove the offenses at trial. Therefore, the district court did not err in denying these claims.

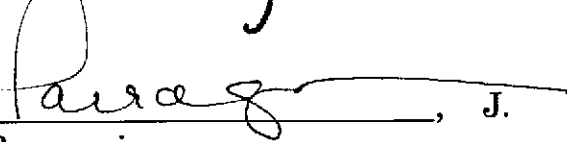
Appellant also raised the following claims: (1) the State committed prosecutorial misconduct during grand jury proceedings and closing arguments; (2) the child-endangerment conviction violated double jeopardy principles; (3) the charge of child endangerment was improperly pled in the indictment; (4) the jury instructions were incorrect and legally

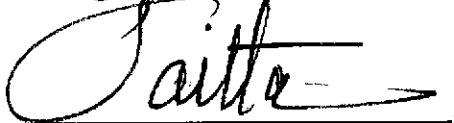
insufficient; and (5) her sentence is cruel and unusual punishment. These claims were waived as they should have been raised on direct appeal, and appellant failed to demonstrate good cause for her failure to do so. See NRS 34.810(1)(b).

Finally, appellant claimed that the cumulative effect of ineffective assistance of counsel warrants vacating her judgment of conviction. Because appellant's ineffective-assistance claims lacked merit, she failed to demonstrate any cumulative error. Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


_____, J.
Pickering


_____, J.
Parraguirre


_____, J.
Saitta

³We 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. Michael Villani, District Judge
Vickie Leavitt Duran
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk