

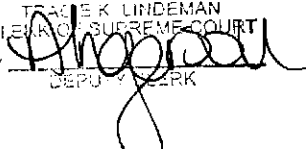
IN THE SUPREME COURT OF THE STATE OF NEVADA

JOEL CARDENAS,
Appellant,
vs.
WARDEN, WILLIAMS SR., SOUTHERN
DESERT CORRECTIONAL FACILITY,
Respondent.

No. 63273

FILED

JAN 16 2014

TRACEE 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 Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

In his petition, filed on September 19, 2012, appellant raised several claims of 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*, 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.

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).

First, appellant claimed counsel was ineffective for failing to request that a presentence investigation report (PSI) be prepared for his sentencing hearing. Appellant failed to demonstrate deficiency or prejudice. Appellant was convicted in another case of sexual assault and convicted in the case underlying the instant petition for failing to appear at his original trial for the sexual assault. He was sentenced in both cases at the same sentencing hearing. Because a PSIR was prepared for the sexual-assault case, one was not required in the instant case. NRS 176.135(3)(b). Appellant did not state why it was objectively unreasonable for counsel not to request a second PSIR or how it would have changed the outcome of his sentencing proceeding. We therefore conclude that the district court did not err in denying this claim.

Second, appellant claimed counsel was ineffective for failing to inform the district court upon resentencing that his sentence was to run concurrent to that in his sexual-assault case and that if it did not, he was entitled to additional days' credit for time served. Appellant failed to demonstrate deficiency or prejudice. At his 2011 sentencing hearing, the district court orally sentenced appellant to consecutive sentences between his two cases, although the judgment of conviction in his failure-to-appear case was silent as to whether the sentences were concurrent or consecutive. Appellant did not allege that this was anything other than a clerical error. Upon resentencing after this court vacated appellant's sentence, *see Cardenas v. State*, Docket No. 58594 (Order Vacating Sentence and Remanding, February 8, 2012), the district court had the authority to correct the error, *see* NRS 176.565. Further, appellant's presentence credits were applied to his sexual-assault case such that he was not entitled to those credits in this case. *See Kuykendall v. State*, 112 Nev. 1285, 1287, 926 P.2d 781, 783 (1996) (holding that the purpose of the statute governing presentence credits "is to ensure that all time served is

credited towards a defendant's *ultimate sentence*") (emphasis added). We therefore conclude that the district court did not err in denying this claim.²

Appellant also raised 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 (1996). 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.

First, appellant claimed counsel was ineffective for not submitting a complete record for review to this court on direct appeal. Appellant failed to demonstrate prejudice. Appellant had claimed on direct appeal that the district court erred in denying his motion for mistrial, but this court declined to consider the claim because appellant failed to provide an adequate record for review. *Cardenas v. State*, Docket No. 58594 (Order Vacating Sentence and Remanding, February 8, 2012).

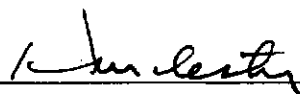
²Appellant also challenged the constitutionality of his sentence because his current judgment of conviction (1) imposes a sentence consecutive to the sexual-assault sentence whereas the 2011 judgment of conviction was silent on the matter and (2) does not grant credit for the time that the 2011 judgment of conviction was in effect and running the sentences concurrently. Even were such claims not procedurally barred, *see* NRS 34.810(1)(b)(2), they would fail on the merits for the reasons discussed herein.


However, it appears that appellant never moved the district court to declare a mistrial. Accordingly, appellant failed to demonstrate a reasonable probability of a different outcome on appeal had counsel submitted an adequate record. We therefore conclude that the district court did not err in denying this claim.


Second, appellant claimed counsel was ineffective due to a conflict of interest because counsel represented appellant at both the trial and appellate levels. Appellant failed to demonstrate deficiency and, thus, that he was prejudiced. More specifically, appellant failed to demonstrate that counsel had divided loyalties such "that an actual conflict of interest adversely affected his lawyer's performance," *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980); *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992). We therefore conclude that the district court did not err in denying this claim.

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

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. Robert W. Lane, District Judge
Joel Cardenas
Nye County District Attorney
Attorney General/Carson City
Nye County Clerk