

IN THE SUPREME COURT OF THE STATE OF NEVADA

GUSTAVO CONTRERAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63623

FILED

FEB 12 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
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; Susan Johnson, Judge.

In his petition filed on April 12, 2013, appellant claimed that his trial counsel was ineffective. 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, and the petitioner must demonstrate the underlying facts

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

by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

First, appellant claimed that his trial counsel was ineffective for failing to investigate witnesses. In support of this claim, appellant included affidavits from two fellow inmates who asserted that they witnessed the altercation. Appellant failed to demonstrate that his trial counsel's performance was deficient. Appellant did not claim that counsel knew of these two potential witnesses prior to trial, but rather merely asserted that counsel could have interviewed the numerous inmates who potentially could have witnessed the incident. Under the circumstance of this case, appellant failed to demonstrate that such an exhaustive interviewing process that was without further guidance from appellant regarding specific potential witnesses would have been undertaken by objectively reasonably diligent counsel. See *Strickland*, 466 U.S. at 691 (stating "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances").

Appellant also failed to demonstrate that he was prejudiced by the failure to discover these potential witnesses as their purported testimony was similar to the testimony already presented to the jury in appellant's defense, that appellant did not initiate the attack on the victim. The jury already rejected this defense at trial. Appellant failed to demonstrate a reasonable probability of a different outcome at trial had further testimony of a similar nature been discovered by counsel and presented at trial, particularly in light of the detention center employees' testimony that appellant attempted to distance himself from the injured party and blend in with the rest of the inmates when the employees

arrived upon the incident scene. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to argue that there was poor preservation of the crime scene at the Clark County Detention Center. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Counsel cross-examined the detention center officers regarding preservation of evidence and appellant failed to demonstrate objectively reasonable counsel would have posed further questions or raised additional arguments about preservation of the scene. Appellant failed to demonstrate a reasonable probability of a different outcome at trial had counsel conducted different actions with respect to arguments concerning preservation of the crime scene. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective as counsel should have raised more arguments to show that a surveillance video which the State failed to preserve for trial was actually exculpatory or was intentionally destroyed. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Counsel argued that the video was exculpatory and should have been preserved. Appellant failed to demonstrate prejudice related to this claim as this court determined on direct appeal that the State did not act in bad faith with respect to preservation of the video and that the video did not have exculpatory value. *Contreras v. State*, Docket No. 58644 (Order of Affirmance, September 12, 2012). Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to argue that an officer committed perjury for testifying that the surveillance video did not depict the fight. Appellant also claimed that counsel should have asserted that the State's witnesses who testified that appellant was the initial aggressor committed perjury. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Counsel cross-examined the officer and the State's witnesses regarding their version of events and appellant failed to demonstrate objectively reasonable counsel would have argued that their testimony amounted to perjury. Appellant failed to demonstrate a reasonable probability of a different outcome at trial had counsel argued the State's witnesses committed perjury. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to retain an expert to review the crime scene or to discuss how the victim obtained the wound to his head. Appellant failed to demonstrate deficiency or prejudice for this claim as he failed to show that expert witness testimony of this type would have been helpful to his defense. In addition, the State's witnesses discussed the crime scene and the victim's head wound and appellant failed to demonstrate that a defense expert witness would have testified in a different manner. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to communicate with him. Appellant failed to demonstrate prejudice related to this claim as he did not demonstrate a reasonable probability of a different outcome at trial had counsel communicated

further with him. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel was ineffective for failing to argue that the detention center employees did not follow proper protocol for placing him in protective custody. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Counsel presented this type of evidence to the jury, as appellant himself testified that he discussed placement in protective custody with the detention center officers and that he was targeted by rival gang members due to errors made by officers in allowing other inmates to learn of that discussion. Appellant failed to demonstrate a reasonable probability of a different outcome at trial had counsel made further efforts to provide the jury with this type of evidence. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that his appellate counsel was ineffective. 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). 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 his appellate counsel was ineffective for failing to file a notice of appeal. Appellant failed to demonstrate either deficiency or prejudice for this claim as counsel filed a notice of appeal. Therefore, the district court did not err in denying this claim.


Second, appellant claimed that his appellate counsel was ineffective for failing to submit affidavits from two fellow inmates with the record on appeal. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that objectively reasonable counsel would have attempted to supplement the record on direct appeal with this type of evidence as this court will generally not consider matters that were outside of the district court record. *See Tabish v. State*, 119 Nev. 293, 312 n.53, 72 P.3d 584, 596 n.53 (2003). Appellant failed to demonstrate a reasonable likelihood of success on appeal had counsel attempted to supplement the record with affidavits. Therefore, the district court did not err in denying this claim.

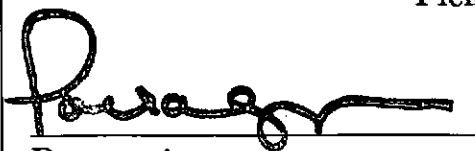
Third, appellant claimed that his appellate counsel was ineffective for failing to demonstrate on appeal that the lost surveillance video was exculpatory. Appellant failed to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Counsel argued on appeal that the video was exculpatory, but this court disagreed as the testimony at trial was that the video was not preserved because it did not depict the fight. Appellant failed to demonstrate a reasonable likelihood of success on appeal had counsel raised additional arguments regarding the surveillance video. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his appellate counsel refused to provide him copies of the transcripts of the district court proceedings. Appellant failed to demonstrate prejudice for this claim as he did not demonstrate a reasonable likelihood of success on appeal had counsel provided him copies of the transcripts during the appellate proceedings. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that the State withheld exculpatory evidence in the form of a surveillance video. This claim was already considered and rejected by this court on direct appeal. *Contreras v. State*, Docket No. 58644 (Order of Affirmance, September 12, 2012). The doctrine of law of the case prevents further litigation of this claim and “cannot be avoided by a more detailed and precisely focused argument.” *Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Therefore, the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, J.
Pickering


_____, J.
Parraguirre


_____, J.
Saitta

²We 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. Susan Johnson, District Judge
Gustavo Contreras
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk