

IN THE SUPREME COURT OF THE STATE OF NEVADA

MANUEL ADAM GEORGE NEREZ, III,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 63628

FILED

JAN 16 2014

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Tracie K. Lindeman*  
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.<sup>1</sup> Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

In his March 26, 2013, petition, 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

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<sup>1</sup>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 Lockett 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 counsel failed to prepare for the preliminary hearing, to fully consult with appellant before the hearing, to challenge the validity and sufficiency of the evidence submitted at the hearing, and to argue against the increase in appellant's bail after the hearing. Appellant failed to demonstrate that counsel's performance was deficient or that he was prejudiced. Probable cause to support a criminal charge "may be based on slight, even 'marginal' evidence, because it does not involve a determination of the guilt or innocence of an accused." *Sheriff v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (citations omitted). At the preliminary hearing, testimony was presented that appellant and two other persons went to a residence with weapons to forcibly remove an individual from the house. Counsel made objections and tested the State's case by cross-examining the witnesses about the evidence and the charges. Counsel argued that insufficient evidence was adduced for the conspiracy to commit kidnapping charge, but the justice court determined that the State had met their burden of proof for the conspiracy and attempted kidnapping charges. The justice court also determined that, based on the evidence presented, bail was inadequate and ordered it increased. Appellant failed to demonstrate that further preparation, investigation, or consultation would have changed the outcome of the preliminary hearing. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that counsel failed to adequately prepare for the severity of the case. Specifically, appellant claimed that counsel failed to investigate and present a proper defense to the State's

argument that appellant lied about his military background despite appellant's providing counsel with documentation of his security clearance. Appellant failed to demonstrate prejudice given the substantial evidence of his guilt. Co-conspirators Joshua Hutchens and Nicholas Needham testified that appellant organized a trip to Pahrump to grab an individual who owed money to an acquaintance of appellant's. Both testified that the backpack in the back of the vehicle, which contained items such as a loaded magazine for a 9-mm handgun, a stun gun, zip ties, and duct tape, belonged to appellant and that appellant went around the back of the residence to determine a way into the house while Hutchens and Needham went to knock on the front door and grab the individual. A deputy testified that he arrived and discovered wallets for Hutchens, Needham, and appellant in the vehicle. Furthermore, the deputy noticed the name "Manny" on Hutchens' cell phone and text messages that indicated "Manny" was involved. Appellant failed to demonstrate that documentation regarding his military background or his security clearance would have affected the outcome at trial. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that counsel failed to investigate and gather exculpatory surveillance video from a gas station that would have proved he was not with Hutchens and Needham. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. Appellant failed to demonstrate that surveillance video was available, or, if available, that the actions of Hutchens and Needham would have been shown on the video. Additionally, he failed to demonstrate that, even if a video was available and did not show appellant, the result of his trial

would have been different. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that counsel failed to ensure his right to a speedy trial. Appellant failed to demonstrate deficiency or prejudice. The district court properly considered the condition of its calendar and other pending cases, some involving appellant's counsel, in setting appellant's trial date. Appellant did not demonstrate that counsel delayed the start of trial for any purpose other than to ensure counsel could be present and prepared for trial. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that counsel failed to object to a continuance in the trial and that, as a result, the State was able to call Needham to testify against appellant. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. The record reveals that the State moved to continue the trial for a month based on new information, and the district court granted the motion after an hour of argument. After the continuance, when the State attempted to add Needham as a witness, counsel for appellant argued that Needham was not listed as a witness, that the continuance should not alter the standard for adding a witness after trial has commenced, and that appellant would be prejudiced by the addition of the witness. The district court agreed and denied the State's motion. Needham was called as a rebuttal witness after appellant testified. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that counsel failed to object to the amending of the charges to add an alternative victim. The record reveals that counsel argued strenuously against the addition but that, based on

the testimony, the district court allowed the amendment. Appellant failed to demonstrate that his counsel was deficient. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that counsel (1) failed to emphasize the substantial deal Hutchens and Needham received for testifying at appellant's trial, (2) failed to cross-examine Hutchens and Needham with their prior statements to demonstrate the discrepancies, (3) failed to make it clear that there was no forensic evidence placing him at the crime scene, and (4) failed to argue that the loaded magazine tying him to the crime could fit any number of firearms. Appellant failed to demonstrate that his counsel was deficient or that he was prejudiced. The record reveals that counsel, beginning with his opening remarks and continuing into his closing, remarked on the reduced charges, the lack of forensic evidence, the failure of law enforcement to take fingerprints, and the commonness of the magazine found in the backpack. Furthermore, when cross-examining the witnesses, counsel inquired into all of these issues. Therefore, the district court did not err in denying these claims.

Eighth, appellant claimed that counsel (1) failed to suppress evidence, (2) failed to challenge the validity of appellant's presence and/or involvement at the scene of the crime, (3) failed to obtain an investigator to examine the credibility of the State's witnesses and to check the appellant's alibi, (4) failed to preserve a movie ticket stub that was evidence of appellant's alibi, (5) failed, in pretrial consultation, to develop an overall defense strategy and to consider whether to put on a defense or not, (6) failed to communicate with appellant between arraignment and trial, (7) failed to maintain a record of advice counsel provided to appellant, (8) failed to establish a proper record for appeal, (9) failed to

request and secure discovery, including exculpatory and impeaching information, (10) failed to call character witnesses to corroborate appellant's version of events, (11) failed to argue prosecutorial misconduct regarding Hutchens and Needham being in the same room with the State prior to trial, (12) failed to present all the text messages from the night of the crime, and (13) failed to pursue the State's reasoning for not producing all the evidence submitted at the preliminary hearing, specifically all the items from the backpack. Appellant did not elaborate or explain these claims with any additional details or facts. Bare claims, such as these, are insufficient to demonstrate that appellant was entitled to relief. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Additionally, appellant failed to demonstrate how any of the above actions would have affected the outcome at trial. Therefore, the district court did not err in denying these claims.

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 appellate counsel failed to follow through with the appeal, to comply with the NRAP in several different instances, resulting in sanctions by this court, to file correct documents to advocate the appeal, to file the appeal timely, and to argue an issue that was discovered by this court. Appellant failed to demonstrate prejudice as an appeal was ultimately filed and considered on its merits by this court. Furthermore, appellant failed to demonstrate that he was prejudiced by this court's discovery of a sentencing mistake and subsequent correction that resulted in the elimination of a deadly weapon enhancement. Therefore, the district court did not err in denying these claims.

Second, appellant claimed that appellate counsel failed to raise certain legal issues relevant to vacating his sentence, to take full examination of the record, and to communicate with appellant. Appellant did not elaborate or explain these claims with any additional details or facts. Bare claims, such as these, are insufficient to demonstrate that appellant was entitled to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Third, appellant claimed that appellate counsel failed to challenge appellant's conviction for insufficient evidence but instead challenged appellant's sentence. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Given the evidence and testimony presented at trial, appellant failed to demonstrate that a claim of insufficient evidence would have a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

Finally, appellant claimed that the cumulative effect of ineffective assistance of counsel warrants vacating his judgment of conviction. As appellant did not demonstrate that any of his claims of

ineffective assistance of counsel had merit, he failed to demonstrate they cumulatively amount to ineffective assistance of counsel. Therefore, the district court did not err in denying this claim.

Having considered appellant's claims and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.  
Hardesty

Douglas, J.  
Douglas

Cherry, J.  
Cherry

cc: Hon. Robert W. Lane, District Judge  
Manuel Adam George Nerez, III  
Nye County District Attorney  
Attorney General/Carson City  
Nye County Clerk