

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES HENRY GREEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 64017

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; Kathleen E. Delaney, Judge.

In his petition filed on June 3, 2009, 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 *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). 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 he received ineffective assistance of counsel because his court-appointed attorney improperly sent a different attorney to represent him at the preliminary hearing and the substitute counsel performed poorly at the preliminary hearing. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that his preliminary-hearing counsel was not authorized to represent him. Appellant failed to demonstrate a reasonable probability of a different outcome had a different counsel attended the hearing or had counsel been further prepared, as the State presented sufficient evidence to support a probable cause finding. See *Sheriff, Washoe Cnty. v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980). Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to communicate with him and for meeting with him only a short time before trial began. Appellant also asserted that counsel's failure in these areas did not allow appellant sufficient time to review the evidence. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Counsel testified at the evidentiary hearing that he communicated with appellant ahead of trial and that he diligently prepared for trial. Appellant did not identify how any failure of counsel to discuss this matter further with appellant or

to allow appellant to personally review the evidence would have had a reasonable probability of resulting in a different outcome at trial, and accordingly, appellant failed to demonstrate he was entitled to relief. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective for actively assisting the State in prosecuting him. Appellant failed to demonstrate either deficiency or prejudice for this claim as the record belies his claim. See *id.* Counsel actively represented appellant and successfully argued for acquittal on one charge. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for failing to investigate the case. Appellant failed to demonstrate either deficiency or prejudice for this claim. Counsel testified at the evidentiary hearing that he had investigators who investigated this matter prior to trial. Appellant failed to demonstrate that there was additional evidence that counsel could have discovered through diligent investigation that would have had a reasonable probability of resulting in a different outcome at trial. See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for advising appellant not to testify. Appellant failed to demonstrate either deficiency or prejudice for this claim. Candid advice is not evidence of deficient performance. Appellant failed to demonstrate a reasonable probability of a different outcome at trial had counsel offered different advice because appellant rejected counsel's advice and testified at trial. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to file pretrial motions and for failing to seek discovery from the State. Appellant failed to demonstrate deficiency or prejudice for this claim as counsel filed multiple pretrial motions, including a motion seeking discovery. In addition, counsel testified that he received discovery from the State. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that his counsel was ineffective for failing to introduce evidence of one of the alleged victim's violent character. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Counsel testified that he did not introduce evidence of the alleged victim's violent character out of concern that the district court would have then permitted the State to introduce appellant's prior use of violence. Tactical decisions such as this one "are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which appellant does not demonstrate. As appellant was acquitted of the charge related to this alleged victim, appellant failed to demonstrate a reasonable probability of a different outcome at trial had counsel introduced this type of evidence. Therefore, the district court did not err in denying this claim.

Eighth, appellant claimed that his counsel was ineffective for failing to object to excessive courtroom security. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The district court requested one additional bailiff to be in the courtroom and requested that security sit near appellant because he was agitated. Under these circumstances, appellant failed to demonstrate

that the extra security measures were improper. *See Holbrook v. Flynn*, 475 U.S. 560, 569 (1986) (concluding that deployment of security personnel in the courtroom is not inherently prejudicial and that courts should review the security measures on a case-by-case basis). Appellant failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected to the additional security measures employed by the district court. Therefore, the district court did not err in denying this claim.

Ninth, appellant claimed that his counsel was ineffective for failing to object when the State offered its personal opinion and vouched for its witnesses during closing arguments. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Counsel testified at the evidentiary hearing that he noticed the challenged comments, but chose not to object so as not to draw attention to them and because he believed that the statements actually harmed the State's case. Tactical decisions such as this one "are virtually unchallengeable absent extraordinary circumstances," *Ford*, 105 Nev. at 853, 784 P.2d at 953, which appellant does not demonstrate. Appellant failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected to the challenged comments. 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*, 105 Nev. at 853, 784 P.2d at 953.

Appellant claimed that his appellate counsel had a conflict of interest because appellant filed a complaint with this court regarding counsel's conduct. Appellant failed to demonstrate that his complaint caused an actual conflict of interest or that his counsel had divided loyalties. *See Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992); *Thomas v. State*, 94 Nev. 605, 607-08, 584 P.2d 674, 676 (1978). Therefore, the district court did not err in denying this claim.

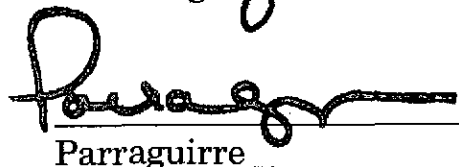
Next, appellant claimed that he improperly appeared in the district court before appearing in the justice court, that there was insufficient evidence to convict him because he acted in self-defense, that the State improperly failed to disclose evidence, that the district court judge was biased against him, that the district court improperly refused to allow a hearing regarding non-disclosed evidence, that the jury instructions were improper, that he was improperly committed to Lake's Crossing prior to trial, that his equal protection and due process rights were violated, and that the district court acted without jurisdiction. These claims could have been raised on direct appeal and appellant failed to demonstrate cause for the failure to do so and actual prejudice. *See NRS 34.810(1)(b)*. Therefore, the district court did not err in denying these claims.

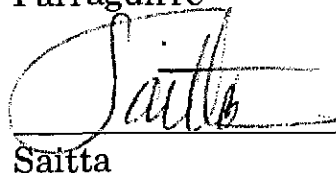
Next, appellant claimed that the verdict was inconsistent and that his sentence was excessive. These claims were already considered

and rejected by this court on direct appeal. *Green v. State*, Docket No. 51874 (Order of Affirmance, May 29, 2009). The doctrine of law of the case prevents further litigation of these claims 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 these claims.

Having concluded that appellant is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.²


_____, J.
Pickering


_____, J.
Parraguirre


_____, J.
Saitta

cc: Hon. Kathleen E. Delaney, District Judge
James Henry Green
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²We also conclude that the district court did not err in denying appellant’s motion to amend brief and motion for extension of photocopy limit.