

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMEL GIBBS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 64081

FILED

MAR 12 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *S. Young*
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; Douglas W. Herndon, Judge.

In his May 13, 2013, petition, appellant claimed that he received ineffective assistance of 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, 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).

First, appellant claimed that his trial counsel was ineffective because she only visited appellant three times while he was at the detention center. Appellant failed to demonstrate that he was prejudiced. Appellant failed to identify how his counsel's failure to visit him more often affected the reliability of the jury's verdict. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective under *Lafler v. Cooper*, 566 U.S. ___, 132 S. Ct. 1376 (2012), because she convinced appellant not to take a fair deal. Appellant failed to demonstrate deficiency. Appellant acknowledged that counsel told him about the plea offer. At the sentencing hearing, counsel for appellant stated that she disagreed with appellant's decision to not accept the plea and that she cautioned appellant and his family, but that appellant chose to proceed to trial. Appellant failed to demonstrate that his counsel's advice with respect to the plea offer fell below an objective standard of reasonableness. Therefore, the district court did not err in denying this claim.

Third, appellant claimed that his trial counsel was ineffective because she wasted time by arguing motions to suppress based on an illegal search and seizure and challenging appellant's gang affiliation when she should have been challenging the lack of intent to kill. Specifically, appellant claimed that counsel should have argued case law and statutes regarding intent and should have sought expert testimony as to appellant's intent and psychological mindset or as to what angle the weapon may have been when fired. Appellant failed to demonstrate

deficiency or prejudice. Counsel, from pretrial hearings to closing argument, challenged the proof of intent to kill.² Appellant failed to allege what additional arguments counsel should have made regarding intent or demonstrate a reasonable probability of a different outcome at trial had counsel made additional argument. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective because she failed to obtain a psychological profile of appellant that could have offered vital information to the jurors and because, in preparation for sentencing, counsel never investigated appellant's mental health problems. Appellant failed to demonstrate deficiency or prejudice. Appellant did not allege or demonstrate that he had any mental health issues or that counsel knew or should have known that appellant had mental health issues. Furthermore, appellant failed to allege or demonstrate a reasonable probability of a different outcome had counsel obtained a psychological profile of appellant. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective because she: (1) did not assist appellant with proper presentation of

²We note that trial counsel, who also was appellate counsel, challenged the sufficiency of the evidence on direct appeal, arguing that the State failed to prove that appellant intended to kill the victims. We concluded "that any rational juror could have found appellant guilty of attempted murder beyond a reasonable doubt . . . considering evidence indicating that he fired shots at the victims, including his admissions to police officers that he fired shots at the victims until his gun magazine was empty." *Gibbs v. State*, Docket No. 56842 (Order of Affirmance, November 15, 2012).

substantive or procedural issues before the district court; (2) argued unnecessary arguments; (3) opened up a "can of worms" that further prejudiced him in front of the jury; (4) had to be corrected by the district court often for prejudicial misstatements; (5) misstated facts when she challenged one witness's knowledge of the shooter by asking if, for all the witness knew, it could have been counsel who shot at him; (6) did not take charge of appellant's case, given his age, education, and inexperience with the legal system; (7) presented facts in a way that cost him a proper plea deal offer; (8) ignored messages and voicemails from appellant's family members who had very important information to divulge; (9) ignored requests from appellant's family members to seek testimony from them concerning appellant; (10) allowed emotions rather than sound legal ethics to "poison her legal obligation"; (11) failed to do necessary law research and investigation which could have exculpated appellant; (12) failed to successfully argue against or preclude the charging of four counts of attempted murder when appellant said he was only trying to scare and not kill; (13) failed to attack the unsupported premise that gang affiliation/retaliation supported the intent to kill and failed to create a strong defense to counterattack the non-existent evidence; and (14) should have put all her energies, skills, and attention into getting rid of the attempted murder charges. Appellant failed to support these claims with specific facts that, if true, would entitle him 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 these claims.

Next, appellant claimed that he received ineffective assistance from 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 had 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).

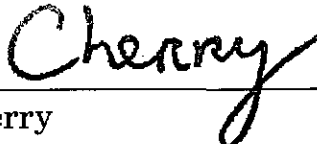
Appellant claimed that appellate counsel was ineffective because she continued with her "illusions" on appeal, further damaging appellant's chances for relief, because she submitted a weak appeal, and because she argued a non-meritorious claim, as she was "obsessed with her direction and irrelevant time-consuming attacks." Appellant failed to supports these claims with specific facts that, if true, would entitle him to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Therefore, the district court did not err in denying these claims.

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. Douglas W. Herndon, District Judge
Jamel Gibbs
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk