

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROTZILYN MERCELLE MITCHELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 65246

FILED

JAN 21 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Appellant argues that the district court erred in denying her claims of ineffective assistance of counsel she raised in her June 21, 2013, petition. 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 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 argues that her counsel was ineffective for failing to make any argument against adjudication as a habitual criminal or argue that the existence of three prior felonies does not automatically make adjudication as a habitual criminal appropriate. Appellant fails to demonstrate that her trial counsel was ineffective or that she was prejudiced. At the evidentiary hearing, counsel testified that he was aware that appellant had recently been adjudicated as a habitual criminal in a separate case and given a lengthy sentence. Given the lengthy sentence in the separate case, counsel believed the best tactic was to request that the court sentence impose a concurrent term in this case, rather than attempt to argue against adjudication as a habitual criminal. 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. Given appellant's lengthy criminal history, appellant fails to demonstrate a reasonable probability of a different outcome had counsel argued against adjudication as a habitual criminal in this case. Therefore, the district court did not err in denying this claim.

Second, appellant argues that her counsel was ineffective for failing to assert that two of her prior felonies, a 1987 Illinois conviction for theft and a 1987 Illinois conviction for violation of bail bond, should not have counted as two separate prior convictions because the bond violation was related to the theft conviction. Appellant failed to demonstrate that her counsel's performance was deficient or that she was prejudiced. The two challenged convictions were not the result of the same act,

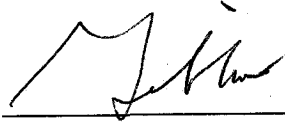
transaction, or occurrence and may be used as two separate convictions for purposes of habitual criminal adjudication. *See Rezin v. State*, 95 Nev. 461, 462, 596 P.2d 226, 227 (1979). Appellant fails to demonstrate a reasonable probability of a different outcome had counsel raised this claim, as she still would have been eligible for adjudication as a habitual criminal even if the district court had counted these convictions as only one for adjudication purposes. *See* NRS 207.010(1)(b). Therefore, the district court did not err in denying this claim.


Third, appellant argues that her counsel was ineffective for failing to argue that she should not be adjudicated a habitual criminal pursuant to *Sessions v. State*, 106 Nev. 186, 190, 789 P.2d 1242, 1244 (1990), because her previous convictions were remote, trivial, or nonviolent. Appellant fails to demonstrate that her counsel's performance was deficient or that she was prejudiced. While not specifically citing the *Sessions* case, counsel argued in the sentencing memorandum and at the sentencing hearing that appellant's prior felonies were remote, trivial or nonviolent and, therefore, she should receive a lenient sentence. In addition, appellant fails to demonstrate a reasonable probability of a different outcome had counsel raised further arguments related to this issue as the habitual criminal statute makes no special allowance for nonviolent crimes or for remoteness of the prior convictions; these are merely considerations within the discretion of the district court. *See Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992). Therefore, the district court did not err in denying this claim.

Fourth, appellant argues that her counsel was ineffective for failing to object when the district court improperly considered convictions for adjudication as a habitual criminal that were not final when she

committed the criminal acts in this matter. Appellant fails to demonstrate that her counsel's performance was deficient or that she was prejudiced. At the sentencing hearing, the district court acknowledged appellant's entire criminal history, including the recent felony convictions. However, when the district court actually discussed its decision to adjudicate appellant a habitual criminal, the court specifically mentioned only the four felonies that were entered before appellant committed the instant offenses. *See Brown v. State*, 97 Nev. 101, 102, 624 P.2d 1005, 1006 (1981) (stating "[a]ll prior convictions used to enhance a sentence must have preceded the primary offense"). Appellant fails to demonstrate a reasonable probability of a different outcome had counsel objected on this basis as she had sufficient prior felonies to be eligible for adjudication as a habitual criminal and it was proper for the district court to consider her entire criminal history when deciding the appropriate sentence. *See Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976) (holding that a sentence will not be disturbed on appeal so long as it was not based solely on impalpable or highly suspect evidence). Therefore, the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. James M. Bixler, District Judge
Gordon Silver
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk