

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RUSSELL LEE GARNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 65330

FILED

FEB 05 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
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; Stefany Miley, Judge.

Appellant argues that the district court erred in denying his claims of ineffective assistance of trial counsel raised in his July 5, 2012, 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.

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682, 686, 120 P.3d 1164, 1166 (2005). To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific allegations that are not belied by the record, and if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).¹

First, appellant argues that his trial counsel was ineffective for failing to file a pretrial petition for a writ of habeas corpus. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant does not identify any issues that reasonably diligent counsel would have raised in a pretrial petition for a writ of habeas corpus. *See id.* Appellant fails to demonstrate a reasonable probability of a different outcome had counsel filed a pretrial habeas petition because he does not identify any issues that would have reasonably been successful. Therefore, the district court did not err in denying this claim.

Second, appellant argues that his trial counsel was ineffective for failing to file a written opposition to the State's motion to consolidate charges. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel orally opposed the joinder of the offenses and appellant fails to demonstrate that this was the action of objectively unreasonable counsel. Because the offenses were connected together or part of a common scheme or plan, appellant fails to demonstrate a reasonable probability of a different

¹We note that the district court concluded that appellant had failed to demonstrate that he was entitled to an evidentiary hearing regarding the majority of his claims and limited the issues discussed at the evidentiary hearing to those that needed further development outside of the existing record.

outcome had counsel filed a written opposition to the joinder of offenses. See NRS 173.115(2). Therefore, the district court did not err in denying this claim without considering it at the evidentiary hearing.

Third, appellant argues that his trial counsel was ineffective for failing to investigate witnesses. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Counsel testified at the evidentiary hearing that the defense team investigated potential witnesses and that appellant had informed him that one of the alleged witnesses was fictitious. Counsel also testified that appellant never informed counsel of the other alleged witnesses. Appellant fails to demonstrate a reasonable probability of a different outcome at trial had further investigation into the alleged witnesses been undertaken as there was overwhelming evidence presented at trial that the credit cards and driver's license were counterfeit.² Therefore, the district court did not err in denying this claim.

Fourth, appellant argues that his trial counsel was ineffective for failing to object when a police officer witness testified that the credit cards and driver's license were fake. Appellant fails to demonstrate that his counsel's performance was deficient or that he was prejudiced. The evidence presented at trial regarding the status of the items and the police officers' familiarity with appellant's true name prior to the commission of the crime demonstrates that the officer's testimony was rationally based

²Appellant was convicted of burglary, possession or sale of document or personal identifying information to establish false status or identity, and two counts of possession of credit or debit card without cardholder's consent.

on his perception. See NRS 50.265. Appellant fails to demonstrate a reasonable probability of a different outcome at trial had his counsel objected to this testimony as there was overwhelming evidence that the items were counterfeit. Therefore, the district court did not err in denying this claim without considering it at the evidentiary hearing.

Fifth, appellant argues that, because it appears that juror number five was not personally polled regarding the verdict, his trial counsel was ineffective for failing to object to the polling of the jury. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The district court asked the jury collectively if the verdict read aloud in court was their actual verdict and the jury collectively responded in the affirmative. Under the circumstances presented in this case, appellant fails to demonstrate that reasonably diligent counsel would have sought further questioning of juror number five. Appellant fails to demonstrate a reasonable probability of a different outcome had counsel sought further polling of the jury. Therefore, the district court did not err in denying this claim without considering it at the evidentiary hearing.

Sixth, appellant argues that his trial counsel was ineffective for failing to prepare for sentencing. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. At the sentencing hearing, counsel noted that appellant had a drug problem and his criminal history was not violent. Counsel requested a lenient sentence. Appellant fails to demonstrate reasonably diligent counsel would have raised further arguments or been further prepared for the sentencing hearing. Given appellant's lengthy criminal history and the fact that he had already been adjudicated a habitual criminal for a

previous conviction, appellant fails to demonstrate a reasonable probability of a different outcome had counsel further prepared for the sentencing hearing. Therefore, the district court did not err in denying this claim without considering it at the evidentiary hearing.

Seventh, appellant argues that his trial counsel was ineffective for failing to file a motion to continue the sentencing hearing until the trial judge had returned. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Counsel orally requested a continuance until the trial judge returned from an extended absence and appellant fails to demonstrate that this action amounted to an objectively unreasonable performance. Appellant fails to demonstrate a reasonable probability of a different outcome had counsel filed a written motion for continuance. Therefore, the district court did not err in denying this claim without considering it at the evidentiary hearing.

Eighth, appellant argues that his trial counsel was ineffective for failing to explain the ramifications of appellant's custody status to appellant or to request that appellant be remanded to custody for this case. Appellant fails to demonstrate that his trial counsel's performance was deficient. Counsel testified at the evidentiary hearing that he and appellant discussed appellant's custody status, that he explained the potential award of presentence credits based on appellant's custody status, and that appellant believed he could be bonded out more easily on his other cases if he was not remanded to custody for this case. Counsel testified that he deferred to appellant's choice not to request a remand for custody in this matter after the discussion with appellant. The district court concluded after the evidentiary hearing that counsel's testimony

regarding the discussions with appellant was credible. We conclude that the district court did not err in denying this claim.

Next, appellant argues that the district court erred by denying his claims of ineffective assistance of 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 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 argues that his appellate counsel was ineffective for failing to assert on appeal that the district court erred by consolidating his separate cases. Appellant fails to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Because the charges were connected together or part of a common scheme or plan, NRS 173.115, and because appellant does not show that the joinder was manifestly prejudicial, appellant fails to demonstrate that objectively reasonable counsel would have raised the underlying claim on direct appeal, or if raised, the claim had a reasonable likelihood of success on appeal. See NRS 174.165(1); *Honeycutt v. State*, 118 Nev. 660, 667-68, 56 P.3d 362, 367 (2002), *overruled on other grounds by Carter v. State*, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005). Therefore, the district court did

not err in denying this claim without considering it at the evidentiary hearing.

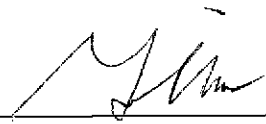
Second, appellant argues that his appellate counsel was ineffective for failing to assert that the district court erred by denying his motion to continue the sentencing hearing until the trial judge returned. Appellant fails to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. Appellant does not have a right to a sentencing hearing before a particular judge. *See Dieudonne v. State*, 127 Nev. ___, ___, 245 P.3d 1202, 1207 (2011). Therefore, appellant fails to demonstrate that reasonably diligent counsel would have argued the district court erred by denying the request for a continuance. Further, appellant fails to demonstrate a reasonable likelihood of success on appeal because he does not demonstrate that the sentencing judge abused its discretion in denying his request to continue the sentencing hearing. *See Doyle v. State*, 104 Nev. 729, 731, 765 P.2d 1156, 1157 (1988). The district court did not err in denying this claim without considering it at the evidentiary hearing.


Third, appellant argues that his appellate counsel was ineffective for failing to assert that he should have received additional presentence credits. Appellant fails to demonstrate that his trial counsel's performance was deficient or that this claim had a reasonable likelihood of success on appeal. Appellant was in custody for other offenses, and therefore, was not entitled to additional presentence credit towards his sentence in this matter. *See* NRS 176.055(1) (explaining that a defendant is entitled to presentence credits for time spent in confinement before a conviction, unless the confinement was pursuant to "another offense").

Therefore, the district court did not err in denying this claim without considering it at the evidentiary hearing.

Finally, appellant argues that the errors of trial and appellate counsel cumulatively amount to ineffective assistance of counsel. As appellant fails to demonstrate deficiency or prejudice for any of his claims, he fails to demonstrate cumulative errors sufficient to amount to ineffective assistance of counsel.

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Stefany Miley, District Judge
Bush & Levy, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk