

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN DREW ALMY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66318

FILED

AUG 25 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
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.¹ Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

In his petition filed on September 18, 2008, and in his numerous supplements, appellant Kevin Almy claimed that he received ineffective assistance of trial counsel.² To prove ineffective assistance of

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude 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).

²Almy filed his first petition on September 18, 2008. That petition was ultimately taken off calendar. Almy filed his second petition on March 23, 2009. He also filed supplements on July 27, 2009, October 27, 2009, and November 20, 2009. After denying Almy's petitions, he appealed, and the Nevada Supreme Court reversed and remanded for counsel. *Almy v. State*, Docket No. 56213 (Order Reversing and Remanding, January 13, 2011). On February 17, 2012, counsel Matthew

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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, Almy claimed his first appointed trial counsel was ineffective for failing to communicate, to inform him about the grand jury, to file motions, to interview witnesses, to investigate the crime scenes, to

...continued

Carling filed a supplement. Thereafter, Carling withdrew and new counsel, Carmine Colucci, was appointed. Colucci filed a supplement on October 8, 2012. On November 14, 2013, the Nevada Supreme Court dismissed Almy's appeal because the district court's order only addressed the claims raised in Almy's last supplement. *Almy v. State*, Docket No. 62959 (Order Dismissing Appeal, November 14, 2013). The district court then entered an order disposing of all of Almy's claims raised in his petitions and supplements. On March 6, 2015, the Nevada Supreme Court granted Almy's request to proceed pro se.

obtain requested evidence, to obtain discovery, to have a psychiatric evaluation performed on Almy, to appeal his excessive bail, to oppose the change of venue and joinder of the arson charge, and for coercing him into waiving his speedy trial rights. Almy failed to demonstrate he was prejudiced because ultimately Almy hired new counsel to represent him at trial. Therefore, the district court did not err in denying these claims.

Second, Almy claimed trial counsel were ineffective for failing to challenge the amount of bail. Almy failed to demonstrate counsel were deficient or resulting prejudice because Almy failed to demonstrate a motion to reduce bail would have had a reasonable likelihood of success, *see* NRS 178.498; *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (stating counsel is not deficient for failing to file futile motions), or there was a reasonable probability of a different outcome at trial had counsel filed the motion. Therefore, the district court did not err in denying this claim.

Third, Almy claimed trial counsel were ineffective for failing to move for recusal of the district court judge. Almy doubted the district court's "neutrality" based on rulings made before and during trial. Almy failed to demonstrate counsel were deficient or resulting prejudice because he failed to demonstrate that such a motion would have been successful. *See Donovan*, 94 Nev. at 675, 584 P.2d at 711. Almy also failed to demonstrate that the district court's rulings and comments constituted bias. *See Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998). Therefore, the district court did not err in denying this claim.

Fourth, Almy claimed trial counsel were ineffective for failing to interview his family members and friends. Almy failed to demonstrate prejudice. Given Almy's statements to numerous people that he thought he just killed two people and burned his house down, and the overwhelming evidence against him, Almy failed to demonstrate how presenting testimony from his family members and friends would have caused the outcome of the proceedings to be different. Therefore, the district court did not err in denying this claim.

Fifth, Almy claimed trial counsel were ineffective for failing to preserve a witness' testimony earlier in the proceedings. Almy failed to demonstrate trial counsel were deficient. Trial counsel told the district court at a hearing during trial their investigator spoke with the witness, and based on that interview, counsel decided not to call the witness at trial or preserve his testimony.³ "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), and Almy failed to demonstrate any extraordinary circumstances. Therefore, the district court did not err in denying this claim.

Sixth, Almy claimed trial counsel were ineffective for failing to provide him with discovery and the grand jury transcript. Almy failed to demonstrate he was prejudiced. Given Almy's own statements and the overwhelming evidence against him, he failed to demonstrate a reasonable

³We note this hearing was held outside the presence of the jury.

probability of a different outcome at trial had counsel provided him with the discovery and grand jury transcript. Therefore, the district court did not err in denying this claim.

Seventh, Almy claimed trial counsel were ineffective for failing to discharge the grand jury indictment. Almy failed to demonstrate counsel were deficient or resulting prejudice. He failed to demonstrate a motion to dismiss the indictment would have been successful. See *Donovan*, 94 Nev. at 675, 584 P.2d at 711. Further, even assuming there was error at the grand jury proceedings, Almy cannot show prejudice for failure to challenge the proceedings because he was later found guilty beyond a reasonable doubt. *Lisle v. State*, 114 Nev. 221, 224-25, 954 P.2d 744, 746-47 (1998). Therefore, the district court did not err in denying this claim.

Eighth, Almy claimed trial counsel were ineffective for failing to present the agreed upon defense theory. Specifically, he wanted counsel to present a defense that he mistakenly believed he started the fire because he left a cigarette butt burning and his bizarre behavior was caused by an epileptic seizure. Almy failed to demonstrate counsel were deficient or resulting prejudice. Counsel stated during a hearing at trial that they could not substantiate Almy's head injury claims or that such an injury caused Almy's epileptic seizures.⁴ Also, Almy chose not to testify. Further, Almy failed to demonstrate a reasonable probability of a different

⁴We note this hearing was held outside the presence of the jury.

outcome at trial given his statements and the overwhelming evidence presented at trial. Therefore, the district court did not err in denying this claim.

Ninth, Almy claimed trial counsel were ineffective for failing to utilize a psychiatrist to testify Almy was unable to understand the criminality of his conduct. Almy failed to demonstrate counsel were deficient or resulting prejudice. During trial, counsel informed the district court it did not present Almy's mental health history because they could not substantiate his claim regarding his head injury from a car crash, he had several psychiatric examinations that demonstrated he was competent, and because the district court would not allow them to present evidence of diminished capacity. *See Crawford v. State*, 121 Nev. 744, 757, 121 P.3d 582, 591 (2005). "Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances, *Ford*, 105 Nev. at 853, 784 P.2d at 953, and Almy failed to demonstrate any extraordinary circumstances. Therefore, the district court did not err in denying this claim.

Tenth, Almy claimed trial counsel were ineffective for failing to impeach witnesses. Almy failed to demonstrate counsel were deficient or resulting prejudice. Counsel impeached the majority of the witnesses Almy lists. To the extent counsel did not impeach them, Almy failed to demonstrate a reasonable probability of a different outcome at trial had counsel done further impeachment, given his statements and the

overwhelming evidence against him. Therefore, the district court did not err in denying this claim.

Eleventh, Almy claimed trial counsel were ineffective for failing to utilize an arson expert. Almy failed to demonstrate prejudice because he failed to demonstrate hiring an expert would have resulted in a different outcome at trial. During the post-conviction proceedings, Almy hired an arson expert. His affidavit does not contradict the finding that the fire was arson. Further, the issues the expert would have testified about, the fan and the oxygen machine, were brought out during cross-examination of the State's expert witness. Therefore, the district court did not err in denying this claim.

Twelfth, Almy claimed trial counsel were ineffective for failing to argue that the State failed to prove the corpus delicti of both the attempted murder and the arson. Appellant failed to demonstrate that counsel were deficient. Corpus delicti of a crime is established by any independent evidence sufficient for a reasonable inference that the crime was committed. *See Doyle v. State*, 112 Nev. 879, 892, 921 P.2d 901, 910 (1996) *overruled on other grounds by Kaczmarek v. State*, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004). There was sufficient independent evidence presented at trial that the fire was intentionally set and that someone tried to kill the victims. Counsel is not deficient for failing to make a futile argument. *Donovan*, 94 Nev. at 675, 584 P.2d at 711. Therefore, the district court did not err in denying this claim.

Thirteenth, Almy claimed trial counsel were ineffective for failing to investigate the crime scenes. Almy failed to demonstrate counsel were deficient or resulting prejudice. The information Almy claimed counsel would find if they investigated the crime scene was presented to the jury by counsel and he failed to demonstrate further investigation would have revealed any additional information. Thus, he also failed to demonstrate a reasonable probability of a different outcome at trial. Therefore, the district court did not err by denying this claim.

Fourteenth, Almy claimed trial counsel were ineffective for failing to review the DVD of a witness' interview. Almy failed to demonstrate prejudice from trial counsels' failure to review the video. At trial, the State began playing the interview. Almost immediately, the district court stopped the video because Almy was dressed in his jail clothing.⁵ Counsel requested a mistrial. The district court denied the motion because the view of Almy in the video was obstructed, it was fleeting, and the jury knew that Almy was in custody at some point since he turned himself in. Because the view of Almy was fleeting and obstructed, and given Almy's statements and the overwhelming evidence against him, Almy failed to demonstrate a reasonable probability of a different outcome at trial had counsel reviewed the video earlier. Therefore, the district court did not err in denying this claim.

⁵We note the rest of the video was not played. Instead, a transcript of the interview was read to the jury.

Fifteenth, Almy claimed trial counsel were ineffective for failing to withdraw. Almy claimed there was a conflict of interest because counsel failed to collect evidence and testimony. Almy failed to demonstrate that there was an actual conflict of interest. *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). He failed to demonstrate his counsel was placed in a situation conducive to divided loyalties, *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992), or his counsel actively represented conflicting interests, *Burger v. Kemp*, 483 U.S. 776, 783 (1987). Therefore, the district court did not err in denying this claim.

Sixteenth, Almy claimed trial counsel were ineffective for not allowing him to testify. Almy failed to demonstrate counsel were deficient. Almy was canvassed by the district court about his right to testify and was informed the decision to testify was his alone. The district court also gave him extra time to make his decision and canvassed him again on his right to testify and whether he had enough time to discuss the decision. Almy told the district court "We're just fine." It appears from the record that Almy made the decision not to testify after consultation with counsel. Therefore, the district court did not err in denying this claim.

Seventeenth, Almy claimed trial counsel were ineffective for failing to move to suppress the evidence obtained from the search of his vehicle because the warrant was served on the vehicle and not on Almy. Almy failed to demonstrate that counsel were deficient. Under NRS 179.075(2), the officers can leave the copy of the warrant and receipt at the place from which the property was taken. Counsel is not deficient for

failing to make futile motions, *Donovan*, 94 Nev. at 675, 584 P.2d at 711, and the district court did not err in denying this claim.

Eighteenth, Almy claimed trial counsel were ineffective for failing to object to a comment made by the State that Almy had committed the "ultimate sin." Almy failed to demonstrate trial counsel were deficient or resulting prejudice. The "ultimate sin" verbiage was from Almy's call to 911 operators when he turned himself in. His statement was properly entered and it was not error for the State to use Almy's own words. Further, he failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected given these were his own words. Therefore, the district court did not err in denying this claim.

Nineteenth, Almy claimed trial counsel were ineffective for failing to object to a firefighter testifying about what another firefighter saw. Almy failed to demonstrate prejudice. The firefighter did testify that the other firefighter saw the blue flames first, and this statement was objectionable. However, the firefighter then testified that he also saw the blue flames and the other firefighter testified later about the blue flames. Given the overwhelming evidence of Almy's guilt, especially given his statements, Almy failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected. Therefore, the district court did not err in denying this claim.

Twentieth, Almy claimed that trial counsel were ineffective for failing to move to dismiss one of the counts of attempted murder because the victim was not present when Almy was shooting and Almy had no

intent to kill him. Almy failed to demonstrate counsel were deficient or resulting prejudice.

[E]ven though the actual commission of the substantive crime is impossible because of circumstances unknown to the defendant, he is guilty of an attempt if he has the specific intent to commit the substantive offense, and under the circumstance, as he reasonably sees them, he does the acts necessary to consummate what would have been the attempted crime.

Darnell v. State, 92 Nev. 680, 681-82, 558 P.2d 624, 625 (1976).

While one of the victims was not present in the bed at the time of the shooting, it was clear from Almy's actions and statements that he intended to shoot and kill two people. Counsel is not deficient for making futile motions, *Donovan*, 94 Nev. at 675, 584 P.2d at 711, and Almy failed to demonstrate a reasonable probability of a different outcome at trial had counsel filed the motion. Therefore, the district court did not err in denying this claim.

Twenty-first, Almy claimed trial counsel were ineffective for failing to move for a mistrial after the fire marshal testified the fire constituted first-degree arson. Almy failed to demonstrate counsel were deficient or resulting prejudice. While trial counsel did not request a mistrial, counsel did object and that objection was sustained. Further, the statement was stricken, and the jury was admonished not to consider the statement. Almy also failed to demonstrate a reasonable probability that the motion for mistrial would have been granted given the district court's immediate curative instruction. See *Lisle v. State*, 113 Nev. 679, 700, 941

P.2d 459, 473 (1997), *overruled on other grounds by Middleton v. State*, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998). Therefore the district court did not err in denying this claim.

Twenty-second, Almy claimed trial counsel were ineffective for failing to seek a mistrial based on an improper argument made by the State in closing argument. Almy failed to demonstrate counsel were deficient or resulting prejudice. While the prosecutor began to tell the jury it should "send a message," counsel objected, the prosecutor stopped midsentence, and withdrew the statement. Almy failed to demonstrate a mistrial was necessary because the statement was withdrawn immediately, and he failed to demonstrate a reasonable probability the motion for mistrial would have been granted. Therefore, the district court did not err in denying this claim.

Twenty-third, Almy claimed trial counsel were ineffective for failing to object or file a motion to prevent the filing of the amended indictment. Specifically, Almy claimed he should have been arraigned on the amended indicted that deleted the count of discharging a firearm. Almy failed to demonstrate counsel were deficient or resulting prejudice. Counsel is not deficient for failing to file futile motions. *Donovan*, 94 Nev. at 675, 584 P.2d at 711. Almy did not need to be arraigned again when the charge was dismissed. *See* NRS 173.095. Thus, Almy also failed to demonstrate a reasonable probability of a different outcome had counsel filed the motion, and the district court did not err in denying this claim.

Next, Almy claimed he received ineffective assistance of appellate counsel. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate 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). 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). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697. We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the district 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, Almy claimed appellate counsel was ineffective for failing to allow Almy to review and approve the appeal prior to submission to the court. Almy failed to demonstrate prejudice because he failed to demonstrate how additional communication would have led to a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

Second, Almy claimed appellate counsel was ineffective because it took counsel five months to file the opening brief and counsel only raised one issue. Almy failed to demonstrate prejudice because he

failed to demonstrate that any additional claims would have had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.

Third, Almy claimed appellate counsel was ineffective for failing to provide him with discovery. Almy failed to demonstrate prejudice because he failed to demonstrate giving him discovery during the appeal process would have led to issues that would have had a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.


Fourth, Almy claimed appellate counsel was ineffective for failing to raise claims regarding ineffective assistance of trial counsel. Almy failed to demonstrate counsel was deficient because claims of ineffective assistance of counsel cannot generally be raised on direct appeal. *Fezell v. State*, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995). Thus, Almy also failed to demonstrate a reasonable probability of success on appeal. Therefore, the district court did not err in denying this claim.


Fifth, Almy claimed appellate counsel was ineffective for failing to appeal one of his convictions for attempted murder. Almy failed to demonstrate counsel was deficient or resulting prejudice. As stated above, the fact that one of the victims was not in the bed when Almy shot at the bed did not cause his conviction for attempted murder to be negated. *See Darnell*, 92 Nev. at 681-82, 558 P.2d at 625. Therefore, the district court did not err in denying this claim.


Finally, Almy raised numerous claims that were procedurally barred because they could have been raised on direct appeal. See NRS 34.810(1)(b)(2). Specifically, he claimed his right to an impartial jury was violated, he should have been tried for the arson in Nye County, he was not given notice of the grand jury proceedings, prosecutorial misconduct, the State failed to establish the corpus delicti, his right to access the courts was violated, and his right to access his legal documents after conviction was violated. Almy failed to demonstrate good cause and prejudice to overcome the procedural bar. See NRS 34.810(1)(b); NRS 34.810(3). Therefore, the district court did not err in denying these claims.

Having reviewed Almy's contentions on appeal and concluding they lack merit, we

ORDER the judgment of the district court AFFIRMED.⁶


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

⁶We have reviewed all documents Almy has submitted in this matter, and we conclude no relief based upon those submissions is warranted. To the extent Almy has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we decline to consider them in the first instance.

cc: Hon. Michelle Leavitt, District Judge
Kevin Drew Almy
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk