IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE CRUZ-CORTEZ A/K/A RIGOBERTO CRUZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66328

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; Kathleen E. Delaney, Judge.

In his April 29, 2013, petition, appellant claimed that his trial and appellate counsel were 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*). To prove prejudice with regard to ineffective assistance of appellate counsel claims, appellant must demonstrate that the omitted

[1]This 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 Luckett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

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, 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 claimed that trial counsel was ineffective for failing to present evidence and argue at trial that he was not trying to steal the vehicle but was instead only attempting to steal the vehicle's airbag. Appellant failed to demonstrate that trial counsel was deficient. Appellant failed to identify any evidence that might support this theory or what evidence of this theory could have been found had there been further investigation. *See Hargrove v. State*, 110 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (stating that a petition must raise claims that are supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief). Further, tactical decisions, such as what defense to present at trial, "are virtually unchallengeable absent extraordinary circumstances." *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). And appellant has not established extraordinary circumstances for challenging counsel's decision to pursue a defense of voluntary intoxication. Trial counsel's decision not to assert the airbag defense was reasonable because arguing that appellant entered the car with the intent to steal the airbag would have been tantamount to a confession of guilt to the count of burglary, whereas a defense of voluntary

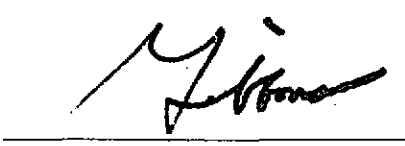
intoxication, if accepted by the jury, represented a complete defense to both the burglary and attempted grand larceny auto counts. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that counsel was ineffective at sentencing because she was not his trial attorney, and therefore, was unprepared for sentencing. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced because he failed to support this claim with specific facts that, if true, would entitle him to relief. *See Hargrove*, 110 Nev. at 502-03, 686 P.2d at 225. Appellant failed to explain how the substitution of counsel at sentencing affected the hearing or what other evidence or arguments could have been presented which would have had a reasonable probability of changing the outcome at sentencing. Therefore, the district court did not err in denying this claim.

Finally, appellant claimed that appellate counsel was ineffective for failing to argue that the district court abused its discretion when it sentenced appellant as a habitual criminal. Specifically, appellant claimed that appellate counsel should have argued that the district court merely found that there were two convictions rather than considering his record as a whole. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Only two prior convictions are required for a defendant to be considered for habitual criminal treatment. NRS 207.010(1)(a). It is within the discretion of the district court whether to dismiss a count of habitual criminal. *See O'Neill v. State*, 123 Nev. 9, 15, 153 P.3d 38, 42 (2007); *Hughes v. State*, 116 Nev. 327, 333, 996 P.2d 890, 893 (2000) (holding that there is no requirement for "particularized findings" that it is "just and proper" to adjudicate a defendant as a habitual criminal (internal quotations omitted)).

Here, the district court considered the convictions and heard argument from counsel regarding appellant's record. Appellant had the requisite two prior felony convictions and he also had several prior misdemeanor and gross misdemeanor convictions for similar conduct. Further, the district court considered the fact that appellant had not been deterred by prior punishments and that he had been previously deported and, upon return, committed more crimes. Therefore, appellant failed to demonstrate that this claim had a reasonable likelihood of success on appeal, and the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[2]



_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

[2]We have reviewed all documents that appellant has submitted to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Kathleen E. Delaney, District Judge
Jose Cruz-Cortez
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk