

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARC MCCURDY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66373
FILED

FEB 24 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Williams*
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; Kenneth C. Cory, Judge.

In his May 13, 2014, post-conviction petition for a writ of habeas corpus, appellant claimed that his trial counsel was ineffective. To prove ineffective assistance of trial 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

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).

504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697.

First, appellant claimed that his trial counsel was ineffective for failing to seek dismissal of the charge at the preliminary hearing. Appellant asserted that the case should have been dismissed because a state witness committed perjury at the preliminary hearing. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that the witness committed perjury and he failed to demonstrate that reasonable counsel would have argued that the charge should have been dismissed at the preliminary hearing based upon an allegation that the witness committed perjury. Because the State presented sufficient evidence at the preliminary hearing to support a probable cause finding for the charge against appellant, see *Sheriff, Washoe Cnty. v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980), appellant failed to demonstrate a reasonable probability of a different outcome had counsel moved for dismissal of the charge based on this ground. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to comply with appellant's requests to file a motion for bond reduction, a motion to suppress, and a motion in limine. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant did not identify any bases upon which counsel should have pursued these motions. Bare claims, such as this one, are insufficient to demonstrate that a petitioner is

entitled 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 this claim.

Third, appellant claimed that his trial counsel was ineffective for failing to sufficiently communicate with appellant. Appellant failed to demonstrate prejudice related to this claim as he did not demonstrate a reasonable probability of a different outcome at trial had counsel communicated further with him. Therefore, the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel was ineffective for convincing appellant to agree to a bench trial. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant asserted that counsel advised him that a bench trial would be beneficial as their trial strategy was based on a legal, rather than a factual, issue. 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. Appellant failed to demonstrate that there was a reasonable probability of a different outcome at trial had his counsel advised him differently. Therefore, the district court did not err in denying this claim.

Fifth, appellant claimed that his trial counsel was ineffective for failing to move to exclude a state witness' testimony at trial because the witness committed perjury. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that the witness committed perjury and

he failed to demonstrate that reasonable counsel would have argued that the witness committed perjury. Counsel cross-examined the witness regarding inconsistent statements and appellant failed to demonstrate that there was a reasonable probability of a different outcome had counsel challenged the witness' testimony further. Therefore, the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for failing to be prepared when the State introduced an irrelevant, prior statement made by his wife. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The State cross-examined appellant's wife regarding a previous statement where she had stated that she would not permit appellant to drive her vehicle. This was in response to her testimony that she permitted appellant to take the keys to her vehicle. As the challenged statement pertained to the witness' truthfulness, the State properly raised questions pertaining to the statement. *See* NRS 50.085(3); *Ford v. State*, 122 Nev. 796, 806, 138 P.3d 500, 507 (2006). Appellant failed to demonstrate there was a reasonable probability of a different outcome at trial had counsel objected to the questions regarding the challenged statement. Therefore, the district court did not err in denying this claim.

Seventh, appellant claimed that his trial counsel was ineffective for failing to request the correction of errors in the presentence investigation report. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant personally informed the trial court that there were errors in the report.

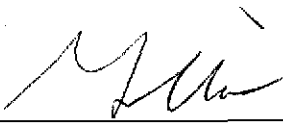
Appellant failed to demonstrate that it was objectively unreasonable for his counsel not to repeat those statements. Appellant has also failed to identify any additional errors contained in the report. A bare claim, such as this one, is insufficient to demonstrate that a petitioner is entitled to relief. *See Hargrove*, 100 Nev. at 502-03 686 P.2d at 225. Therefore, the district court did not err in denying this claim.


Next, appellant claimed that his appellate counsel was ineffective. 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, 1113-14 (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*, 105 Nev. at 853, 784 P.2d at 953.

Appellant claimed that his appellate counsel was ineffective for failing to argue on direct appeal that the blood evidence should have been suppressed because it was taken in violation of the Fourth Amendment as outlined in *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552 (2013) (plurality opinion). Appellant failed to demonstrate either deficiency or prejudice for this claim. *McNeely* discussed instances where an officer conducted a nonconsensual blood draw without a warrant. 569

U.S. at ____, 133 S. Ct. 1552 at 1558-60. In this case, the district court found that appellant consented to the blood draw; therefore, *McNeely* was not applicable to appellant's case. We conclude the district court did not err in denying this claim.

Having concluded that appellant is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

²We also conclude that the district court did not err in denying appellant's motion for the appointment of counsel and request for an evidentiary hearing.

In addition, 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. Kenneth C. Cory, District Judge
Marc McCurdy
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk