

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KRISTOPHER MICHAEL
ZIMMERMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66401

FILED

FEB 24 2015

TRACIE K. UNDEMAN
CLERK OF SUPREME COURT
BY  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. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Appellant argues that the district court erred in denying his claim of ineffective assistance of trial counsel raised in his June 24, 2013, petition. 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 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).



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Appellant argues that his trial counsel was ineffective for failing to move for dismissal of the charges based upon excessive pre-indictment delay. Appellant cannot demonstrate any deficiency regarding this claim because his trial counsel sought dismissal of the case due to excessive pre-indictment delay and the trial court denied the motion. Therefore, the district court did not err in denying this claim.


Next, appellant argues that his appellate counsel was ineffective for failing to assert on direct appeal that the district court erred in declining to dismiss the charges due to excessive pre-indictment delay. 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 v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Appellant fails to demonstrate that his appellate counsel's performance was deficient or that he was prejudiced. At the evidentiary hearing, appellate counsel testified that he considered raising a claim based upon excessive pre-indictment delay, but concluded it was meritless. He testified that he made a tactical decision to not raise any weak issues on appeal, such as a claim based upon pre-indictment delay, out of concern that such claims would be confused with issues of greater potential. Tactical decisions such as this one "are virtually unchallengeable absent extraordinary circumstances," *id.*, which appellant does not demonstrate.

Appellant also fails to demonstrate that actual, nonspeculative prejudice resulted from the delay or that the State intentionally delayed the initiation of the prosecution to gain a tactical advantage. See *Wyman v. State*, 125 Nev. 592, 600-01, 217 P.3d 572, 578 (2009); see also *United States v. Gouveia*, 467 U.S. 180, 192 (1984) (explaining that the defendant has the burden to prove that the delay in bringing an indictment “was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense.”). Therefore appellant fails to demonstrate that he was prejudiced.¹ Accordingly, 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.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

¹To the extent that appellant argues that the pre-indictment delay standard set forth in *Wyman* should be reevaluated, the Nevada Supreme Court’s decisions are binding on this court and we decline to do so.

cc: Hon. Jerome Polaha, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk