

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL JAMES BETTS,
Appellant,
vs.
E.K. MCDANIEL, WARDEN, ELY
STATE PRISON,
Respondent.

No. 66559

FILED

JUN 16 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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 Seventh Judicial District Court, Lincoln County; Steve L. Dobrescu, Judge.

In his petition filed on August 10, 2010, appellant Michael Betts claimed that he received ineffective assistance of counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient because it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability, 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

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).

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 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).

Betts claimed that trial counsel was ineffective for failing to object to or report several instances of prosecutorial misconduct.

First, Betts claimed trial counsel was ineffective for failing to report that the State attempted to obtain a guilty plea based on fabricated evidence. Betts failed to demonstrate he was prejudiced because he failed to demonstrate there was a reasonable probability of a different outcome at trial had trial counsel reported the State. Therefore, the district court did not err in denying this claim.

Second, Betts claimed trial counsel was ineffective for failing to argue the State delayed his preliminary hearing without good cause because the State dismissed the charges and then refiled them. Betts failed to demonstrate trial counsel was deficient or resulting prejudice because the State is allowed to dismiss and refile charges pursuant to NRS 174.085. Therefore, the district court did not err in denying this claim.

Third, Betts claimed trial counsel was ineffective for failing to object on the grounds the State improperly vouched for a witness' credibility. This claim lacks merit. Trial counsel specifically objected to the vouching and the objection was sustained. Appellate counsel raised this claim on appeal, and the Nevada Supreme Court concluded that sustaining the objection was a sufficient remedy for the improper vouching. Therefore, the district court did not err in denying this claim.

Fourth, Betts claimed trial counsel was ineffective for failing to argue the State withheld evidence of exculpatory witness statements in

violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Betts failed to demonstrate he was prejudiced. A *Brady* violation occurs when “the evidence at issue is favorable to the accused; the evidence was withheld by the state; either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material.” See *Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). Evidence is material where there is a reasonable probability the omitted evidence would have affected the outcome at trial. *Jimenez v. State*, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996).

Even assuming the evidence was favorable to Betts, he failed to demonstrate a reasonable probability the omitted evidence would have affected the outcome of trial. While testimony from the other inmates may have bolstered his testimony that he never got on the truck to head back to Pioche, Betts’ actions after being left at the work site were enough to support the charge of escape. Betts did not try to flag down passing cars, did not respond to the search teams looking for him, and was found concealed behind a bush. Therefore, the district court did not err in denying this claim.

Fifth, Betts claimed trial counsel was ineffective for failing to argue the State introduced false prior convictions. At the end of Betts’ testimony, the State asked about three prior convictions. Betts admitted to having committed two of them and that they were crimes of dishonesty. Betts denied the third conviction and the State was finished with its questioning. Betts claimed trial counsel should have objected to the introduction of all of the convictions because their introduction was improper and should have objected to the third conviction because it was false.

Betts failed to demonstrate trial counsel was deficient or resulting prejudice. The two prior convictions Betts admitted to committing were admissible for impeachment purposes. See NRS

50.095(1). As to the third conviction, Betts denied the conviction and the State did not offer proof he committed it. While this was improper, *Tomarchio v. State*, 99 Nev. 572, 577-78, 665 P.2d 804, 808 (1983), we conclude that, because Betts had two other prior convictions, the error was harmless. See *Yllas v. State*, 112 Nev. 863, 867, 920 P.2d 1003, 1006 (1996) (discussing that in *Jones v. State*, 93 Nev. 287, 289, 564 P.2d 605, 607 (1977), the fact the witness had two other prior felonies meant there was little likelihood of prejudice from asking about the third). Therefore, Betts failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected to the prior convictions. Accordingly, the district court did not err in denying this claim.

Sixth, Betts claimed trial counsel was ineffective for withdrawing his motion to dismiss the charge of escape and his motion for witnesses, which were filed prior to the preliminary hearing. Betts failed to demonstrate he was prejudiced because he failed to demonstrate a reasonable probability his motions would have been granted. Therefore, the district court did not err in denying this claim.

Seventh, Betts claimed trial counsel was ineffective for failing to adequately cross-examine or impeach the State's witness with prior inconsistent statements. Specifically, Betts claims the crew supervisor changed his testimony between the preliminary hearing and trial. At the preliminary hearing, the supervisor testified he was outside the 20 minute count period but did not do another count because he did not think any of the inmates had gotten off the truck. At trial he testified he was within the 20 minute count period so he did not do another count.

Betts failed to demonstrate he was prejudiced. While counsel did not impeach the supervisor with his prior testimony, he did get the supervisor to admit he did not do a good job that day and he may have miscounted the inmates. Further, another witness testified they were

away from the inmates for upwards of 30 minutes, which impeached the supervisor's testimony that they were gone for less than 20 minutes. Therefore, Betts failed to demonstrate a reasonable probability of a different outcome at trial had trial counsel used the supervisor's preliminary hearing testimony. Accordingly, the district court did not err in denying this claim.

Eighth, Betts claimed trial counsel was ineffective for failing to conduct any pretrial investigation or for failing to locate, interview or subpoena witnesses. Betts failed to demonstrate he was prejudiced. Betts wanted the other inmates on the crew to testify he was never on the bus and the supervisor either never did his count or made a mistake in counting the inmates. However, even assuming that Betts never got on the bus, Betts failed to demonstrate a reasonable probability of a different outcome at trial had these witnesses testified. As stated previously, Betts' actions after being left at the work site were enough to support the charge of escape. Betts did not try to flag down passing cars, did not respond to the search teams looking for him, and was found concealed behind a bush. Therefore, the district court did not err in denying this claim.

Ninth, Betts claimed trial counsel was ineffective for relying on a disgruntled and inadequate investigator. Betts claimed the investigator should have done interviews with the other inmates at the worksite. Betts failed to demonstrate he was prejudiced. Even if the investigator had interviewed the witnesses and testified favorably, Betts failed to demonstrate a reasonable probability of a different outcome at trial. Therefore, the district court did not err in denying this claim.

Tenth, Betts claimed trial counsel was ineffective for failing to pursue Betts' theory of defense and for failing to move for acquittal based on insufficient evidence. Betts failed to demonstrate he was prejudiced. Trial counsel did pursue Betts' theory of defense that he was left at the

worksite. Further, because the Nevada Supreme Court concluded on direct appeal that there was sufficient evidence to convict Betts of escape, he failed to demonstrate that moving for acquittal based on insufficient evidence would have been successful. *Betts v. State*, Docket No. 54356 (Order of Affirmance, May 7, 2010). Therefore, the district court did not err in denying this claim.

Eleventh, Betts claimed trial counsel was ineffective for failing to object to or file a motion to suppress the statement he made prior to being given his *Miranda* warnings.² *Miranda v. Arizona*, 384 U.S. 436 (1966). Betts failed to demonstrate trial counsel was deficient or resulting prejudice. The State apparently conceded that the statement was improperly obtained because it did not introduce the statement until after Betts testified and used the statement to impeach Betts' testimony. See *Harris v. New York*, 401 U.S. 222, 225-26 (1972). Further, Betts failed to demonstrate a reasonable probability of a different outcome at trial. The Nevada Supreme Court concluded there was sufficient evidence to convict Betts. *Betts v. State*, Docket No. 54356 (Order of Affirmance, May 7, 2010). In doing so, the court did not rely on Betts' statement, instead the court focused on Betts' actions after he was left at the worksite. *Id.* Therefore, the district court did not err in denying this claim.

Twelfth, Betts claimed trial counsel was ineffective for failing to file a motion for change of venue. Betts failed to demonstrate that trial

²To the extent Betts claimed trial counsel should have filed other pre-trial motions, he failed to demonstrate what motions should have been filed and why they would have been successful. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (a petitioner must raise claims that are supported by specific factual findings and are not belied by the record and, if true, would entitle him to relief). Therefore, the district court did not err in denying this claim.

counsel was deficient or resulting prejudice. Before a trial may be removed from the county in which the crime occurred, it must be demonstrated, after voir dire, that a fair and impartial jury cannot be selected. NRS 174.455. Betts failed to demonstrate that a fair and impartial jury was unable to be selected and trial counsel is not deficient for failing to make futile motions. *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Therefore, Betts failed to demonstrate a reasonable probability of a different outcome had trial counsel made the motion, and the district court did not err in denying this claim.

Thirteenth, Betts claimed trial counsel was ineffective for failing to request a jury instruction regarding his involuntary and inadmissible confession. Betts failed to demonstrate that he was prejudiced. The Nevada Supreme Court concluded that, while it was error to not give an instruction regarding the limited use of Betts' statement, the error did not affect his substantial rights. *Betts v. State*, Docket No. 54356 (Order of Affirmance, May 7, 2010). Further, Betts failed to demonstrate a reasonable probability of a different outcome at trial because there was sufficient evidence to convict him without considering his statement. Therefore, the district court did not err in denying this claim.

Fourteenth, Betts claimed he was entitled to relief based on the cumulative errors of trial counsel. Betts failed to demonstrate that any alleged errors by counsel, singly or cumulatively, would have had a reasonable probability of altering the outcome at trial. Therefore, the district court did not err in denying this claim.

Next, Betts claimed appellate counsel was ineffective. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient because it fell below an objective standard of reasonableness, and resulting prejudice such that

the omitted issue would have had 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 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, Betts claimed appellate counsel was ineffective because there was a conflict of interest based on the fact appellate counsel worked in the same office as trial counsel and refused to raise claims where trial counsel failed to object. Betts failed to demonstrate an actual conflict interest. See *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). Betts 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 that his counsel actively represented conflicting interests, *Burger v. Kemp*, 483 U.S. 776, 783 (1987).

Further, we note appellate counsel made arguments regarding the admissibility of Betts' statement and challenging the failure to give a limiting instruction. Trial counsel did not object to the use of Betts' statement or ask for a limiting instruction; therefore, Betts' claim appellate counsel refused to raise this type of claim is without merit. To the extent Betts claimed that appellate counsel should have raised claims of ineffective assistance of counsel on direct appeal, ineffective-assistance-of-counsel claims are generally not properly raised on direct appeal. See *Archanian v. State*, 122 Nev. 1019, 1036, 145 P.3d 1008, 1020-21 (2006)

(the courts of appeal have "declined to consider ineffective-assistance-of-counsel claims on direct appeal unless the district court has held an evidentiary hearing on the matter or an evidentiary hearing would be needless"). Therefore, the district court did not err in denying this claim.

Second, Betts claimed appellate counsel was ineffective because he only submitted a ten page brief with inadequate and unreasonable arguments. Specifically, he claimed that appellate counsel should have made other arguments regarding his un-Mirandized statement and whether it should have been admitted, and should have argued that he was convicted with the use of perjured testimony, and the State withheld *Brady* material.


Betts failed to demonstrate any of these claims had a reasonable likelihood of success on appeal. As discussed previously, Betts' un-Mirandized statement was only introduced to impeach him and therefore Betts' claims that appellate counsel should have argued the statement was inadmissible because it was involuntary and made without counsel present would not have been successful. *See Harris*, 401 U.S. at 225-26. Betts failed to demonstrate the supervisor's testimony that he did not do another inmate count because it was within the 20 minute period was perjured testimony. Further, there was sufficient other evidence to convict Betts of escape regardless of whether the supervisor did a proper count of the inmates or not. Finally, as discussed previously, Betts failed to demonstrate the *Brady* claim would have been successful because he failed to demonstrate the evidence was material. Therefore, the district court did not err in denying this claim.

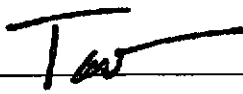
Finally, Betts raised several claims that were procedurally barred because the claims were either raised on direct appeal or could have been raised on direct appeal. Betts claimed the prosecutor committed misconduct, the district court erred by admitting his un-

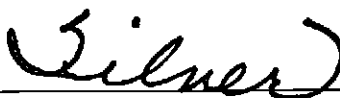
Mirandized statement, insufficient evidence was presented at the preliminary hearing and at trial, the State withheld *Brady* evidence, he was convicted with the use of perjured testimony, and he was treated differently than other similarly situated defendants. Betts failed to overcome the law-of-the-case doctrine and failed to demonstrate good cause and prejudice to raise the claims not previously raised on direct appeal. Therefore, the district court did not err in denying these claims.

Having reviewed the record and concluded that Betts is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Steve L. Dobrescu, District Judge
Michael James Betts
Attorney General/Carson City
Attorney General/Ely
Lincoln County Clerk

³We have reviewed all documents Betts has submitted in this matter, and we conclude no relief based upon those submissions is warranted. To the extent Betts 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.