

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES ALLEN REPINEC,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66682

FILED

MAY 20 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF 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, White Pine County; Steve L. Dobrescu, Judge.

In his July 17, 2014, petition, appellant James Repinec claimed his trial counsel was 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*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts

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

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 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, Repinec claimed that his trial counsel was ineffective for failing to investigate Repinec's custody status during the day that he was alleged to have used controlled substances. Repinec asserted he was taken into custody for an unrelated offense on the day in question and he would have been available for a urine test at that time. Repinec claimed that had counsel discovered when he was actually in custody, this would have demonstrated the State's witness was not truthful about the circumstances regarding the drug recognition exam. Repinec failed to demonstrate his trial counsel's performance was deficient or resulting prejudice. The district court concluded Repinec did not discuss his custody status for the day in question with his counsel prior to trial. The district court further concluded that, because Repinec did not communicate this information to his counsel, Repinec failed to demonstrate that his counsel should have investigated this type of information. The record supports the district court's conclusion. *See Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994) (concluding counsel was not ineffective for failing to investigate statements when he was not informed of those statements ahead of trial).

Moreover, there was substantial evidence of Repinec's guilt produced at trial demonstrating he arrived at the White Pine County Sheriff's Office, announced he was under the influence of multiple controlled substances, and then failed a drug recognition examination.

The drug recognition officer testified a number of the physical tests could not be faked and the examination demonstrated Repinec was under the influence of methamphetamine and marijuana. The evidence also showed the drug recognition officer left Repinec in the lobby while he obtained a urine sample kit. However, Repinec was no longer waiting for the officer when the officer returned and the officer did not know where Repinec had gone. Under these circumstances, Repinec failed to demonstrate a reasonable probability of a different outcome at trial had counsel investigated Repinec's custody status on the day in question. Therefore, the district court did not err in denying this claim.

Second, Repinec claimed that his trial counsel was ineffective for failing to have Repinec undergo a psychiatric examination to show he was actually under stress and lied about his drug use because he wished to be arrested. Repinec failed to demonstrate his trial counsel's performance was deficient or resulting prejudice. Repinec failed to demonstrate objectively reasonable counsel would have sought a psychiatric examination on this basis. Moreover, the drug recognition officer explained the examination in detail, the examination was specifically designed to discover drug use and not other possible medical or psychiatric issues. The officer testified Repinec failed tests that could not be faked, such as the horizontal gaze nystagmus test. Repinec failed to demonstrate a reasonable probability of a different outcome at trial had counsel sought a psychiatric examination for Repinec. Therefore, the district court did not err in denying this claim.

Third, Repinec claimed that his trial counsel was ineffective for failing to interview potential defense witnesses. Repinec failed to demonstrate his trial counsel's performance was deficient or resulting

prejudice. Repinec merely speculates these witnesses would have provided favorable information and did not demonstrate that investigation into these witnesses would have revealed favorable testimony. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (a petitioner claiming counsel did not conduct an adequate investigation must specify what a more thorough investigation would have uncovered). As there was substantial evidence of Repinec's guilt produced at trial, he failed to demonstrate a reasonable probability of a different outcome had counsel interviewed the potential witnesses. Therefore, the district court did not err in denying this claim.


Next, Repinec 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, 1114 (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).

First, Repinec claimed that his appellate counsel was ineffective for failing to argue on appeal the district court erred in denying his motions which asserted the State failed to prove that the amount of the controlled substances he used were an amount necessary for identification. Repinec failed to demonstrate his appellate counsel's

performance was deficient or resulting prejudice. The evidence demonstrated Repinec used an amount of methamphetamine and marijuana sufficient for identification by a witness qualified to make such identification, *see* NRS 453.570, as the officer testified at length regarding Repinec's failure of the drug recognition examination. In addition, Repinec's own statements regarding the amount of controlled substances he ingested were admitted at trial. Repinec failed to demonstrate a reasonable likelihood of success on appeal had counsel raised this argument. *See Sheriff, Clark Cnty. v. Benson*, 89 Nev. 160, 163, 509 P.2d 554, 556 (1973). Therefore, the district court did not err in denying this claim.

Second, Repinec appeared to claim that his appellate counsel was ineffective for failing to assert that his confession should not have been admissible because the State did not satisfy the corpus delicti rule. Repinec failed to demonstrate his appellate counsel's performance was deficient or resulting prejudice. The corpus delicti of a crime must be established before a defendant's extrajudicial admissions can be considered. *See West v. State*, 119 Nev. 410, 417, 75 P.3d 808, 813 (2003). The corpus delicti is established by any independent evidence sufficient for a reasonable inference that a 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, 91 P.3d 16 (2004). Here, corpus delicti was established by the police officer's testimony regarding the drug recognition examination and Repinec's failure of that examination. Repinec failed to demonstrate a reasonable likelihood of success on appeal had counsel challenged the admission of his confession on this basis. Therefore, the district court did not err in denying this claim.

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Steve L. Dobrescu, District Judge
James Allen Repinec
Attorney General/Carson City
White Pine County District Attorney
White Pine District Court Clerk