

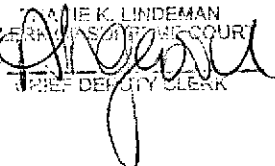
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRETT CLINTON COMBS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 65864

FILED

DEC 18 2015

JAMIE K. LINDEMAN  
CLERK OF THE COURT  
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant Brett Clinton Combs argues the district court erred in denying the claims of ineffective assistance of counsel he raised in his July 19, 2011, petition. 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 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, Combs argues his trial counsel was ineffective because counsel had a conflict of interest in representing him because counsel had previously represented a person who was an associate of Combs. Combs asserts counsel previously represented Wendell Reiger, and that it was possible Reiger had been involved in the criminal activity at issue in this matter. Combs also argues the conflict of interest violated RPC 1.7 and 1.9. Our review of the record reveals Combs fails to demonstrate an actual conflict of interest existed. *Strickland*, 466 U.S. at 692 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350 (1980)).

At the evidentiary hearing, counsel acknowledged he represented Wendell Reiger during criminal proceedings stemming from Reiger's commission of a number of robberies in Nevada. Counsel further acknowledged Combs had notified counsel that Reiger was an associate of Combs. However, counsel explained Reiger's criminal matters had nothing to do with Combs criminal matters, neither Combs nor Reiger had stated Reiger had any involvement in the incidents at issue in this case, and he had not learned any information which caused him to believe Combs' interests were adverse to those of Reiger's interests.

The district court concluded Combs did not demonstrate counsel's representations of both Combs and Reiger adversely affected counsel's performance or created a situation conducive to divided loyalties and substantial evidence supports that conclusion. *Id.*; see also *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992). In addition, Combs fails to demonstrate counsel violated RPC 1.7 or RPB 1.9 because he failed to demonstrate Reiger's interests were directly adverse to those of Combs,

counsel was materially limited by representation of both clients, or counsel was prevented from revealing information favorable to Combs out of a concern of disadvantaging Reiger's interests. Therefore, the district court did not err in denying this claim.

Second, Combs argues his trial counsel was ineffective for raising a poor argument in his motion to suppress. Combs argues counsel should have asserted the evidence discovered in the search was not properly recovered because Combs was merely an overnight guest and not a resident of the home. Combs fails to demonstrate counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he had reviewed the facts and argued the search was an improper warrantless-investigatory search because he felt that argument had the greatest likelihood of success. 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 Combs does not demonstrate. Moreover, the evidence demonstrated Combs had notified his probation officer that he resided at the residence where the stolen property was discovered, Combs indicated to the officers conducting the search the bedroom containing the stolen items was his, and his wallet containing his identification was discovered in the bedroom. Accordingly, Combs fails to demonstrate a reasonable probability of a different outcome had counsel attempted to argue Combs was merely an overnight guest at that home. Therefore, the district court did not err in denying this claim.

Third, Combs argues his trial counsel was ineffective for failing to assert the photo line-up was suggestive and lacked credibility. Combs fails to demonstrate his counsel's performance was deficient or resulting prejudice. Combs cannot demonstrate deficiency for this claim

because counsel argued the photo line-up was suggestive and lacked credibility. Moreover, this court considers the totality of the circumstances to determine whether the photo line-up procedure was “so unduly prejudicial as to fatally taint [the defendant’s] conviction.” *Cunningham v. State*, 113 Nev. 897, 904, 944 P.2d 261, 265 (1997) (alteration in original) (quoting *Simmons v. United States*, 390 U.S. 377, 383 (1968)). Here, there was substantial evidence of Combs’ guilt produced at trial because he was identified by two victims of the Colorado robberies and the items taken from those robberies were discovered in Combs’ bedroom. Accordingly, Combs fails to demonstrate a reasonable probability of a different outcome had counsel further challenged the photo line-ups. Therefore, the district court did not err in denying this claim.

Fourth, Combs argues his trial counsel was ineffective for informing the jury during closing argument the police had received an anonymous tip regarding Combs’ involvement in planning a robbery. At the evidentiary hearing, counsel testified he believed he needed to explain to the jury the background for what had occurred. Tactical decisions such as this one “are virtually unchallengeable absent extraordinary circumstances,” *Ford*, 105 Nev. at 853, 784 P.2d at 953, which Combs does not demonstrate. Given the substantial evidence of Combs’ guilt produced at trial, Combs fails to demonstrate a reasonable probability of a different outcome had counsel declined to discuss the anonymous tip or Combs’ possible involvement in planning a robbery. Therefore, the district court did not err in denying this claim.

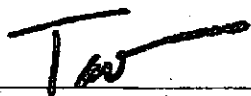
Fifth, Combs argues his trial counsel was ineffective for failing to present an adequate defense at trial. Combs asserts counsel could have done further actions to demonstrate other individuals were responsible for

the Colorado robberies or were the actual persons who possessed the stolen property. At the evidentiary hearing, counsel explained he raised arguments which he believed were favorable to Combs' defense. Tactical decisions such as this one "are virtually unchallengeable absent extraordinary circumstances," *id.*, which Combs does not demonstrate. Further, as Combs was identified as the person who committed the Colorado robberies and was discovered with the stolen items in his bedroom, he fails to demonstrate a reasonable probability of a different outcome had counsel presented a different defense at trial. Therefore, the district court did not err in denying this claim.

Sixth, Combs argues the cumulative effect of ineffective assistance of counsel warrants vacating his judgment of conviction. Combs fails to demonstrate any errors, even if considered cumulatively, amount to ineffective assistance of counsel sufficient to warrant vacating the judgment of conviction. Therefore, he fails to demonstrate he was entitled to relief for this claim.

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

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Elissa F. Cadish, District Judge  
Christopher R. Oram  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk