

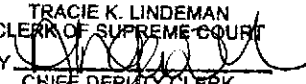
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JORGE MIRANDA-RIVAS,
Appellant,
vs.
GREGORY SMITH, WARDEN; AND
THE STATE OF NEVADA,
Respondents.

No. 69855

FILED

JUL 26 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus.¹ Second Judicial District Court, Washoe County; David A. Hardy, Judge.

In his petition filed on August 25, 2015, appellant Jorge Miranda-Rivas claimed he received ineffective assistance of trial and appellate counsel.

To establish ineffective assistance of trial counsel, a petitioner must demonstrate 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, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Similarly, to establish ineffective assistance of appellate counsel, a petitioner must demonstrate 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 had a

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

16-9100839

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. 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, Miranda-Rivas claimed trial counsel was ineffective for failing to investigate the prosecution's witnesses. Miranda-Rivas argued the testimony of these witnesses was inconsistent with their police statements and therefore impeachable. The district court found Miranda-Rivas' claim was belied by the record, he did not allege specific facts showing trial counsel was ineffective, and he failed to identify any specific prior inconsistent statements trial counsel should have used for impeachment purposes. The district court's findings are supported by the record and we conclude it did not err in dismissing this claim. *See Nika v. State*, 124 Nev. 1272, 1300-01, 198 P.3d 839, 858 (2008) (Explaining that "[postconviction habeas] claims must consist of more than 'bare' allegations and that an evidentiary hearing is mandated only when a post-conviction petitioner asserts specific factual allegations that are not belied or repelled by the record and that, if true, would entitle him to relief.").

Second, Miranda-Rivas claimed trial counsel was ineffective for failing to move to suppress evidence. Miranda-Rivas argued the recordings of his jailhouse telephone calls were inadmissible because they were made before he was advised of his *Miranda*² rights. Miranda-Rivas

²*Miranda v. Arizona*, 384 U.S. 436 (1966).

further argued the blue jacket found in the vicinity of the stolen vehicle and the bullets found in the white GMC were inadmissible because there was no physical evidence linking these items to him. The district court found trial counsel was not deficient for failing to move for suppression because the statements made in the recorded telephone calls were not the products of a custodial interrogation and therefore the recordings and the evidence retrieved as a result of the recordings were not subject to suppression. The district court's findings are supported by the record and we conclude it did not err in dismissing this claim. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (holding counsel cannot be deemed ineffective for failing to make a futile motion).

Third, Miranda-Rivas claimed trial counsel was ineffective for failing to introduce evidence in support of his defense. Miranda-Rivas argued trial counsel should have introduced and played a video recording of his accomplices purchasing gas after the robbery because the recording would have clearly demonstrated he was not with them. The district court found trial counsel may have been deficient for not introducing surveillance video from the Galena Chevron Gas Station—if it existed and if it conclusively demonstrated Miranda-Rivas was not present at the gas station with his accomplices. However, the district court further found Miranda-Rivas could not demonstrate prejudice because, even if trial counsel had introduced the video evidence and substantially impeached the testimony of his accomplices, there was more than sufficient evidence to establish his identity as the perpetrator of the crimes. The district court's findings are supported by the record and we conclude it did not err in dismissing this claim.

Fourth, Miranda-Rivas claimed trial counsel was ineffective for failing to properly impeach the prosecution's witnesses. Miranda-Rivas argued trial counsel should have impeached his accomplices with their prior inconsistent statements and the fact they accepted plea offers to lesser charges in exchange for their testimonies at his trial. The district court found this claim was belied by the record, which "is replete with counsel's attempts to impeach the State's witnesses, often successfully." The district court's finding is supported by the record and we conclude it did not err in dismissing this claim. *See Nika*, 124 Nev. at 1300-01, 198 P.3d at 858.

Fifth, Miranda-Rivas claimed trial counsel was ineffective for failing to present a defense. Miranda-Rivas argued trial counsel was deficient for failing to establish a line of defense that he was not present and did not participate in the crimes and for failing to set forth a meaningful adversarial challenge to the State's case. The district court found this claim was belied by the record, which demonstrates trial counsel presented a defense by arguing the accomplices' testimony was unreliable, Miranda-Rivas did not commit the crimes alleged, and "the accomplices committed the crimes and conspired to 'pick another person to blame for this.'" The district court's finding is supported by the record and we conclude it did not err in dismissing this claim. *See id.*

Sixth, Miranda-Rivas claimed trial counsel was ineffective for failing to object to the testimony of his accomplices. Miranda-Rivas argued the accomplices' testimonies were based on the prosecution's promise to reduce their charges in exchange for their testimony against him, and he suggested this testimony included a confession and damaging hearsay. The district court found no indication the accomplices made any

confessions that were used against Miranda-Rivas, Miranda-Rivas did not identify any hearsay statements that were prejudicial and should have been challenged, and Miranda-Rivas failed to allege any facts that might entitle him to relief. The district court's findings are supported by the record and we conclude it did not err in dismissing this claim. *See id.*

Seventh, Miranda-Rivas claimed trial counsel was ineffective for failing to move for a mistrial based on insufficient evidence to support the grand-larceny-of-a-motor-vehicle count. Miranda-Rivas argued the only evidence of this crime was the uncorroborated testimony of his accomplices and a blue jacket that was found in the vicinity of the stolen vehicle. The district court found the Nevada Supreme Court had rejected Miranda-Rivas' sufficiency challenge on direct appeal, there was sufficient evidence to corroborate the accomplices' testimonies as to the grand-larceny-of-a-motor-vehicle charge, and trial counsel was not deficient for failing to move for a mistrial on this ground. The district court's findings are supported by the record and we conclude it did not err in dismissing this claim. *See Miranda-Rivas v. State*, Docket No. 64687 (Order of Affirmance, October 15, 2014); *Donovan*, 94 Nev. at 675, 584 P.2d at 711.

Eighth, Miranda-Rivas claimed trial counsel was ineffective for failing to move to sever the counts. Miranda-Rivas argued the theft of the vehicle was not connected to the robbery because it happened after the robbery was committed. The district court found the Nevada Supreme Court had rejected Miranda-Rivas' severance challenge on direct appeal, severance of the charges was not warranted, the joinder was appropriate under NRS 173.115(2), and trial counsel was not deficient for failing to move to sever the counts. The district court's findings are supported by the record and we conclude it did not err in dismissing this claim. *See*

Miranda-Rivas v. State, Docket No. 64687 (Order of Affirmance, October 15, 2014); *Donovan*, 94 Nev. at 675, 584 P.2d at 711.

Ninth, Miranda-Rivas claimed trial counsel was ineffective for failing to move for a mistrial based on a double jeopardy violation. Miranda-Rivas argued the offenses of assault with a deadly weapon and discharging a firearm within or from a structure are lesser-included offenses of robbery with the use of a firearm, his assault-with-a-deadly-weapon conviction cannot stand, and his sentences for robbery with the use of a firearm and discharging a firearm within or from a structure should merge. The district court found the Nevada Supreme Court had rejected Miranda-Rivas' double jeopardy challenge on direct appeal, Miranda-Rivas' convictions do not violate the Double Jeopardy Clause, trial counsel was not deficient for failing to move for a mistrial or resentencing, and Miranda-Rivas was not prejudiced. The district court's findings are supported by the record and we conclude it did not err in dismissing this claim. See *Miranda-Rivas v. State*, Docket No. 64687 (Order of Affirmance, October 15, 2014); *Donovan*, 94 Nev. at 675, 584 P.2d at 711.

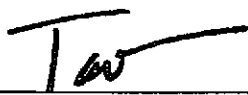
Tenth, Miranda-Rivas claimed cumulative error deprived him of his "federal constitutional guarantees of due process, equal protection, the effective assistance of counsel, a fair tribunal, and an impartial jury." The district court found the cumulative error doctrine did not apply here because all of Miranda-Rivas's grounds for relief had been rejected. We conclude the district court did not err in this regard. See *State v. Perry*, 245 P.3d 961, 982 (Idaho 2010) ("[A] necessary predicate to the application of the [cumulative error] doctrine is a finding of more than one error.").

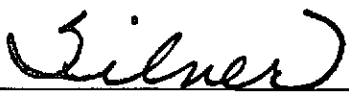
Eleventh, Miranda-Rivas claimed appellate counsel was ineffective for failing to raise the previous claims of ineffective assistance of trial counsel on direct appeal. The district court found appellate counsel was not deficient because ineffective-assistance-of-counsel claims should be raised in a postconviction petition for a writ of habeas corpus in the first instance rather than in a direct appeal. The district court's finding is supported by the record and we conclude it did not err in dismissing this claim. *See Feazell v. State*, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995) (explaining that ineffective-assistance-of-counsel claims may not be raised on direct appeal unless they have already been the subject of an evidentiary hearing).

Based on the foregoing, we conclude the district court did not err by denying Miranda-Rivas' habeas petition without appointing counsel or conducting an evidentiary hearing. *See* NRS 34.750(1); NRS 34.770(2). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. David A. Hardy, District Judge
Jorge Miranda-Rivas
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk