

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAYSHAWN ANDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71932

FILED

SEP 13 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Dayshawn Anderson appeals from an order of the district court denying his August 30, 2016, postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Anderson raised several claims of ineffective assistance of trial and appellate counsel. We give deference to the district court's factual findings that are supported by substantial evidence and not clearly wrong 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). To demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*,

¹This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).

100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*); see also *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (applying *Strickland* to claims of ineffective assistance of appellate counsel). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697.

First, Anderson claimed trial counsel were ineffective for not arguing he could not be convicted of child abuse, neglect, or endangerment because he was not “responsible” for the child pursuant to NRS 432B.140. Any such argument would have been futile as this court previously rejected this claim on appeal. See *Anderson v. State*, Docket No. 68323 (Order of Affirmance, March 16, 2016). Counsel cannot be deemed ineffective for failing to raise futile arguments. *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). We therefore conclude the district court did not err in denying this claim.

Second, Anderson claimed trial counsel were ineffective as they labored under a conflict of interest. Where a petitioner demonstrates counsel suffers from an actual conflict of interest that adversely affects her performance, we presume prejudice. *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980); *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992). In support of his claim, Anderson noted only counsel had filed a motion to withdraw in which they stated all communication had broken down. A breakdown in communication does not indicate an actual conflict of interest as it does not show counsel was “placed in a situation conducive to divided loyalties.” *Clark*, 108 Nev. at 326, 831 P.2d at 1376 (quotation marks omitted). Accordingly, the district court did not err in not presuming prejudice.

Further, Anderson failed to demonstrate deficiency or prejudice from the alleged communication breakdown. Counsel filed the motion to withdraw, averring Anderson was refusing to communicate with them. Anderson did not indicate what more objectively reasonable counsel should have done. Anderson claimed he was prejudiced because different trial counsel would have prepared him to testify on his own behalf. However, Anderson did not support this claim with specific facts that, if true and not belied by the record, would have resulted in a different outcome at trial. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). He did not indicate what replacement counsel could have done to convince him to testify at trial or what he would have testified to. We therefore conclude the district court did not err in denying this claim.

Third, Anderson claimed appellate counsel was ineffective for failing to challenge the district court's denial of counsel's motion to withdraw. This court would have reviewed the district court's decision for an abuse of discretion and considered three factors: "(1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion." *Young v. State*, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004) (quoting *United States v. Moore*, 159 F.3d 1154, 1158-59 (9th Cir. 1998)). The motion was filed only five days before trial, the district court conducted a detailed inquiry and addressed each point Anderson had presented, the district court reasonably concluded any perceived conflict had been resolved, and at the end counsel indicated they were ready to proceed to trial. As the claim would have been futile, counsel was not ineffective for failing to raise it. We therefore conclude the district court did not err in denying this claim.

Fourth, Anderson claimed appellate counsel was ineffective for not filing a petition for rehearing from this court's order affirming his judgment of conviction. Anderson's claim was bare as he did not indicate what material facts or questions of law this court overlooked or misapprehended, nor did he indicate what statute, procedural rule, regulation, or directly controlling decision this court overlooked, misapplied, or failed to consider. *See* NRAP 40(c) (outlining the scope of rehearing petitions); *see also Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. We therefore conclude the district court did not err in denying this claim.

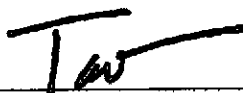
Fifth, Anderson claimed the cumulative error of trial counsel and of appellate counsel warranted relief. Even assuming multiple deficiencies in counsel's performance may be cumulated to establish prejudice, *see McConnell v. State*, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009), Anderson did not demonstrate any deficient performance, and thus, there was nothing to cumulate. We therefore conclude the district court did not err in denying these claims.

Anderson next claimed the trial court erred in denying his pretrial petition for a writ of habeas corpus and abused its discretion in refusing to give a curative jury instruction regarding the State's misconduct in opening statements and in denying his post-verdict motion for judgment of acquittal. Each of these claims could have been raised in Anderson's direct appeal and were therefore procedurally barred. *See* NRS 34.810(1)(b)(2). He did not allege good cause or actual prejudice to overcome the procedural bar. *See* NRS 34.810(1)(b). We therefore conclude the district court did not err in denying these claims.

Finally, Anderson claimed insufficient evidence supported his convictions of kidnapping and child abuse, neglect or endangerment; the State violated *Batson v. Kentucky*, 476 U.S. 79 (1986), during jury selection; the prosecutor engaged in misconduct; and the district court erred in allowing the State to amend the information mid-trial and in refusing to allowing Anderson to impeach a witness. These claims were raised and rejected on appeal, *see Anderson*, Docket No. 68323, and those holdings are the law of the case, which "cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings," *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). We therefore conclude the district court did not err in denying these claims. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Dayshawn Anderson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk