

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARC ANTHONY COLON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70276

FILED

SEP 13 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Marc Anthony Colon appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Colon argues the district court erred in denying the claims of ineffective assistance of trial counsel raised in his June 29, 2012, petition and September 2, 2015, supplement.¹ To prove ineffective assistance of 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, 687-88 (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*,

¹The record before this court does not contain copies of Colon's postconviction petition or his supplemental petition as required by NRAP 30(b)(2), (b)(3). We remind Colon it is his burden as the appellant to provide this court with an adequate record for review. See *McConnell v. State*, 125 Nev. 243, 256 n.13, 212 P.3d 307, 316 n.13 (2009).

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).

First, Colon argues his trial counsel should have ensured bench conferences were transcribed. Colon fails to demonstrate the district court erred by denying this claim.

Bench conferences should be memorialized, “either contemporaneously or by allowing the attorneys to make a record afterward,” but the appellant must demonstrate meaningful appellate review of any alleged error was precluded by the failure to memorialize the bench conference. *Preciado v. State*, 130 Nev. 40, 43, 318 P.3d 176, 178 (2014). Here, many of the bench conferences were transcribed and counsel made a record regarding a number of issues that were discussed at a bench conference, which were the actions of objectively reasonable counsel. Further, assuming there were issues that were discussed at a bench conference that were not later memorialized, the district court found Colon failed to demonstrate any unrecorded bench conference had significance or meaningful appellate review was precluded by any failure to memorialize a bench conference. The district court found Colon’s bare allegation regarding this issue was insufficient to demonstrate he is entitled to relief. See *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984). The district court also found Colon failed to demonstrate a reasonable probability of a different outcome had counsel objected when a bench conference was not transcribed or caused every bench conference to be memorialized. The record before this court supports the district court’s findings and we conclude the district court did not err in denying this claim.

Second, Colon argues his trial counsel failed to adequately investigate Colon's alibi witness or prepare the witness to testify at trial. Colon further argues counsel should have investigated additional witnesses to support his alibi. Colon fails to demonstrate the district court erred by denying these claims.

During the trial, Colon's alibi witness testified Colon attended a party during his visit to Las Vegas, but was unsure of the exact date. The alibi witness acknowledged she had previously stated the party was on the same day the victim died, but when confronted with further information regarding Colon's whereabouts during his time in Las Vegas, she recognized the party might not have been on the same day as the victim's death.

The district court concluded counsel interviewed the witness prior to trial and questioned the alibi witness at length regarding her recollection of events. The district court found Colon failed to demonstrate counsel acted in an objectively unreasonable manner regarding the alibi witness. In addition, the district court found Colon did not demonstrate counsel would have discovered favorable information had counsel undertaken reasonably diligent investigation regarding the alibi witness or any additional potential alibi witnesses, given the overwhelming evidence of Colon's guilt produced at trial. *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). The record before this court supports the district court's conclusion in this regard.

Moreover, we note the Nevada Supreme Court has already concluded the question of Colon's guilt in this matter was not close, *Colon v. State*, Docket No. 53019 (Order of Affirmance, September 29, 2011), and

our review of the record demonstrates there was significant evidence of Colon's guilt produced at trial, particularly in light of the statements to the police made by Colon's daughters, asserting Colon hit the victim and was at the hotel room the night the victim died. Given the significant evidence of Colon's guilt, Colon fails to demonstrate a reasonable probability of a different outcome at trial had counsel further investigated alibi witnesses or prepared the alibi witness to testify at trial. Therefore, we conclude the district court did not err in denying these claims.

Third, Colon argues his trial counsel should have objected to introduction of letters written by his codefendant and should have sought a limiting instruction regarding the letters. Colon fails to demonstrate the district court erred by denying these claims.

Colon and the victim's mother were codefendants and were tried together. During the trial, the State introduced letters the victim's mother wrote to Colon during their incarceration while awaiting trial. In the letters, the victim's mother wished Colon a happy Father's Day, said she was proud of him, called him a handsome man, and described sexual fantasies she had about Colon. The State introduced the letters to demonstrate the victim's mother maintained a romantic relationship with Colon and she therefore did not feel threatened or controlled by Colon.

The district court concluded counsel acted in a reasonable manner by declining to object to introduction of the letters because the letters undermined a contention that Colon was abusive or controlling. The district court concluded the letters were not used as evidence of Colon's guilt, but rather to negate a duress defense used by the victim's mother and, for those reasons, Colon did not demonstrate counsel acted in an objectively unreasonable manner by failing to object to the letters' introduction at trial.

The district court further concluded Colon made only bare claims regarding the letters and bare claims, such as this one, are insufficient to demonstrate a petitioner is entitled to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Substantial evidence supports the district court's findings and Colon fails to demonstrate the district court erred by denying these claims.

Next, Colon argues the district court erred in denying his claims of ineffective assistance of appellate counsel. 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, Colon argues his appellate counsel should have asserted the district court erred by failing to record bench conferences. Colon fails to demonstrate the district court erred in denying this claim. As explained previously, many of the bench conferences during trial were transcribed. The district court found Colon did not demonstrate he suffered prejudice from any unrecorded bench conferences or that meaningful appellate review was precluded by any failure to memorialize a bench conference. Accordingly, the district court concluded Colon failed to demonstrate his appellate counsel acted in an objectively unreasonable manner or a reasonable probability he would have had success on appeal had counsel


raised this issue. The record before this court supports the district court's findings and we conclude the district court did not err in denying this claim.


Second, Colon argues his appellate counsel should have investigated his alibi witness or other potential alibi witnesses. Colon fails to demonstrate the district court erred in denying this claim. The district court concluded Colon did not demonstrate his counsel could have discovered information regarding his alibi witness that would have produced helpful information and substantial evidence supports this conclusion. *See Molina*, 120 Nev. at 192, 87 P.3d at 538. Accordingly, the district court properly concluded Colon failed to demonstrate a reasonable probability of success on appeal had his counsel sought further information regarding the alibi witness or other potential alibi witnesses. Therefore, we conclude the district court did not err in denying this claim.

Third, Colon argues his appellate counsel should have asserted the district court erred by admitting of letters written by his codefendant and by failing to issue a limiting instruction regarding the letters. Colon fails to demonstrate the district court erred in denying these claims. As stated previously, the district court concluded the letters were not used as evidence of Colon's guilt, but rather to negate a duress defense used by the victim's mother and, for those reasons, Colon did not demonstrate counsel acted in an objectively unreasonable manner by declining to raise a claim concerning admission of the letters on direct appeal. The district court further concluded Colon made only bare claims regarding the letters and bare claims, such as these, are insufficient to demonstrate a petitioner is entitled to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Substantial evidence supports the district court's findings and Colon fails to demonstrate the district court erred by denying these claims.

Finally, Colon argues the cumulative errors of counsel amount to ineffective assistance of counsel and should warrant vacating the judgment of conviction. The district court concluded Colon failed to demonstrate counsel committed any errors, and accordingly, there were no errors to cumulate. The record before this court supports the district court's findings and we conclude the district court did not err in denying this claim.

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
The Law Office of Dan M. Winder, P.C.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk