

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHNNY LEE JONES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71766

FILED

DEC 13 2017

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

ORDER OF AFFIRMANCE

Johnny Lee Jones appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ First Judicial District Court, Carson City; James E. Wilson, Judge.

Jones argues the district court erred in denying the claims of ineffective assistance of trial counsel raised in his May 23, 2013, petition. 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*, 466 U.S. at 697.

First, Jones claimed his trial counsel had a conflict of interest because counsel had been the District Attorney for Carson City when Jones

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).

committed the crime. "Conflict of interest and divided loyalty situations can take many forms, and whether an actual conflict exists must be evaluated on the specific facts of each case. In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties." *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991)). A conflict of interest exists if "counsel 'actively represented conflicting interests'" and the "actual conflict of interest adversely affected [the defendant's] lawyer's performance." *Strickland*, 466 U.S. at 692 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350, 348 (1980)).

We conclude Jones failed to demonstrate an actual conflict of interest existed. Jones raised this issue at the beginning of his trial, counsel explained the Attorney General's Office had represented the State with this matter as it arose out of the prison, and he had never heard of this matter until he had ceased to be the District Attorney and came to represent Jones. The trial court concluded there was no conflict given the Attorney General's Office's representation of the State in this matter. *See* NRS 228.170(2) (granting the Attorney General the authority to investigate and prosecute crimes committed by a person confined in a state correctional facility). Under these circumstances, we conclude the district court did not err in denying this claim.

Second, Jones claimed his trial counsel was ineffective for failing to act in a professional manner toward Jones. Jones asserted counsel argued with him, called him derogatory names, cursed at him, and angrily slammed doors. Jones failed to demonstrate his counsel's performance was deficient or resulting prejudice. Jones was not entitled to a meaningful attorney-client relationship and Jones did not demonstrate these issues

caused his counsel's performance to fall below an objectively reasonable standard. *See Morris v. Slappy*, 461 U.S. 1, 14 (1983). The record before this court reveals significant evidence of Jones' guilt, as three witnesses, including a defense witness, testified that Jones spat at the victim. Given the significant evidence of Jones' guilt presented at trial, Jones failed to demonstrate a reasonable probability of a different outcome had counsel and Jones developed a better working relationship. Therefore, we conclude the district court did not err in denying this claim.

Third, Jones claimed his trial counsel was ineffective for failing to object when correctional officers escorted him to the witness stand and stood near him during his testimony. Jones also asserted counsel should have objected to the amount of security personnel in the courtroom. Jones failed to demonstrate his counsel's performance was deficient or resulting prejudice. Both Jones and his counsel raised these issues with the trial court and the trial court subsequently addressed these issues with the security personnel in the courtroom. Jones failed to demonstrate a reasonable probability of a different outcome had counsel addressed this issue in a different manner or at an earlier time. Therefore, we conclude the district court did not err in denying this claim.

Fourth, Jones claimed his trial counsel was ineffective for failing to use transcripts of the preliminary hearing to impeach the credibility of the victim during her testimony. Jones failed to demonstrate his counsel's performance was deficient or resulting prejudice. A review of the record reveals counsel cross-examined the victim at length. Jones did not identify any portion of the victim's testimony which could have been impeached with use of the preliminary hearing transcript and a bare claim is insufficient to demonstrate a petitioner is entitled to relief. *See Hargrove*

v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Therefore, we conclude the district court did not err in denying this claim.

Fifth, Jones claimed his trial counsel failed to adequately prepare for trial. Jones failed to demonstrate his counsel's performance was deficient or resulting prejudice. A review of the record reveals counsel appropriately questioned witnesses and presented Jones' defense. Jones did not identify what further actions counsel should have performed or how counsel could have been more prepared for the trial. Jones raised a bare claim and such claims are insufficient to demonstrate a petitioner is entitled to relief. *See id.* Therefore, we conclude the district court did not err in denying this claim.

Next, Jones claimed 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, Jones claimed his appellate counsel was ineffective for failing to argue his right to testify was denied when he was required to wear a stun belt during the trial and when testifying. Jones also asserted the security presence in the courtroom during trial and when he was testifying was improper. Jones failed to demonstrate his counsel's performance was

deficient or resulting prejudice. Counsel raised a claim regarding use of the stun belt in Jones' first direct appeal, arguing the district court erred by failing to consider the appropriate factors when it concluded Jones should wear the stun belt during trial. The Nevada Supreme Court concluded the district court committed error regarding use of the stun belt, but the error was harmless beyond a reasonable doubt. *Jones v. State*, Docket No. 55970 (Order of Reversal and Remand, April 6, 2011). Jones failed to demonstrate objectively reasonable counsel would have raised further similar arguments.

Moreover, in light of the significant evidence of guilt presented at trial, Jones failed to demonstrate a reasonable probability of a different outcome had appellate counsel raised additional challenges to the use of a stun belt or the courtroom security. *See Hymon v. State*, 121 Nev. 200, 209-10, 111 P.3d 1092, 1099-100 (2005) (discussing factors for a district court to consider when weighing use of a stun belt and reviewing failure to conduct an appropriate hearing for harmless error); *Gonzalez v. Pflizer*, 341 F.3d 897, 903 (9th Cir. 2003) (stating a federal habeas petitioner has the burden to demonstrate prejudice resulting from improper use of physical restraints during trial). Therefore, we conclude the district court did not err in denying this claim.

Second, Jones claimed his appellate counsel was ineffective for failing to argue the district court erred by denying his request for a continuance of the trial to permit him to obtain evidence and witnesses to support an insanity defense or to obtain a different counsel to aid him in such a defense. Jones failed to demonstrate his counsel's performance was deficient or resulting prejudice. The trial court denied Jones' request for a continuance because the continuance would have improperly delayed the

trial and because Jones had already been examined by a defense expert, who concluded Jones was not legally insane. Jones failed to demonstrate he was prejudiced by the denial of his motion to continue and accordingly, he did not show the trial court abused its discretion in denying the motion to continue on these bases. *See Rose v. State*, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007); *see also Young v State*, 120 Nev. 963, 968-69, 102 P.3d 572, 576 (2004) (listing factors for consideration in reviewing a district court's denial of a motion for a substitution of counsel). Accordingly, Jones failed to demonstrate it was objectively unreasonable for his appellate counsel to decline to raise the underlying claim or there was a reasonable likelihood of success on appeal had such a claim been raised. Therefore, we conclude the district court did not err in denying this claim.


Third, Jones claimed his appellate counsel was ineffective for failing to federalize the issues raised on direct appeal. Jones failed to demonstrate his counsel's performance was deficient or resulting prejudice. Jones failed to demonstrate he would have gained a more favorable standard of review on direct appeal had his appellate counsel raised arguments under federal laws. *See Browning v. State*, 120 Nev. 347, 365, 91 P.3d 39, 52 (2004). Jones failed to demonstrate a reasonable likelihood of success on appeal had counsel raised further arguments based upon federal laws. Therefore, we conclude the district court did not err in denying this claim.

Fourth, Jones claimed his appellate counsel was ineffective for failing to assert he was entitled to relief due to cumulative error. Jones failed to demonstrate either deficiency or prejudice for this claim because he failed to demonstrate any error, and therefore, there was no error to

cumulate. Accordingly, we conclude the district court did not err in denying this claim.

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. James E. Wilson, District Judge
Johnny Lee Jones
Attorney General/Carson City
Carson City Clerk