IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE FRANCISCO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73006

FILED

APR 11 2018

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

ORDER OF AFFIRMANCE

Jose Francisco appeals from an order of the district court denying his November 10, 2014, postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Francisco contends the district court erred by denying his claims that appellate counsel were ineffective. 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 the omitted issue would have had 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, 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 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).

First, Francisco argues appellate counsel Troy Jordan was ineffective because he suffered from an actual conflict of interest that adversely affected his performance. Francisco claims Jordan was conflicted because he was in the process of obtaining employment with the Carson City District Attorney's (CCDA) office during the pendency of Francisco's appeal and represented Francisco after accepting the CCDA's offer of employment. Francisco further asserts that Jordan did not put forth effort in Francisco's appeal because the fast track statement was a mere five pages.

Francisco has not demonstrated Jordan suffered from an actual conflict of interest. "[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). The district court found the CCDA approached Jordan about a vacancy and Jordan twice turned down the offer before ultimately accepting. This finding is supported by the record and indicates Jordan's potential employment with the CCDA did not place him in a position conducive to divided loyalties. Further, the CCDA was not the prosecuting entity in Francisco's case, and Jordan withdrew from representing Francisco shortly after accepting the CCDA's offer and before he began working there.

Francisco has also not demonstrated he was prejudiced by any potential conflict of interest. A brief fast track statement does not necessarily indicate a lack of effort. *See Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) ("[A]ppellate counsel is most effective when [he] does not raise every conceivable issue on appeal."). And Francisco does not demonstrate or even allege that, but for Jordan's impending employment by the CCDA, the result of the appeal would have been different. That

appellate counsel Patricia Halstead, Jordan's replacement, determined a supplemental fast track statement was not warranted supports there was no reasonable probability of a different outcome. We therefore conclude the district court did not err in denying this claim.

Second, Francisco argues appellate counsel were ineffective for failing to challenge the trial court's denial of Francisco's motion to suppress evidence recovered during searches of his person, bag, and residence. In his suppression motion, Francisco claimed his verbal consent to search his person, bag, and residence was invalid because consent was sought in English and he only speaks Spanish. He claimed his consent to search his residence was also invalid because he did not understand the Spanish-language consent form he signed and he was told to hurry up and sign or officers would obtain a warrant.

The trial court held a suppression hearing and filed a written order denying the motion. The trial court's order noted Francisco understood "fairly sophisticated questions in English" at his suppression hearing, answering questions before the interpreter finished translating them into Spanish and even, on occasion, before the prosecutor finished posing the question. Thus, the trial court found, Francisco spoke English well enough to give valid consent. The trial court also concluded Francisco's written consent to search his residence was irrelevant where he had already given valid verbal consent. We defer to the district court's finding that the trial court's findings were supported by the record.

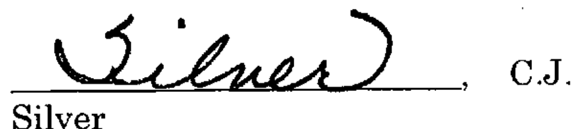
Francisco has failed to demonstrate counsel were deficient. Appellate counsel is most effective when he or she does not raise every nonfrivolous issue on appeal. *Ford*, 105 Nev. at 853, 784 P.2d at 953; *see also Jones v. Barnes*, 463 U.S. 745, 751 (1983) (noting defendants do not

have "a constitutional right to compel appointed counsel to press nonfrivolous points"). Jordan testified at the evidentiary hearing on the instant petition that he intentionally focused on the single issue he felt was most likely to succeed on appeal so as not to dilute its strength with too many arguments. Francisco has failed to demonstrate this tactic was objectively unreasonable. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) ("[C]ounsel's strategic or tactical decisions will be 'virtually unchallengeable absent extraordinary circumstances.'"). And Halstead testified that she reviewed Francisco's file and agreed with Jordan's assessment. That both Jordan and Halstead concluded the suppression issue lacked merit on appeal supports that neither were objectively unreasonable in their assessments.

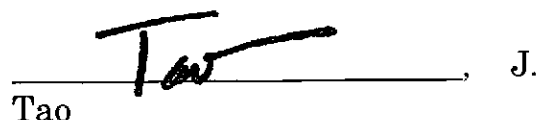
Francisco has also failed to demonstrate a reasonable probability of success had counsel raised the suppression issue. Francisco does not challenge the trial court's findings regarding his English-language abilities but simply claims they were not fatal to his success on appeal. However, the motion to suppress turned on Francisco's ability to understand English, and an appellate court would have deferred to the trial court's finding, *see Stevenson v. State*, 114 Nev. 674, 679, 961 P.2d 137, 140 (1998) ("[A] district court's findings of fact in a suppression hearing will not be disturbed on appeal if supported by substantial evidence."). Francisco also does not challenge the trial court's finding that the validity of Francisco's written consent was irrelevant where he had already given valid verbal consent. *Cf. Howe v. State*, 112 Nev. 458, 464 n.2, 916 P.2d 153, 158 n.2 (1996) ("The question of consent should be determined by analyzing whether the officers had permission at the time they entered."). We therefore conclude the district court did not err in denying this claim.

Finally, Francisco argues trial counsel was ineffective for failing to litigate his motion to suppress evidence to its logical conclusion and trial and appellate counsel were ineffective for failing to litigate a violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). None of these claims were raised in Francisco's petition, and we decline to consider them on appeal in the first instance. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_______________, C.J.
Silver



_______________, J.
Tao

_______________, J.
Gibbons

cc: Hon. Scott N. Freeman, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk