IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EDWARD GARZA,
Appellant,
vs.
DWIGHT NEVEN, WARDEN OF HIGH DESERT CORRECTIONAL FACILITY,
Respondent.

No. 72848

FILED

APR 11 2018

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

ORDER OF AFFIRMANCE

Edward Garza appeals from a district court order dismissing the postconviction petition for a writ of habeas corpus he filed on October 2, 2014.[1] Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Garza raised claims of prosecutorial misconduct, disclosure violations, and ineffective assistance of counsel in his timely first postconviction habeas petition. Although the district court conducted an evidentiary hearing, it did not support its ruling with adequate factual findings, *see* NRS 34.830(1), and it incorrectly relied upon NRS 34.745(4) and *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987), to dismiss the petition.[2] However, we conclude the district court reached the right result for the following reasons. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d

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

[2]NRS 34.745(4) does not apply because this was Garza's first postconviction habeas petition and NRS 34.745(4) only applies to "a second or successive petition." And *Maresca* does not apply because Garza was only required to "[t]ell [his] story briefly without citing cases or law." NRS 34.735 (setting forth the pleading requirements for a petition).

338, 341 (1970) (this court will affirm the judgment of a district court if it reached the right result albeit for a wrong reason).

Garza claimed the prosecutor committed misconduct by eliciting false testimony from a sheriff's deputy, knowingly presenting false evidence to the jury, and misrepresenting the evidence during the closing argument. However, he waived these claims by not pursuing them on direct appeal. *See* NRS 34.810(1)(b)(2); *Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) ("[C]laims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived."), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999). Garza also claimed the prosecutor committed misconduct by suggesting an acquittal would expose the county to a civil suit for millions of dollars, but the Nevada Supreme Court rejected this claim on direct appeal and its ruling is now the law of the case. *See Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975); *Garza v. State*, Docket No. 64640 (Order of Affirmance, June 12, 2014).

Garza claimed the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) by failing to disclose evidence of law enforcement officer misconduct, dash camera recordings, and his medical records. However, he has not demonstrated that the State could or should have known of the law enforcement officers' misconduct at the time of his trial.[3] *See Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000) (identifying the components of a *Brady* violation); *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (a petitioner is not entitled to postconviction relief if his claims

[3]We note Garza's jury trial ended August 5, 2013, and the newspaper article he relies upon in support his law-enforcement-officer-misconduct claim was dated July 4, 2014.

are bare or belied by the record). And, because he learned of the bases for his remaining *Brady* claims during the trial, he waived these claims by not raising them on direct appeal. *See* NRS 34.810(1)(b)(2); *Franklin*, 110 Nev. at 752, 877 P.2d at 1059.

Garza claimed trial and appellate counsel were ineffective. To establish ineffective assistance of trial counsel, a petitioner must demonstrate counsel's performance was deficient because it fell below an objective standard of reasonableness, and resulting prejudice in 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 because it fell below an objective standard of reasonableness, and resulting prejudice in that the omitted issue had a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). The petitioner must demonstrate both components of the ineffective-assistance inquiry—deficiency and prejudice. *Strickland*, 466 U.S. at 697.

First, Garza claimed trial counsel was ineffective for failing to interview Mike Reich. He asserted Reich's testimony would have bolstered his self-defense claim by showing that he was waiting outside for a friend and not lying in wait for the law enforcement officers as the State had argued. However, he has not explained how waiting outside for a friend demonstrates he was acting in self-defense when he shot at the law enforcement officers; therefore, he has not alleged specific facts that demonstrate the outcome of the trial would have been different if Reich had testified and he was not entitled to relief on this claim. *See Means v. State*,

120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004) (petitioner bears the burden of proving ineffective assistance of counsel).

Second, Garza claimed trial counsel was ineffective for failing to introduce information collected by the defense investigator into evidence at the trial. He asserted this information implicated several police officers and the prosecutor "in varied degrees of misconduct" and constituted exculpatory evidence. However, he has not shown that the investigator possessed exculpatory information or that the information would have been admissible at trial; therefore, he has not alleged specific facts that demonstrate the outcome of the trial would have been different if trial counsel had attempted to introduce the defense investigator's information into evidence and he was not entitled to relief on this claim. *See id.*

Third, Garza claimed trial counsel was ineffective for declining copies of notes and reports prepared by the State's expert witness. He asserted "[i]t is clearly axiomatic that to properly cross-examine an expert witness, counsel must be armed with the expert's reports." However, he has not shown that trial counsel was unprepared for his cross-examination of the State's expert witness; therefore, he has failed to alleged specific facts that demonstrate the outcome of the trial would have been different if trial counsel had accepted the expert witness' documents and he was not entitled to relief on this claim. *See id.*

Fourth, Garza claimed trial counsel was ineffective for failing to procure his medical records in a timely manner, erroneously stipulating to them, and not interviewing the surgeon. He asserted the medical records and the surgeon's testimony would have supported his self-defense claim and bolstered his credibility by showing he was shot in the stomach and not the hip as the State had argued. However, he has not shown that

information contained in his medical records and obtained from the surgeon would have proven he was shot in the stomach; therefore, he has failed to alleged specific facts that demonstrate the outcome of the trial would have been different if trial counsel had further investigated his medical history and he was not entitled to relief on this claim. *See id.*

Garza also claimed trial counsel was ineffective for failing to provide Janice Lujan's notes to the jury after the prosecutor implied she was lying; inquire as to whether the responding law enforcement officers were wearing "bumper mikes"; interview Sheriff DeMeo, Captain Brecht, and Sergeant Horn; move for a change of venue; suppress illegally seized items; request an EMT report; file a pretrial petition for a writ of habeas corpus; and "investigate I-COP." He further asserted trial counsel had a conflict of interest. However, these claims were nothing more than bare allegations and therefore he was not entitled to relief. *See Hargrove v. State*, 100 Nev. at 502-03, 686 P.2d at 225.

Finally, Garza claimed appellate counsel was ineffective for failing to raise the prosecutorial misconduct and *Brady* claims that he raised in his postconviction habeas petition on direct appeal. However, he has not shown that the prosecutor deliberately elicited false testimony about the I-COP recording system from a law enforcement officer, knowingly presented a photograph of the wrong car to the jury, or intentionally misrepresented evidence during closing argument. *See Valdez v. State*, 124 Nev. 1172, 1188-90, 196 P.3d 465, 476-77 (2008) (discussing the proper analysis of prosecutorial misconduct claims). His dash-camera-recording *Brady* claim lacked merit because the State presented evidence that there was nothing depicted on the recording and it was deleted. *See generally Daniel v. State*, 119 Nev. 498, 520, 78 P.3d 890, 905 (2003) ("Loss

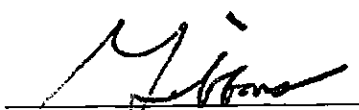
or destruction of evidence by the State violates due process 'only if the defendant shows either that the State acted in bad faith or that the defendant suffered undue prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed.'"). And his medical-records *Brady* claim lacked merit because he could have obtained his own medical records if he had exercised reasonable diligence. *See Rippo v. State*, 113 Nev. 1239, 1257, 946 P.2d 1017, 1028 (1997). Therefore, he has failed to demonstrate that any of these claims had a reasonable probability of success on appeal and he was not entitled to relief on his claim of ineffective assistance of appellate counsel.

Having concluded Garza is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.[4]

_____, C.J.
Silver

_____, J.
Tao



_____, J.
Gibbons

cc: Hon. Robert W. Lane, District Judge
Edward Garza
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk

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[4]We decline to consider the new evidence Garza appended to his informal appellate brief. *See Tabish v. State*, 119 Nev. 293, 312 n.53, 72 P.3d 584, 586 n.53 (2003) ("This court cannot consider matters not properly appearing in the record on appeal and therefore cannot consider . . . new evidence.").