

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JASON ROBERT SPARKS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73771

FILED

SEP 11 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Jason Robert Sparks appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Sparks argues the district court erred by denying his claims of ineffective assistance of counsel he raised in his May 10, 2016, petition and later-filed supplement. 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*). To demonstrate prejudice regarding the decision to enter a guilty plea, a petitioner must demonstrate a reasonable probability, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (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 if supported by substantial evidence and not clearly erroneous 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, Sparks argued his counsel was ineffective for failing to discover the State did not timely file a notice of intent to seek the habitual criminal enhancement. Sparks asserted he was not aware that the State had not filed the notice and he would not have entered a guilty plea had he been so informed. Sparks failed to demonstrate his counsel's performance was deficient or resulting prejudice.

At the evidentiary hearing, counsel testified Sparks was aware from the beginning of the case that he faced the habitual criminal enhancement, particularly in light of his prior sentence under the habitual criminal enhancement for a previous conviction. Counsel testified that Sparks agreed to stipulate in the guilty plea agreement to a sentence under the small habitual criminal enhancement out of concern that he would be sentenced under the large habitual criminal enhancement had he gone to trial. Counsel testified she discovered the State failed to file a timely notice of its intent to seek the habitual criminal enhancement at the sentencing hearing. Counsel informed the sentencing court of this issue and sought to have sentence imposed at that time because the habitual enhancement would not have been available. However, the sentencing court decided to continue the sentencing hearing to permit the State to file the notice as the parties had stipulated to a sentence under the small habitual criminal enhancement in the plea agreement. The State later filed the notice and

Sparks was sentenced to serve a term of 6 to 20 years in prison under the small habitual criminal enhancement.

The district court decided that counsel's performance was reasonable under these circumstances and the record supports the district court's conclusion. The district court further found that Sparks was aware he would be sentenced under the small habitual criminal enhancement as he stipulated to such a sentence in his guilty plea agreement. Given Sparks' knowledge that he would receive a sentence under the small habitual criminal enhancement, Sparks failed to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial had counsel discovered the State's failure to file the notice at an earlier time. Therefore, we conclude the district court did not err by denying this claim.¹

Second, Sparks argued his counsel was ineffective for failing to assert the State violated NRS 207.016 when it did not timely file a notice of intent to seek the habitual criminal enhancement and, therefore, should not be granted a continuance to correct its mistake. Sparks failed to demonstrate his counsel's performance was deficient or resulting prejudice. The district court found Sparks' counsel raised this argument during the sentencing hearing but the sentencing court did not agree with counsel's

¹Sparks also asserted his guilty plea was not knowingly entered because he was not aware the State had not filed a notice of intent to seek the habitual criminal enhancement. Given the district court's finding that Sparks had actual knowledge that he would be sentenced under the small habitual criminal enhancement as he stipulated to such a sentence in his guilty plea agreement, Sparks failed to demonstrate withdrawal of his guilty plea was necessary to correct a manifest injustice. See NRS 176.165; *Harris v. State*, 130 Nev. 435, 448, 329 P.3d 619, 628 (2014). Therefore, the district court did not err by denying this claim.

assertion. The district court found counsel appropriately advocated for Sparks given the circumstances in this matter, and the record supports the district court's finding. Sparks failed to demonstrate a reasonable probability of a different outcome had counsel raised further objections or arguments regarding this issue. Therefore, we conclude the district court did not err by denying this claim.


Next, Sparks argued 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*, 112 Nev. at 998, 923 P.2d at 1114. 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).

Sparks argued his appellate counsel was ineffective for failing to properly assert on appeal that the sentencing court committed error by continuing the sentencing hearing to permit the State time to file the notice of its intent to seek the habitual criminal enhancement. Sparks failed to demonstrate his counsel's performance was deficient or resulting prejudice. The district court found appellate counsel raised the underlying argument on appeal but the argument was not successful. The district court further found Sparks stipulated to a sentence under the small habitual criminal enhancement. Substantial evidence supports the district court's findings. Given the district court's findings, Sparks failed to demonstrate his

appellate counsel acted in an objectively unreasonable manner or a reasonable probability of success on appeal had counsel raised further arguments regarding the underlying issue. Therefore, we conclude the district court did not err by denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Silver


_____, J.
Gibbons

cc: Hon. Elissa F. Cadish, District Judge
Resch Law, PLLC d/b/a Conviction Solutions
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²The Honorable Jerome T. Tao did not participate in the decision in this matter.