

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT JAMES WALSH,
Appellant,
vs.
JAMES DZURENDA, DIRECTOR,
NEVADA STATE DEPARTMENT OF
CORRECTIONS; BRIAN WILLIAMS,
WARDEN; AND ADAM P. LAXALT,
ATTORNEY GENERAL,
Respondents.

No. 73540

FILED

JUL 17 2018

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

ORDER OF AFFIRMANCE

Robert James Walsh appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.

Walsh asserts the district court erred by denying the claims of ineffective assistance of trial counsel raised in his February 14, 2017, 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, and the petitioner must

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

demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

First, Walsh argued his trial counsel was ineffective for failing to assert methamphetamine is a schedule II controlled substance. Walsh failed to demonstrate his counsel's performance was deficient or resulting prejudice. Methamphetamine is classified as a schedule I controlled substance. See NRS 453.146 (stating the State Board of Pharmacy has the duty to classify controlled substances); NRS 453.166 (directing the State Board of Pharmacy to place a substance in schedule I if it "[h]as high potential for abuse" and it "[h]as no accepted medical use"); NAC 453.510(7) (classifying methamphetamine as a schedule I controlled substance). Accordingly, Walsh failed to demonstrate counsel acted in an objectively unreasonable manner by not raising this claim or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Second, Walsh argued his trial counsel was ineffective for failing to assert NRS 453.3385 was unconstitutional for failing to define a schedule I controlled substance. Walsh failed to demonstrate his counsel's performance was deficient or resulting prejudice. NRS 453.3385(1) refers to substances listed "in schedule I", and NRS 453.146 identifies the types of controlled substances that are to be classified as schedule I controlled substances. Because the statutes in chapter NRS 453 are meant to be read together, Walsh failed to demonstrate his counsel acted in an objectively unreasonable manner by failing to raise this claim. See *Williams v. State Dep't of Corr.*, 133 Nev. ___, ___, 402 P.3d 1260, 1262 (2017) ("This court avoids statutory interpretation that renders language meaningless or superfluous, and whenever possible . . . will interpret a rule or statute in

harmony with other rules or statutes.” (internal quotation marks and brackets omitted)). Walsh failed to demonstrate a reasonable probability of a different outcome had counsel asserted NRS 453.3385 was unconstitutional. Therefore, we conclude the district court did not err in denying this claim.

Third, Walsh argued his trial counsel was ineffective for failing to assert the trial court in Nye County lacked jurisdiction over his case because the State alleged that the crime arose in Clark County. Walsh cannot demonstrate either deficiency or prejudice for this claim because “[w]hen a public offense is committed in part in one county and in part in another . . . the venue is in either county,” NRS 171.030, and accordingly, the State appropriately brought this case in Nye County. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Walsh argued that his trial counsel was ineffective for failing to move to suppress the methamphetamine evidence because it was obtained from his codefendant’s vehicle without a warrant. Walsh failed to demonstrate his counsel’s performance was deficient or resulting prejudice. Non-owner passengers of a vehicle generally lack standing to challenge a search of a vehicle, see *Scott v. State*, 110 Nev. 622, 627-28, 877 P.2d 503, 507-08 (1994), and Walsh made no attempt to demonstrate he had a legitimate expectation of privacy in the car, see *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978) (“The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.”). Accordingly, Walsh failed to demonstrate counsel acted in an objectively unreasonable manner by not raising this claim or a reasonable probability of a different outcome had counsel done

so. Therefore, we conclude the district court did not err by denying this claim.

Fifth, Walsh argued his trial counsel was ineffective for failing to move for a judgment of acquittal due to insufficient evidence that he committed trafficking. Walsh failed to demonstrate his counsel's performance was deficient or resulting prejudice.

The record reveals a witness testified that Walsh agreed to sell a large amount of methamphetamine and Walsh agreed to accompany the witness to Pahrump to complete the sale. A detective testified he listened over the phone as Walsh discussed the details of the sale. Walsh, the witness, and two others then drove from Las Vegas to Pahrump with the methamphetamine. When they arrived in Pahrump, officers detained Walsh and secured the methamphetamine from an area of the vehicle easily accessible to Walsh. Walsh was later recorded during a jail phone call stating that he came to Pahrump to "deliver," but was stopped by the authorities when he arrived. An expert witness testified that the methamphetamine weighed in excess of 54 grams.

We conclude this testimony and evidence was sufficient to find Walsh committed high-level trafficking in a schedule I controlled substance. See NRS 453.3385(1)(c). Because there was sufficient evidence of Walsh's guilt presented at trial, Walsh failed to demonstrate counsel acted in an objectively unreasonable manner by failing to move for a judgment of acquittal or a reasonable probability of a different outcome had counsel done so. See NRS 175.381(2). Therefore, we conclude the district court did not err by denying this claim.

Sixth, Walsh argued his trial counsel was ineffective for failing to request that the jury be instructed on trafficking in a schedule II

controlled substance as a lesser-included offense. Walsh failed to demonstrate his counsel's performance was deficient or resulting prejudice.

We apply the elements test to determine whether an offense is a lesser-included offense of the charged offense so as to warrant a jury instruction. *See Barton v. State*, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006). An offense is "necessarily included" in the offense charged if "the offense charged cannot be committed without committing the lesser offense." *Id.* at 690, 30 P.3d at 1106 (quoting *Lisby v. State*, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966)). A comparison of the relevant statutes shows that it was possible to commit trafficking in a schedule I controlled substance without necessarily committing trafficking in a schedule II controlled substance. *Compare* NRS 453.3385 *with* NRS 453.3395. Thus, trafficking in a schedule II controlled substance was not a lesser-included offense of trafficking in a schedule I controlled substance, and Walsh was not entitled to an instruction on it. Accordingly, Walsh failed to demonstrate his counsel acted in an objectively unreasonable manner by failing to request this instruction or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Seventh, Walsh argued his trial counsel was ineffective for failing to pursue a procuring agent defense. Walsh failed to demonstrate his trial counsel's performance was deficient or resulting prejudice. "The procuring agent defense can be maintained only if the defendant were merely a conduit for the purchaser and in no way benefitted from the transaction." *Dixon v. State*, 94 Nev. 662, 664, 584 P.2d 693, 694 (1978). The evidence produced at trial demonstrated that Walsh personally

negotiated the methamphetamine sale, expected a benefit from the sale, and was not merely a conduit for the purchaser. Accordingly, Walsh failed to demonstrate counsel acted in an objectively unreasonable manner by not pursuing this defense or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Eighth, Walsh argued his trial counsel was ineffective for failing to discover and obtain records regarding the informant's criminal history and record as an informant for the Nye County Sheriff's Office. Walsh failed to demonstrate his counsel's performance was deficient or resulting prejudice. The informant testified regarding his criminal history and extensive work as an informant during the trial. Walsh did not demonstrate objectively reasonable counsel would have attempted to obtain further information regarding these issues. Given the informant's testimony regarding these issues, Walsh failed to demonstrate a reasonable probability of a different outcome had counsel investigated the informant's criminal history and work with law enforcement. Therefore, we conclude the district court did not err by denying this claim.

Ninth, Walsh argued his trial counsel was ineffective for vouching for the credibility of a Nye County detective during closing arguments. Walsh failed to demonstrate his counsel's performance was deficient or resulting prejudice. During his closing argument, Walsh's counsel stated that the detective was not lying, but argued that the detective may have misperceived the events of this case and that the facts presented at trial did not prove Walsh was guilty beyond a reasonable doubt. Walsh did not demonstrate that this argument amounted to an action of an objectively unreasonable defense counsel. Walsh failed to

demonstrate a reasonable probability of a different outcome had counsel argued this case in a different manner. Therefore, we conclude the district court did not err by denying this claim.

Tenth, Walsh argued his trial counsel was ineffective for failing to object when the trial court declined to supplement the jury instructions after the jury asked questions regarding the definition of trafficking during its deliberations. Walsh failed to demonstrate his counsel's performance was deficient or resulting prejudice. During its deliberations, the jury asked the trial court if the controlled substance had to be delivered over a state line to be considered trafficking, if delivery from Clark County to Nye County was sufficient to constitute trafficking, and for a definition of trafficking. The State requested an instruction to clarify that the substances did not have to be delivered across state lines, but defense counsel urged the trial court to simply refer the jury to the trafficking definition contained in the instructions. The trial court declined to supplement the already-given instructions, but referred the jury to the instructions that already provided the statutory definition of trafficking. Given the nature of the jury's questions, we conclude counsel's decision to urge the district court to direct the jury to review the instructions containing the statutory definition of trafficking was objectively reasonable.

In addition, Walsh did not propose an alternate instruction that would have provided clarity regarding trafficking and also would have been favorable to his defense. Accordingly, Walsh failed to meet his burden to demonstrate a reasonable probability of a different outcome had counsel requested additional instructions regarding trafficking. *See Jeffries v. State*, 133 Nev. ___, ___, 397 P.3d 21, 28 (2017) (“[A] district court does not abuse its discretion when it refuses to answer a jury question after giving

correct instructions if neither party provides the court with a proffered instruction that would clarify the jury's doubt or confusion.""). Therefore, we conclude the district court did not err in denying this claim.

Eleventh, Walsh argued his trial counsel was ineffective for failing to object to the admission of a recording of a jail phone call because it was altered and taken out of context. Walsh also asserted the State failed to disclose the recording in a timely manner and, therefore, should not have been able to utilize it at trial. Walsh failed to demonstrate his counsel's performance was deficient or resulting prejudice. During trial, a detective testified that the recording was of a phone call made from the jail utilizing Walsh's inmate account number and that the voice on the recording was Walsh's, as he was familiar with Walsh's voice from previous conversations. Walsh does not demonstrate counsel had any legal bases to object to the admission of the recording and a bare claim is insufficient to demonstrate he is entitled to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). In addition, Walsh does not specify when the recording was disclosed to the defense and, therefore, failed to meet his burden to demonstrate there was an untimely disclosure of evidence. *Cf.* NRS 174.285(2) (providing that disclosures must be made not less than 30 days prior to trial "or at such reasonable later time as the court may permit."). Accordingly, Walsh failed to demonstrate counsel acted in an objectively unreasonable manner by not raising this claim or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Twelfth, Walsh argued his trial counsel was ineffective for failing to object to the State's notice of intent to seek adjudication as a habitual criminal or challenge the validity of his prior convictions. Walsh

failed to demonstrate his counsel's performance was deficient or resulting prejudice. On direct appeal, the Nevada Supreme Court noted Walsh acknowledged he was personally aware of the State's intent to seek the habitual criminal enhancement, *Walsh v. State*, Docket No. 66107 (Order of Affirmance, October 16, 2015), and Walsh failed to demonstrate his counsel acted objectively unreasonable in this regard. In addition, the prior convictions the district court utilized to adjudicate Walsh a habitual criminal were facially legal, see *Dressler v. State*, 107 Nev. 686, 697-98, 819 P.2d 1288, 1295-96 (1991), and Walsh failed to demonstrate counsel acted in an objectively unreasonable manner with respect to challenging those convictions. Given the record in this matter, Walsh failed to demonstrate a reasonable probability of a different outcome had counsel objected to the notice of intent to seek adjudication as a habitual criminal or challenge the validity of Walsh's prior convictions. Therefore, we conclude the district court did not err by denying this claim.

Thirteenth, Walsh argued his trial counsel was ineffective for failing to assert the sentencing court erred by imposing a sentence of life without the possibility of parole because it was a greater sentence than his codefendants or other similarly situated defendants received. Walsh failed to demonstrate his counsel's performance was deficient or resulting prejudice. The Nevada Supreme Court has stated "sentencing is an individualized process; therefore, no rule of law requires a court to sentence codefendants to identical terms." *Nobles v. Warden*, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990). Because the sentencing court did not need to impose similar sentences to the codefendants or other criminal defendants, Walsh failed to demonstrate counsel acted in an objectively unreasonable manner by not pursuing this type of argument or a reasonable probability of a

different outcome had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Fourteenth, Walsh argued his trial counsel was ineffective for failing to perform an investigation to support the entrapment defense. Walsh failed to demonstrate his counsel's performance was deficient or resulting prejudice. Walsh did not demonstrate counsel could have discovered further information regarding an entrapment defense through reasonably diligent investigation. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (concluding petitioner failed to demonstrate prejudice where it was unclear what additional investigation would have uncovered). Walsh failed to demonstrate a reasonable probability of a different outcome had counsel performed further investigation related to an entrapment defense. Therefore, we conclude the district court did not err by denying this claim.

Next, Walsh argued his appellate counsel was ineffective. To prove ineffective assistance of appellate 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 the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113-144 (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, Walsh argued his appellate counsel was ineffective for failing to assert the trial court in Nye County lacked jurisdiction because

the crime arose in Clark County. As explained previously, Walsh cannot demonstrate either deficiency or prejudice for this claim because he was appropriately charged with the offense in Nye County. See NRS 171.030. Therefore, we conclude the district court did not err by denying this claim.

Second, Walsh argued his appellate counsel was ineffective for failing to assert there was insufficient evidence presented to demonstrate he committed trafficking in a controlled substance. Walsh failed to demonstrate his counsel's performance was deficient or resulting prejudice. As explained previously, a review of the record demonstrates there was sufficient evidence of Walsh's guilt of trafficking in a schedule I controlled substance presented at trial. See NRS 453.3385(1)(c); see also *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) ("The relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (internal quotation marks omitted)). Given the evidence produced at trial, Walsh failed to demonstrate counsel acted in an objectively unreasonable manner by failing to raise this issue on direct appeal or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Third, Walsh argued his appellate counsel was ineffective for failing to assert the trial court erred by declining to provide further instruction regarding the definition of trafficking after the jury asked questions during its deliberations. Walsh failed to demonstrate his counsel's performance was deficient or resulting prejudice. As trial counsel did not request a clarifying instruction regarding the definition of trafficking, and Walsh did not propose an alternate instruction defining

trafficking that was favorable to his defense, Walsh failed to meet his burden to demonstrate counsel acted in an objectively unreasonable manner by failing to raise this issue or a reasonable probability of a different outcome had counsel raised this issue on direct appeal. *See Jeffries*, 133 Nev. at ___, 397 P.3d at 28. Therefore, we conclude the district court did not err by denying this claim.


Fourth, Walsh argued his appellate counsel was ineffective for failing to argue on direct appeal that the trial court erred by admitting the recording of the jail phone call. Walsh failed to demonstrate his counsel's performance was deficient or resulting prejudice because he made a bare, unsupported claim and did not identify any bases upon which his appellate counsel should have pursued this claim. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Therefore, we conclude the district court did not err by denying this claim.


Next, Walsh argues the district court erred by declining to conduct an evidentiary hearing. To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific allegations not belied by the record and, if true, would entitle him to relief. *See id.* The district court concluded Walsh's claims did not meet that standard and the record before this court reveals the district court's conclusions in this regard were proper.

Finally, Walsh argues the district court erred by denying his request for the appointment of postconviction counsel. The appointment of postconviction counsel was discretionary in this matter. *See* NRS 34.750(1). After a review of the record, we conclude the district court did not abuse its discretion in this regard as this matter was not sufficiently complex so as to

warrant the appointment of postconviction counsel. *See Renteria-Novoa v. State*, 133 Nev. ___, ___, 391 P.3d 760, 760-61 (2017). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Kimberly A. Wanker, District Judge
Robert James Walsh
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk