

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EVINE D. BATTLE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74773-COA

FILED

JAN 17 2019

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

ORDER OF AFFIRMANCE

Evine D. Battle appeals from a district court order denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Battle argues the district court erred by denying the claims of ineffective assistance of trial counsel raised in his August 16, 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.

First, Battle argued his counsel was ineffective for failing to file a motion to suppress evidence obtained as a result of a pat-down search. Battle asserted the police officer did not have a reasonable suspicion to justify the pat-down search. Battle failed to demonstrate his counsel's

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

performance was deficient or resulting prejudice. During the trial, counsel explained to the trial court that she had not been able to file a motion to suppress evidence because she had only viewed the pertinent video recording depicting the pat-down search shortly before trial. Counsel explained the investigation into the facts of this case was limited as Battle had invoked his speedy trial rights, and as a result, she had not been able to pursue a motion to suppress evidence ahead of trial. Counsel therefore requested the district court to instruct the jury concerning the constitutionality of the pat-down search. The district court recognized the limitations imposed upon the defense given Battle's decision to invoke his speedy trial rights, but declined to utilize counsel's proposed instruction. Given the record in this matter and Battle's request for a speedy trial, we conclude Battle did not demonstrate counsel's performance fell below an objectively reasonable standard.

In addition, the facts in the record demonstrated the totality of the circumstances justified the pat-down search. *See Cortes v. State*, 127 Nev. 505, 511, 260 P.3d 184, 189 (2011). The evidence produced at trial demonstrated a person had frightened workers at a Jack in the Box restaurant and a worker called the police. When an officer arrived in the restaurant, he observed that Battle was wearing a hooded sweatshirt with the hood covering his head, dark sunglasses at night, and gloves. The officer attempted to talk with Battle, but Battle walked away from the officer and out of the restaurant at a brisk pace. The officer followed Battle and ordered Battle to stop and to raise his hands. Battle initially raised his hands, but soon lowered them and reached towards his pocket. The officer again commanded Battle to raise his hands and Battle complied. The officer testified that for safety reasons, he placed Battle in handcuffs and conducted a pat-down of Battle. The officer testified he discovered a pistol in Battle's front pocket. Battle's dress, his refusal to talk with the officer in

the restaurant, and his reach towards a pocket despite the command to raise his hands demonstrated a reasonable officer confronted with this situation could reasonably suspect that Battle was armed and that a pat-down was necessary for safety reasons. *See id.* Accordingly, Battle failed to demonstrate a reasonable probability of a different outcome had counsel moved to suppress the evidence obtained following the pat-down search. Therefore, we conclude the district court did not err by denying this claim.

Second, Battle claimed his trial counsel was ineffective for failing to move to suppress his statements due to a violation of his *Miranda*² rights. Battle failed to demonstrate his counsel's performance was deficient or resulting prejudice. Battle appeared to assert counsel should have sought suppression of his statement to the officer following the discovery of the firearm where he stated it was legal for him to carry a concealed weapon. The record demonstrated Battle made that statement directly after the officer discovered the firearm and did not make the statement under questioning by the officer. Considering the circumstances in which Battle made the challenged statement, he failed to demonstrate he was subjected to a custodial interrogation, and therefore, his statements were properly admitted at trial. *See Rosky v. State*, 121 Nev. 184, 191-92, 111 P.3d 690, 695-96, (2005). Accordingly, Battle failed to demonstrate reasonable counsel would have moved to suppress this statement 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.³

²*Miranda v. Arizona*, 384 U.S. 436 (1966).

³Battle also argues his trial counsel acted under a conflict of interest because she prioritized her other clients. However, Battle did not raise this claim before the district court and we decline to consider it in the first instance. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

Next, Battle 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 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. 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).

Battle claimed his appellate counsel was ineffective for failing to argue the kidnapping conviction should be dismissed because it was incidental to the robbery. Battle failed to demonstrate his counsel's performance was deficient or resulting prejudice. The record reveals that Battle filed letters written by his appellate counsel in which counsel acknowledged Battle wished for him to raise a challenge to the kidnapping conviction on appeal, but counsel informed Battle he believed that issue did not have merit and he would not pursue meritless claims on appeal. Tactical decisions such as this "are virtually unchallengeable absent extraordinary circumstances," *Ford*, 105 Nev. at 853, 784 P.2d at 953, which Battle did not demonstrate.

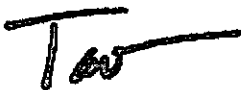
In addition, Battle did not demonstrate a reasonable probability of a different outcome had counsel argued the kidnapping charge was incidental to the robbery on direct appeal. The evidence produced at trial demonstrated Battle robbed a game store employee at gunpoint. After obtaining the store's money, Battle ordered the employee to the back of the store, zip-tied her hands to a bathroom stall, and left her alone in the store bathroom. The movement to a secluded portion of the store and the

restraint of the victim were not necessary to complete the robbery and substantially increased risk of danger to the victim. *See Mendoza v. State*, 122 Nev. 267, 275, 130 P.3d 176, 181 (2006). Therefore, we conclude the district court did not err by denying this claim.

Finally, Battle 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 Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). The district court concluded Battle's claims did not meet that standard and the record before this court reveals the district court's conclusions in this regard were proper. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, A.C.J.
Douglas


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Douglas W. Herndon, District Judge
Evine D. Battle
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk