

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENNETH ANDREW PALMER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70694

FILED

JUN 14 2017

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

ORDER OF AFFIRMANCE

Kenneth Andrew Palmer appeals from a district court order denying the postconviction petition for a writ of habeas corpus he filed on March 23, 2016.¹ Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

First, Palmer appears to claim the district court erred by rejecting his claim that his due process rights were violated when a police officer was allowed to testify about telephone conversations he had with a confidential informant. The district court found this claim had previously been decided on direct appeal, it was barred by the law of the case doctrine, and it could not be reargued in a habeas petition. The district court's factual findings are supported by the record and are not clearly wrong, and we conclude it did not err by rejecting this claim. See *Pellegrini v. State*, 117 Nev. 860, 888, 34 P.3d 519, 538 (2001); *Palmer v. State*, Docket No. 64601 (Order of Affirmance, October 15, 2015).

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

Second, Palmer claims the district court erred by denying his claim that defense counsel was ineffective for failing to challenge the legality of the search and seizure of his cellular telephone and money. The district court found the telephone and the money were obtained as a result of a consensual pat-down, any challenge raised by defense counsel would have been futile, and Palmer was unable to demonstrate ineffective assistance of counsel. The district court's factual findings are supported by the record and are not clearly wrong, and we conclude Palmer has not demonstrated defense counsel was ineffective in this regard. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006); *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).


Third, Palmer claims the district court erred by denying his claim that defense counsel was ineffective for failing to challenge the legality of the search and seizure of drug evidence found inside the van. We decline to address this claim because it was not raised in Palmer's habeas petition or considered by the district court in the first instance. See *Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004).


Fourth, Palmer claims the district court erred by not considering the application of *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), and *Minnesota v. Dickerson*, 508 U.S. 366 (1993), to his case. The district court denied this claim because it did not challenge the validity of a guilty plea or the effectiveness of defense counsel as required by *Franklin v. State*, 110 Nev. 750, 751-52, 877 P.2d 1058, 1059 (1994), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 979 P.2d 222


(1999). However, Palmer's conviction was the result of a trial, not a guilty plea, and therefore *Franklin* does not apply.

We note Palmer's constitutional claim was available when *Dickerson* was decided in 1993, and, consequently, it was available at the time of Palmer's trial. As Palmer has not demonstrated good cause for his failure to raise this claim in the trial court, we conclude the claim is procedurally barred and the district court reached the right result in denying the claim. See NRS 34.810(1)(b), (3); *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

Having concluded Palmer is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Douglas W. Herndon, District Judge
Kenneth Andrew Palmer
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk