IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EVARISTO JONATHAN GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71525

ORDER OF AFFIRMANCE

Evaristo Jonathan Garcia appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.[1] Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Garcia argues the district court erred in denying his claims of ineffective assistance of counsel raised in his June 10, 2016, petition. To prove ineffective assistance of 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 there is a reasonable probability that, 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

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

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

First, Garcia argued his attorneys were ineffective for failing to investigate a State's witness. Garcia asserted counsel did not know the witness was in State custody as a material witness and counsel did not have sufficient time to prepare to cross-examine the witness. Garcia failed to demonstrate his attorneys' performances were deficient or resulting prejudice. During trial, a State's witness was held in custody pursuant to a material witness warrant. After the State questioned the witness and the jury members were excused for the evening, Garcia's counsel informed the district court the defense had spent a considerable amount of resources attempting to locate that witness prior to trial and had been unable to locate him. The State acknowledged it had the opportunity to talk to the witness after he had been taken into custody and the defense requested the district court to permit the defense attorneys to question the witness that evening so as to permit them to be prepared to cross-examine him the next day. The district court granted that request. The following day, the defense attorneys informed the district court they had had sufficient time with the witness and were prepared to cross-examine him.

Under these circumstances, Garcia failed to demonstrate these were the actions of objectively unreasonable defense attorneys. As the attorneys informed the district court they had attempted to locate the witness, and following their discussion with him after he was taken into custody, were prepared to cross-examine the witness, Garcia did not demonstrate a reasonable probability of a different outcome had counsel further investigated the witness or prepared to cross-examine him. Therefore, we conclude the district court did not err in denying this claim.

Second, Garcia argued his attorneys were ineffective for failing to request a mistrial or a new trial due to introduction of prejudicial gang information. Garcia failed to demonstrate his attorneys' performances were deficient or resulting prejudice. Garcia cannot demonstrate his attorneys' performances were deficient in this regard because they orally moved for a mistrial during the trial and filed a motion for new trial after the jury's verdict due to introduction of the gang information. Further, the Nevada Supreme Court has already concluded introduction of the gang information was not improper because the pretrial discovery reasonably suggested the evidence supported a gang enhancement, but the State promptly withdrew the enhancement when it could not reasonably argue the evidence supported it. *Garcia v. State*, Docket No. 64221 (Order of Affirmance, May 18, 2015). Under these circumstances, Garcia failed to demonstrate a reasonable probability of a different outcome had counsel made further attempts to gain a mistrial or new trial due to introduction of gang information. Therefore, we conclude the district court did not err in denying this claim.

Third, Garcia argued his counsel was ineffective for failing to object when the district court sentenced him to serve an equal and consecutive term for the deadly weapon enhancement. Garcia asserted the proper sentence for the deadly weapon enhancement was only a term of 1 to 20 years in prison. Garcia failed to demonstrate either deficiency or prejudice for this claim because the proper penalty for the use of a deadly weapon is the penalty that was in effect when the offense was committed. *See State v. Second Judicial Dist. Court (Pullin)*, 124 Nev. 564, 572, 188 P.3d 1079, 1084 (2008). Garcia committed the murder in 2006 and at that time "NRS 193.165 mandated that a defendant serve an equal and

consecutive sentence for the use of a deadly weapon in the commission of the primary offense." *Id.* at 567, 188 P.3d at 1081; *see also* 1995 Nev. Stat., ch. 455, § 1, at 1431. Therefore, we conclude the district court did not err in denying this claim.

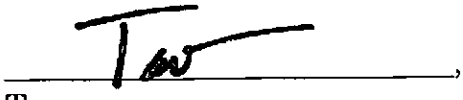
Next, Garcia argued his appellate counsel was ineffective. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. *Kirksey 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).

Garcia argued his appellate counsel was ineffective for failing to contact him during the direct appeal proceedings. Garcia asserted he could have advised counsel of additional claims which could have been raised on appeal. Garcia failed to demonstrate his counsel's performance was deficient or resulting prejudice. Garcia failed to identify any claims he would have sought to raise on appeal that would have had a reasonable probability of success. A bare claim, such as this one, is insufficient to demonstrate a petitioner is entitled to relief. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, we conclude the district court did not err in denying this claim.

Finally, Garcia appears to assert the district court erred in declining to appoint postconviction counsel to represent him. 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.

Having concluded Garcia is not entitled to relief, we ORDER the judgment of the district court AFFIRMED.[2]



_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Richard Scotti, District Judge
Evaristo Jonathan Garcia
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[2]The Honorable Abbi Silver, Chief Judge, did not participate in the decision in this matter.