

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LERONE GIBSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 69809

**FILED**

AUG 16 2016

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Appellant Lerone Gibson argues the district court erred in denying his claim of ineffective assistance of trial counsel raised in his November 15, 2012, petition.<sup>1</sup> 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.

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<sup>1</sup>The State argues the district court lacked jurisdiction to consider the petition in this matter because Gibson expired his sentence and was released from custody during the litigation of the petition. This court has already considered and rejected this claim. *Gibson v. State*, Docket No. 64684 (Order of Reversal and Remand, January 21, 2015). The doctrine of the law of the case prevents further litigation of this issue, and therefore, we decline to reconsider this claim. See *Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

*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 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).<sup>2</sup>

Gibson argues his trial counsel were ineffective for failing to investigate the school records pertaining to one of Gibson's daughters. Gibson asserts counsel could have discovered information showing that a separate court proceeding related to an allegation regarding his daughter's truancy was dismissed due to her enrollment in a homeschooling program. Gibson failed to demonstrate his trial counsels' performances were deficient or resulting prejudice. At the evidentiary hearing, counsel

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<sup>2</sup>The State asserts the district court erred by declining to dismiss the petition due to application of the procedural bars. We note that the petition was not timely filed and was Gibson's second petition. The district court concluded Gibson had good cause to excuse the procedural bars due to official interference. See *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); *Gonzales v. State*, 118 Nev. 590, 595, 53 P.3d 901, 904 (2002). The district court found prison officials failed to deliver Gibson's petition to the postal services in a timely manner, and thus, caused Gibson's petition to be delayed beyond the timely-filing deadline. As the district court's factual findings regarding good cause are entitled to deference, we conclude the district court properly declined to dismiss Gibson's petition as procedurally barred. See *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012).

testified they received and reviewed the school records. During trial, counsel presented evidence regarding the daughter's participation in a homeschooling program. Based upon the record before this court, Gibson fails to demonstrate it was objectively unreasonable for counsel to fail to perform additional actions with respect to the school records.

In addition, the daughter testified she spent a substantial amount of her time helping her father rather than attending school, homeschool or otherwise. Under these circumstances, Gibson fails to demonstrate a reasonable probability of a different outcome at trial had counsel conducted further investigation into the daughter's school records. Therefore, we conclude the district court did not err in denying this claim.


Next, Gibson argues his appellate counsel was ineffective for failing to adequately assert on appeal that the district court erred in permitting a child protective services' investigator to testify that the children's wounds were caused by an extension cord. Gibson states counsel should have argued the investigator was not permitted to testify regarding medical causation because the investigator was not an expert in that area.


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).

Gibson failed to demonstrate appellate counsel's performance was deficient or resulting prejudice. On appeal, the Nevada Supreme Court concluded the district court properly permitted the investigator to state the children's wounds were consistent with being struck by an extension cord because such an opinion was not based upon specialized, technical, or scientific knowledge. *Gibson v. State*, Docket No. 57193 (Order of Affirmance, July 15, 2011). In addition, the children testified Gibson struck them with an extension cord, causing their wounds. Under these circumstances, Gibson fails to demonstrate it was objectively unreasonable for appellate counsel not to raise additional arguments regarding this testimony. Gibson also fails to demonstrate there was a reasonable likelihood of success on appeal had counsel raised further arguments regarding this testimony. Therefore, we conclude the district court did not err in denying this claim.

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

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Elizabeth Goff Gonzalez, District Judge  
Matthew D. Carling  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk