

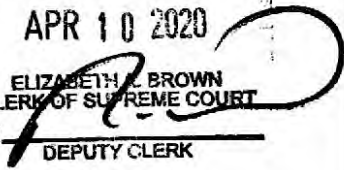
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THOMAS JUSTIN SJOBERG,  
Appellant,  
vs.  
ISIDRO BACA, WARDEN; AND THE  
STATE OF NEVADA,  
Respondents.

No. 77990-COA

**FILED**

APR 10 2020

ELIZABETH L. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Thomas Justin Sjoberg appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

*Ineffective assistance of defense counsel*

Sjoberg argues the district court erred by denying the claims of ineffective assistance of counsel raised in his November 1, 2017, petition and later-filed supplement. 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 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*). To

20-13697

demonstrate prejudice regarding the decision to enter an *Alford*<sup>1</sup> plea, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). 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).

First, Sjoberg argued that his counsel was ineffective for coercing or causing Sjoberg to enter an unknowing and involuntary plea. Sjoberg asserted his counsel did not investigate the case and did not communicate with him concerning the evidence, available defenses in this matter, and potential penalties.

At the evidentiary hearing, Sjoberg's counsel testified she and her assistant conducted an investigation of the allegations against Sjoberg. Counsel testified she met with Sjoberg multiple times, reviewed the evidence and possible defenses with him, and explained the potential penalties. Counsel further testified that she believed there was a likelihood that Sjoberg would have been convicted had he proceeded to trial because

---

<sup>1</sup>*North Carolina v. Alford*, 400 U.S. 25 (1970).

the victim appeared to her to have been a credible witness. Counsel testified that based upon her review of the case, she advised Sjoberg to accept the State's plea offer but explained to him that he had to make the ultimate decision regarding the offer. The district court found counsel was credible and Sjoberg's testimony concerning these issues was not credible. Substantial evidence supports the district court's findings. Sjoberg failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability he would have refused to enter an *Alford* plea and would have insisted on proceeding to trial had counsel performed different actions. Therefore, we conclude the district court did not err by denying this claim.

Second, Sjoberg argued his counsel was ineffective for failing to move to suppress his statement to the police. Sjoberg contended that counsel should have investigated his mental difficulties and hearing loss, and then asserted that those issues caused his statement to have been taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), NRS 171.1526, and NRS 171.1538.

At the evidentiary hearing, Sjoberg's counsel testified that she was aware Sjoberg had cerebral palsy and hearing loss. However, she testified that she had no trouble communicating with him and he had not indicated to her that he had been unable to understand the deputy during the interview. Counsel also testified that based upon her review of the interview, she concluded that Sjoberg had not undergone a custodial interrogation and, therefore, *Miranda* did not apply. She stated she did not file a motion to suppress because she concluded that it would not have been

successful. Counsel also testified that she did not believe that Sjoberg's statements to the deputy were significant and concluded that Sjoberg would have likely been convicted based upon the victim's statements even if his own had been suppressed.

The district court found that counsel's decisions with respect to Sjoberg's interview were reasonable under the circumstances in this case. Substantial evidence supports the district court's decision. *See Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). The district court also found that the video recording depicting the interview demonstrated that the deputy advised Sjoberg of his *Miranda* rights and Sjoberg nodded in response, indicating he understood those rights. Because Sjoberg indicated he understood his rights and continued to talk to the deputy, the district court found Sjoberg failed to demonstrate a reasonable probability he would have refused to enter an *Alford* plea and would have insisted on proceeding to trial had counsel moved to suppress his statement based upon *Miranda*.

In addition, the district court found Sjoberg failed to demonstrate a reasonable probability he would have refused to enter an *Alford* plea and would have insisted on proceeding to trial had counsel moved to suppress his statement based on NRS 171.1536 and NRS 171.1538. The district court found Sjoberg was not under arrest when the interview took place. Therefore, the district court determined NRS 171.1536 and NRS 171.1538 did not apply to Sjoberg's interview because those statutes discuss actions to be taken after a person with a communications disability or other disability has been arrested.

Substantial evidence supports the district court's findings. Therefore, we conclude the district court did not err by denying this claim.

Third, Sjoberg appeared to argue his counsel was ineffective for failing to utilize available evidence when counsel moved to withdraw Sjoberg's guilty plea. Sjoberg contended his second counsel should have presented his testimony and expert testimony concerning his difficulties caused by cerebral palsy and hearing loss in an effort to support his claim that his statement to the deputy should have been suppressed as he did not knowingly waive his *Miranda* rights. The district court found that *Miranda* was not applicable because Sjoberg had not undergone a custodial interrogation. The district court also found that even if *Miranda* did apply, the deputy had advised Sjoberg of his rights and Sjoberg knowingly and voluntarily waived those rights. Based upon those findings, the district court concluded Sjoberg did not demonstrate his second counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel called additional witnesses in support of the motion to withdraw guilty plea. Substantial evidence supports the district court's findings. Therefore, we conclude the district court did not err by denying this claim.

*Ineffective assistance of appellate counsel*

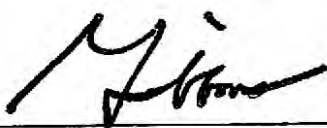
Sjoberg argues the district court erred by denying his claims concerning the ineffective assistance of his appellate counsel. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted

issue would have a reasonable probability of success on appeal. *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114. 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*, 105 Nev. at 853, 784 P.2d at 953. Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. We give deference to the 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*, 121 Nev. at 686, 120 P.3d at 1166.

First, Sjoberg argued his appellate counsel was ineffective for failing to provide a sufficient appellate appendix on appeal from the denial of his presentence motion to withdraw guilty plea. The district court found that counsel should have included a transcript and video recording of Sjoberg's interview with the deputy in the appendix filed in support of his direct appeal. However, the district court found that Sjoberg's underlying claim concerning the violation of his *Miranda* rights when he participated in the interview lacked merit. The district court found Sjoberg's underlying claim lacked merit because Sjoberg had not been in custody when he was interviewed and he had also knowingly waived his *Miranda* rights. Substantial evidence supports the district court's finding. Because Sjoberg's underlying claim lacked merit, Sjoberg failed to demonstrate a reasonable likelihood of success on appeal had his appellate counsel included a transcript and video recording of his interview in the appendix. Therefore, we conclude the district court did not err by denying this claim.

Second, Sjoberg argued his appellate counsel was ineffective for failing to argue that his statement to the police should have been suppressed pursuant to NRS 171.1536 and NRS 171.1538. As stated previously, the district court found NRS 171.1536 and NRS 171.1538 did not apply to Sjoberg's interview because those statutes discuss actions to be taken after a person with a communications disability or other disability has been arrested and Sjoberg had not been arrested when he participated in the interview. Substantial evidence supports the district court's findings, and Sjoberg failed to demonstrate his appellate counsel was deficient for not raising the underlying claim on direct appeal. Sjoberg also failed to demonstrate a reasonable likelihood of success on appeal had counsel argued his statements should have been suppressed pursuant to NRS 171.1536 and NRS 171.1538. Therefore, we conclude the district court did not err by denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. John Schlegelmilch, District Judge  
Karla K. Butko  
Attorney General/Carson City  
Lyon County District Attorney  
Third District Court Clerk