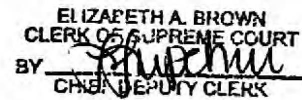
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES THEODORE SHARKEY,
Appellant,
vs.
JAMES DZURENDA, NDOC DIRECTOR; JERRY HOWELL, WARDEN; SOUTHERN DESERT CORRECTIONAL CENTER; AND THE STATE OF NEVADA,
Respondents.

No. 79294-COA



APR 27 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

James Theodore Sharkey appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 26, 2019. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Sharkey argues the district court erred by denying his ineffective-assistance-of-appellate-counsel claims and not conducting an evidentiary hearing. 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. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *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

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appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). 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 v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Sharkey claimed appellate counsel was ineffective for failing to argue his 2014 misdemeanor battery constituting domestic violence conviction did not qualify to enhance his current conviction to a felony. Sharkey argued he pleaded his second offense down to a first offense and was told by his attorney and the State that it could not be used to enhance a future domestic violence to a felony.

At sentencing, Sharkey challenged his 2014 conviction arguing that he pleaded guilty to a first offense battery constituting domestic violence and he was not informed it could be used to enhance his next battery constituting domestic violence to a felony. He did not argue that the State told him his 2014 conviction could not be used to enhance his next conviction to a felony and nothing in the record supports this assertion. Therefore, appellate counsel was limited on appeal to arguing that Sharkey was not informed his 2014 conviction could be used to enhance his next conviction to a felony.

The district court found Sharkey was informed, at the time he pleaded guilty in 2014, of the penalties for first, second, and third battery constituting domestic violence. And Sharkey was informed in the 2014 "Admonishment of Rights" that by pleading to this offense, Sharkey

"understand[s] the State will use this conviction, and any other prior conviction from this or any other state which prohibits the same or similar conduct, to enhance the penalty for any subsequent offense." Based on this, the district court concluded Sharkey was given appropriate clarification and warning of possible future enhancements. *See State v. Second Judicial Dist. Court (Kephart)*, 134 Nev. 384, 392, 421 P.3d 803, 808-09 (2018). Therefore, the district court also concluded that Sharkey failed to demonstrate this claim would have a reasonable probability of success on appeal. The record supports the district court's findings, and we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Sharkey claimed appellate counsel was ineffective for failing to argue the State failed to prove he was represented by counsel during one of his prior misdemeanor convictions. Specifically, he claims that he initialed both portions of the form where it said he was represented by counsel and he was not represented by counsel. Further, while there is a signature in the signature line for an attorney, instead of putting his or her bar number on the next line, the person put the date. Therefore, Sharkey states this document does not show on its face that he was represented by counsel.

Sharkey did not properly object to his prior conviction on this ground before the trial court; therefore, had appellate counsel raised this claim, it would have been subject to plain error analysis. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48-49 (2018), *cert. denied*, 139 S. Ct. 415 (Oct. 29, 2018). To demonstrate plain error, Sharkey would have had to show there was an error, the error was plain or clear, and the error affected his substantial rights. *See id.* at 50, 412 P.3d at 48.

The district court found that Sharkey initialed the portion of the form that said he was represented by counsel. The form shows that the initials in the box for not being represented by counsel were crossed out. Further, there is an attorney's signature in the signature line. Therefore, the district court found that Sharkey failed to demonstrate any error and failed to demonstrate this claim would have had a reasonable probability of success on appeal. Thus, the district court concluded appellate counsel was not ineffective for failing to raise this claim on appeal. The record supports the findings of the district court, and we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Sharkey claimed appellate counsel was ineffective for failing to argue that the trial court erred by denying his motion to suppress. Specifically, he claimed the letters found in his home that he wrote to his roommate should have been suppressed because the victim in this case acted under "the color of law" when she entered his home, found the letters, and turned them over to the State.

Here, the district court found that the victim entered the home to retrieve her belongings, not to conduct a search on behalf of the State. While retrieving her belongings, she found the letters and then contacted the district attorney's office. She was instructed to make copies of the letters and turn them over to the office. The district court found that because the victim did not enter the home and conduct a search at the request of the State, she was not a "state actor" or "acting under the color of law" and the evidence did not need to be suppressed. Therefore, the district court concluded Sharkey failed to demonstrate this claim had a reasonable probability of success on appeal and appellate counsel was not ineffective for failing to pursue this claim.

The record supports the findings and conclusions of the district court. "The Fourth Amendment simply does not apply where evidence is discovered and turned over to the government by private citizens." *Radkus v. State*, 90 Nev. 406, 408, 528 P.2d 697, 698 (1974). Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fourth, Sharkey claimed appellate counsel was ineffective for failing to argue the State withheld *Brady*[1] material from him. Specifically, he argued the State only gave him paper copies of the photographs of the victim. "[T]here are three components to a *Brady* violation: the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material." *Mazzan v. Warden*, 116 Nev. 48, 67, 993 P.3d 25, 37 (2000).

The district court found the evidence was not withheld because the State provided Sharkey with copies of the photographs. Therefore, the district court concluded Sharkey failed to demonstrate this claim would have had a reasonable probability of success on appeal. The record supports the district court's finding, and we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fifth, Sharkey argued appellate counsel was ineffective for failing to file a reply brief on appeal. Sharkey failed to demonstrate that had counsel filed a reply brief, his appeal would have had a reasonable probability of success. Therefore, he failed to demonstrate counsel was deficient or that he was prejudiced. Accordingly, we conclude the district

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[1]*Brady v. Maryland*, 373 U.S. 83 (1963).

court did not err by denying this claim without first conducting an evidentiary hearing.

Next, Sharkey raised several other ineffective assistance of appellate claims in numerous supplemental pleadings. On appeal, Sharkey claims the district court erred by denying his petition without considering these claims. NRS 34.750(5) states that "[n]o further pleadings may be filed except as ordered by the court." The district court did not give Sharkey permission to file further pleadings; therefore, we conclude the district court did not abuse its discretion by not considering the other claims Sharkey raised in his numerous supplemental pleadings. Further, we decline to consider these claims for the first time on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

Next, Sharkey claims the district court erred by denying the claims underlying his ineffective-assistance-of-appellate-counsel claims as procedurally barred. The district court determined that these claims could have been raised on appeal from Sharkey's judgment of conviction, *see* NRS 34.810(1)(b)(2), and he failed to demonstrate good cause and prejudice to overcome the procedural bar, *see* NRS 34.810(1)(b).

On appeal, Sharkey argues he had good cause and prejudice to overcome the procedural bar because: (1) the federal courts have found NRS 34.810(1)(b) to be an inadequate procedural bar, (2) his claims implicated the constitution or involved plain error, (3) the district court could *sua sponte* decide the issues on the merit, and (4) he received ineffective assistance of appellate counsel. Sharkey's first three good cause claims were not raised in his petition below, *see* NRS 34.735 (requiring a petitioner to plead good cause on the face of the petition), and we decline to consider them for the first time on appeal, *see McNelton*, 115 Nev. at 416, 990 P.2d

at 1276. As to his claim of ineffective of assistance of appellate counsel, as stated above, Sharkey failed to demonstrate that any of the claims he wanted counsel to raise on appeal would have had a reasonable probability of success on appeal. Therefore, this claim did not provide good cause to overcome the procedural bar. Accordingly, we conclude the district court did not err by denying his underlying claims as procedurally barred.

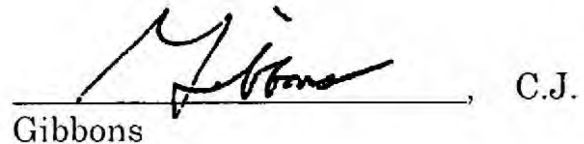
Next, Sharkey claims the district court erred by denying his petition when he did not receive the State's reply to his petition. Sharkey claims the State only electronically filed its reply. Contrary to Sharkey's claim, the State's reply specified it was mailed to Sharkey on May 28, 2019. Further, even if Sharkey did not receive a copy of the State's response before the district court denied his petition, Sharkey fails to demonstrate his substantial rights were violated. *See* NRS 178.598 (stating "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"). Because the State did not file a motion to dismiss, Sharkey did not have the right to respond to the State's reply. *See* NRS 34.750(4), (5). Therefore, we conclude Sharkey failed to demonstrate the district court erred by denying the petition.

Finally, Sharkey claims the district court erred by denying his motion to appoint counsel. The appointment of counsel in this matter was discretionary. *See* NRS 34.750(1). When deciding whether to appoint counsel, the district court may consider factors including, whether the issues presented are difficult, whether the petitioner is unable to comprehend the proceedings, or whether counsel is necessary to proceed with discovery. *Id.* Because the district court granted Sharkey leave to proceed in forma pauperis and his petition was a first petition not subject to summary dismissal, NRS 34.745(1), (4), Sharkey met the threshold

requirements for the appointment of counsel. *See* NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 761 (2017). However, the district court found that the issues in this matter were not difficult, Sharkey was able to comprehend the proceedings, and discovery with the aid of counsel was not necessary. *See* NRS 34.750(1); *Renteria-Novoa*, 133 Nev. at 76, 391 P.3d at 761. Therefore, the district court denied Sharkey's motion to appoint counsel. The record supports the decision of the district court, and we conclude the district court did not abuse its discretion by denying the motion for the appointment of counsel.

Having concluded Sharkey is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.



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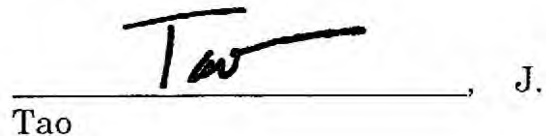
Gibbons



____________________, J.
Tao

____________________, J.
Bulla

cc: Hon. Michael Villani, District Judge
James Theodore Sharkey
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk