

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TEAG LANIER FOX,
Appellant,
vs.
BRIAN WILLIAMS; AND THE STATE
OF NEVADA,
Respondents.

No. 79675-COA

FILED

AUG 10 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Teag Lanier Fox appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Ineffective assistance of trial counsel

Fox argues the district court erred by denying the claims of ineffective assistance of trial counsel he raised in his June 11, 2019, petition. 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, 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 687. To warrant an evidentiary hearing, the 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, Fox claimed his trial counsel was ineffective for failing to investigate eyewitnesses, character witnesses, and expert witnesses. Fox asserted that potential eyewitnesses may have supported his assertion of self-defense and character witnesses may have testified he did not dislike the police. Fox also contended trial counsel should have investigated whether expert witnesses would have provided favorable testimony concerning the forensic evidence, the police reports, and his state of mind. The district court reviewed Fox's petition and found that Fox's claims concerning potential witnesses were bare and unsupported or the potential testimony would have been irrelevant. The district court also found that overwhelming evidence of Fox's guilt was presented at trial. The district court therefore found that Fox did not demonstrate that his claims regarding investigation of potential witnesses warranted relief. *See id.* The record supports the district court's decision, and we conclude the district court did not err by denying these claims without conducting an evidentiary hearing.

Second, Fox claimed his trial counsel was ineffective for declining to give an opening statement. After the State's opening statement, counsel reserved the defense opening statement. However, counsel did not give an opening statement prior to the presentation of the defense's testimony and evidence. The defense proceeded to present

testimony and other evidence in support of Fox's assertion that the officer must have believed his vaping device was a firearm and Fox only used his firearm after the officer drew a firearm. The purpose of an opening statement is merely to explain to the judge and jury the evidence that a party believes will be presented during trial. *Watters v. State*, 129 Nev. 886, 889–90, 313 P.3d 243, 247 (2013). Because Fox was able to present his testimony and evidence to the jury in support of his self-defense theory, he did not demonstrate a reasonable probability of a different outcome had counsel presented an opening statement. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Fox claimed his trial counsel was ineffective for failing to properly cross-examine witnesses. Fox contended counsel should have highlighted inconsistencies between the witnesses' testimonies concerning the officer's actions during the shooting and should have posed questions in an effort to challenge testimony concerning Fox's feelings toward police officers. The district court concluded the record demonstrated that counsel appropriately cross-examined witnesses concerning these issues, and Fox did not demonstrate his counsel's performance in this regard was objectively unreasonable. Fox also failed to demonstrate a reasonable probability of a different outcome had counsel posed different questions to the challenged witnesses in light of the overwhelming evidence of his guilt. Therefore, we

conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Fox claimed his trial counsel was ineffective for failing to properly question Fox concerning his version of events and his mental health issues. Fox also contended counsel was ineffective for failing to utilize the vaping device as an exhibit in an effort to bolster Fox's assertion that the officer mistook the vaping device for a firearm. The district court found the record revealed counsel appropriately questioned Fox during trial. The district court also found counsel utilized a photographic exhibit of the vaping device during Fox's testimony. Based on the record, the district court found Fox failed to demonstrate that counsel's performance when questioning Fox was objectively unreasonable. The district court also found Fox failed to demonstrate a reasonable probability of a different outcome had counsel further questioned him about these issues or utilized evidence concerning the vaping device in a different manner. The record supports the district court's decision, and we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fifth, Fox claimed his trial counsel was ineffective for failing to object when the State violated his right to attorney/client privilege as it asked if he had rehearsed or discussed his testimony with counsel prior to trial. Fox cannot demonstrate his counsel's performance was objectively unreasonable because counsel objected following the challenged question. In addition, this court concluded on direct appeal that any error stemming

from this question was harmless, *see Fox v. State*, Docket No. 74333-COA (Order of Affirmance, September 24, 2018), and, therefore, Fox failed to demonstrate a reasonable probability of a different outcome had counsel performed different actions with respect to the challenged question. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Sixth, Fox claimed his trial counsel was ineffective for failing to request a mistrial because the State violated pretrial orders and failed to provide discovery and *Brady*¹ material. During the sentencing hearing, Fox personally requested a mistrial based upon these issues, but the trial court denied Fox's motion for mistrial. Because the trial court considered and rejected Fox's motion for mistrial, Fox did not demonstrate a reasonable probability of a different outcome had counsel also moved for a mistrial based upon these issues. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Seventh, Fox claimed his trial counsel was ineffective because counsel waited until 13 days before the start of trial to meet with him to discuss defense trial strategy. Counsel was prepared to present Fox's self-defense theory during trial, and Fox did not demonstrate that counsel's performance in preparing for trial fell below an objective standard of reasonableness. Fox did not explain how meeting at an earlier time would

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

have altered his trial defense, and, therefore, he failed to demonstrate a reasonable probability of a different outcome at trial had he met with counsel to discuss strategy at an earlier time. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Eighth, Fox claimed his trial counsel was ineffective for failing to object during closing arguments when the State argued that the jury should not consider whether Fox should be given mental health treatment or placed on probation because such decisions were reserved for the trial court. The trial court instructed the jury that it should consider guilt or innocence, but not “consider the subject of punishment” as any punishment was only to be considered by the trial court. Also, the State’s argument was made in accordance with the jury instructions. Therefore, Fox failed to demonstrate his counsel’s performance during the State’s closing arguments fell below an objective standard of reasonableness. In addition, Fox failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected to the challenged statement in light of the overwhelming evidence of his guilt presented at trial. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Ineffective assistance of appellate counsel

Next, Fox argues the district court erred by denying his claims of ineffective assistance of 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 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 687. 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).

First, Fox claimed his appellate counsel was ineffective for failing to argue on direct appeal that the trial court erred by denying his request for a mistrial because the State violated pretrial orders and failed to provide discovery and *Brady* material. Fox personally requested a mistrial because he believed the State violated its pretrial obligations to disclose evidence and information concerning witnesses, but the trial court concluded Fox's motion lacked merit and denied the motion. Fox did not demonstrate that the trial court abused its discretion by denying his motion for mistrial. See *Ledbetter v. State*, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006). He therefore did not demonstrate counsel's performance fell below an objective standard of reasonableness by failing to raise the underlying claim on direct appeal, or a reasonable likelihood of success on appeal had

counsel done so. Accordingly, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Fox claimed his appellate counsel was ineffective for failing to argue on direct appeal that the State committed misconduct during its closing argument when it urged the jury not to consider whether Fox should be given mental health treatment or placed on probation because such decisions were reserved for the trial court. As stated previously, Fox did not demonstrate that the State's argument was improper. He therefore did not demonstrate counsel's performance fell below an objective standard of reasonableness by failing to raise the underlying claim on direct appeal, or a reasonable likelihood of success on appeal had counsel done so. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.²

Third, Fox appeared to claim his appellate counsel was ineffective for failing to argue on direct appeal that the State violated his right to attorney/client privilege as it asked if he had rehearsed or discussed his testimony with counsel prior to trial. However, Fox did not demonstrate either deficiency or prejudice for this claim because counsel raised the underlying issue on direct appeal and this court denied relief. *See Fox v.*

²Fox contends the district court's order did not properly address his other claims of ineffective assistance of appellate counsel regarding prosecutorial misconduct. However, we conclude that the district court's order sufficiently addressed these claims and Fox is not entitled to relief regarding this issue.

State, Docket No. 74333-COA (Order of Affirmance, September 24, 2018). Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Cumulative effect of counsel's errors

Next, Fox claimed the cumulative effect of errors committed by trial and appellate counsel warrant reversal of the judgment of conviction. However, even assuming multiple deficiencies in counsel's performance may be cumulated to find prejudice under the *Strickland* test, see *McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009), Fox failed to demonstrate he was entitled to relief even considering any errors cumulatively because strong evidence of his guilt was presented at trial. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Hearing outside of Fox's presence

Next, Fox argues the district court erred by conducting a hearing concerning his postconviction petition outside of his presence. A criminal defendant does not have an unlimited right to be present at every proceeding. See *Gallego v. State*, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 776 n.12, 263 P.3d 235, 253 n.12 (2011). A "defendant must show that he was prejudiced by the absence." *Kirksey*, 112 Nev. at 1000, 923 P.2d at 1115. The record indicates the hearing at issue was not an evidentiary hearing, no testimony was presented, and the district court merely directed the State

to prepare an order denying the petition. *Cf. Gebers v. State*, 118 Nev. 500, 504, 50 P.3d 1092, 1094-95 (2002) (concluding a petitioner's statutory rights were violated when she was not present at hearing where testimony and evidence were presented). Fox does not demonstrate he was prejudiced by his absence from the relevant hearing. Accordingly, we conclude the district court did not err in this regard.

Appointment of postconviction counsel and discovery

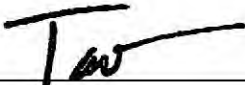
Finally, Fox argues the district court erred by denying his requests for the appointment of postconviction counsel and to conduct discovery. The appointment of counsel in this matter was discretionary. *See* NRS 34.750(1). When deciding whether to appoint counsel, the district court may consider factors 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 Fox was indigent and his petition was a first petition not subject to summary dismissal, *see* NRS 34.745(1), (4), Fox 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, 760-761 (2017). However, the district court found that the issues in this matter were not difficult 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, and it denied Fox's request for postconviction counsel. In addition, Fox was not entitled to conduct discovery. *See* NRS 34.780(2). The record supports the decisions of the

district court, and we conclude the district court did not abuse its discretion by declining to appoint postconviction counsel or permitting Fox to conduct discovery.

Having concluded Fox is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. William D. Kephart, District Judge
Teag Lanier Fox
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³To the extent Fox argues the district court erred by adopting the State's proposed order denying his petition, he fails to demonstrate he is entitled to relief. Fox does not identify any legal reason why the district court should not have adopted the proposed draft order. Moreover, Fox does not demonstrate the adoption of the proposed order adversely affected the outcome of the proceedings or his ability to seek full appellate review.