

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DUSTON MILLER, A/K/A DUSTIN
MILLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79795-COA

FILED

OCT 09 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

Duston Miller appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 22, 2019. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Miller argues the district court erred by denying his claims that his trial counsel was ineffective. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *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, 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). To warrant an evidentiary hearing, 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).

Miller claimed counsel was ineffective for failing to investigate the fair market value of the cigarettes taken during one of the crimes. Specifically, he claimed an invoice showed that each carton cost the store \$59.53 and only ten cartons were taken. Therefore, the worth of the cigarettes was under the threshold of \$650 for a grand larceny.

Testimony at trial was that at least 22 cartons were taken during each larceny. Thus, even at \$59.53 per carton, the value of the cartons taken would have exceeded \$650. Therefore, Miller failed to demonstrate counsel was deficient for failing to investigate or that further investigation would have resulted in a reasonable probability of a different outcome at trial. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (a petitioner claiming counsel did not conduct an adequate investigation must show how a better investigation would have made a more favorable outcome probable). Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Miller next claimed counsel was ineffective for failing to object to the State's comments in closing argument. He claimed the State's

argument that, while Miller was not seen on some of the surveillance tapes, the jury should still find he was there based on his car being the getaway car was improper. Further, he claimed the State's argument that he identified himself on the surveillance video of one of the crimes was false.

The State's closing argument was based on reasonable inferences from the evidence presented at trial. While Miller may not have appeared in all of the surveillance video, his car did. Miller was the getaway driver for most of the thefts, and therefore, it was reasonable for the State to argue he participated in the thefts. Further, while Miller may not have specifically pointed himself out in the surveillance video during his interview, he did discuss with the detective his involvement in the theft at the Circle K and identified several actions he took that were consistent with what the surveillance video depicted. Therefore, it was reasonable for the State to argue that Miller identified himself on the surveillance video, and counsel was not deficient for failing to object. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Miller also claimed counsel was ineffective for failing to object to the State making improper comments regarding his right to remain silent during the police interview. Specifically, he claimed the State argued, "He never once said I never stole cigarettes. He never once said that's not me in the Circle K. Never once says I don't know who did it. I wasn't there." Even assuming the State's argument was a comment on Miller's silence, the argument was not improper because Miller waived his right to remain silent

when he agreed to speak with the detective. *See Flowers v. State*, 136 Nev. 1, 16, 456 P.3d 1037, 1051 (2020). Therefore, counsel was not deficient for failing to object. *See Donovan*, 94 Nev. at 675, 584 P.2d at 711. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Miller next claimed counsel was ineffective for failing to file a motion to suppress a coat. The coat was seized during a search of his car at the tow yard after he was arrested. Miller admits he gave the arresting officer consent to search his vehicle but he claims that the officer should have known that the consent was limited to the arresting officer. Because Miller gave consent to search the vehicle and did not expressly limit that consent, we conclude Miller failed to demonstrate counsel was deficient for failing to file a motion to suppress the coat. *See generally State v. Ruscetta*, 123 Nev. 299, 302-03, 163 P.3d 451, 454 (2007) (“Relevant considerations with respect to the scope of consent include ‘any express or implied limitations regarding the time, duration, area, or intensity of police activity necessary to accomplish the stated purpose of the search, as well as the expressed object of the search.’”). Therefore, we conclude the district court did not err by denying this claim without first holding an evidentiary hearing.

Miller also claimed counsel was ineffective for failing to file a motion to suppress the tape recording of his interview with a detective. Miller claimed he did not know he was being recorded and neither did the detective. Therefore, the recording was an illegal wiretap, and should have been suppressed. First, Miller was representing himself when he filed a

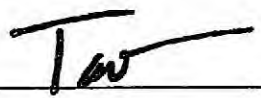
pretrial motion to suppress the recording. The district court denied Miller's pro se motion prior to appointing counsel to represent Miller. Miller failed to demonstrate counsel was deficient for failing to re-raise this claim after he was appointed. Further, at trial, the detective testified he brought the tape recorder with him when he interviewed Miller and, therefore, consented to the recording. Accordingly, the recording did not constitute an illegal wiretap. *See* NRS 200.650. Thus, Miller failed to demonstrate a motion to suppress filed by counsel would have had a reasonable probability of success. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Finally, Miller claimed counsel was ineffective for failing to file and pursue a direct appeal on his behalf. The district court concluded that Miller had made clear his intent to pursue an appeal in pro se and, therefore, counsel had no obligation to pursue a direct appeal on Miller's behalf or to file a new notice of appeal when Miller's pro se notice of appeal was dismissed by the Nevada Supreme Court as premature. However, a defendant may not proceed in pro se on direct appeal from a judgment of conviction. *See Blandino v. State*, 112 Nev. 352, 354, 914 P.2d 624, 626 (1996). "[T]rial counsel has a constitutional duty to file a direct appeal in two circumstances: when requested to do so and when the defendant expresses dissatisfaction with his conviction." *Toston v. State*, 127 Nev. 971, 978, 267 P.3d 795, 800 (2011). Because Miller's claim was not belied by the record and, if true, would entitle him to relief, we conclude the district court erred by denying this claim without first conducting an evidentiary hearing

to determine whether Miller asked counsel to file an appeal or otherwise expressed dissatisfaction with his conviction.¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Kathleen E. Delaney, District Judge
Duston Miller
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

¹Because Miller may be entitled to file an untimely direct appeal pursuant to NRAP 4(c), depending on the outcome of the evidentiary hearing, we decline to consider claims 7 through 22 raised in his petition.