

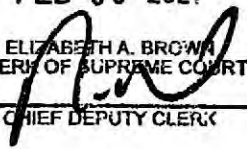
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DELBERT ROY DOUGLAS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 77274-COA

FILED

FEB 08 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Delbert Roy Douglas appeals from an order of the district court denying a February 2, 2015, postconviction petition for a writ of habeas corpus and later-filed supplements. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

*Ineffective assistance of trial counsel*

Douglas argues the district court erred by denying his claims of ineffective assistance of trial counsel without conducting an evidentiary hearing. 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. To warrant an evidentiary hearing, a petitioner must raise

claims supported by specific 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, Douglas argued his trial counsel was ineffective for failing to argue that his DNA was illegally collected because the police did not obtain a valid search warrant. Douglas also appeared to contend that he was given a blank parking ticket rather than a valid warrant and counsel should have obtained surveillance video depicting the officers' failure to display a valid warrant. Prior to trial, counsel moved to suppress the evidence obtained pursuant to the warrant because it was not based upon probable cause and was not properly signed by a magistrate. The trial court denied the motion, finding that Douglas's allegations lacked merit. Because his counsel challenged the validity of the warrant, Douglas did not demonstrate his counsel's performance fell below an objective standard of reasonableness. Douglas also failed to demonstrate a reasonable probability of a different outcome had counsel raised a challenge to the warrant in a different manner.

As to Douglas's parking-ticket allegation, while NRS 179.075(2) requires an officer serving a warrant to search property to provide the subject of the warrant with a copy, NRS 179.077 does not have such a requirement for the collection of biological samples. Because providing a copy of a warrant to Douglas was unnecessary in these circumstances, Douglas failed to demonstrate his counsel acted in a deficient manner or a reasonable probability of a different outcome had counsel acted differently.

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

Second, Douglas argued his counsel was ineffective for failing to assert that the police lacked probable cause to arrest him. However, the record demonstrates that the police had probable cause to arrest Douglas based upon the victim's statements alleging he had sexually abused her and information indicating that Douglas failed to properly register his address as a sex offender. *See Doleman v. State*, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991) (defining probable cause to arrest). Douglas did not demonstrate counsel's failure to argue the police lacked probable cause to arrest him fell below an objective standard of reasonableness. Douglas also failed to demonstrate a reasonable probability of a different outcome had counsel raised this argument. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Douglas argued his trial counsel was ineffective for failing to investigate, conduct discovery, or prepare for trial. Douglas contended that counsel should have investigated whether another person was the father of one of the victim's children. Douglas also contended counsel should have discovered witnesses who would have stated that the victim was not afraid of him and he did not act inappropriately with the victim. DNA evidence demonstrated that Douglas fathered the victim's children. Therefore, Douglas did not demonstrate counsel should have investigated whether a different person was actually the father or how the victim and Douglas interacted. He also did not demonstrate a reasonable

probability of a different outcome had counsel done so. To the extent Douglas contended counsel should have further investigated, conducted discovery, or prepared for trial, he did not support this claim with sufficient factual allegations. Accordingly, the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Douglas argued his trial counsel had a conflict of interest because counsel acted in a dishonest manner by stating this was not a defensible case. A conflict of interest exists if “counsel actively represented conflicting interests” and the “conflict of interest adversely affected [the defendant’s] lawyer’s performance.” *Strickland*, 466 U.S. at 692. “In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties.” *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992). Counsel’s candid advice about the possible outcome of Douglas’s trial is not evidence of deficient performance or that counsel was actively representing conflicting interests. See *Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 69, 412 P.3d 56, 62 (2018) (noting that one of the roles of an attorney is to provide candid advice to his or her client). Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Fifth, Douglas argued his trial counsel was ineffective for failing to present a consent defense. “Submission is not the equivalent of consent.” *McNair v. State*, 108 Nev. 53, 57, 825 P.2d 571, 574 (1992). “A rape victim is not required to do more than her age, strength, and the surrounding facts and attending circumstances would reasonably dictate as

a manifestation of her opposition.” *Id.*; see also *Shannon v. State*, 105 Nev. 782, 790, 783 P.2d 942, 947 (1989) (discussing that factors such as the victim’s age, maturity level, the influence of the defendant over the victim, and the victim’s act of feigning sleep evidenced that the sexual acts occurred against the victim’s will).

The evidence produced at trial demonstrated that Douglas was the victim’s father and the sexual abuse occurred when the victim was 13 and 19. The victim stated that she was alone with Douglas when the acts occurred, she attempted to resist, and Douglas physically restrained her. The victim also stated that Douglas told her that if she told anyone of the abuse, he would harm her.

In light of the evidence and testimony concerning the relationship between Douglas and the victim, their age difference, difference in strength, and Douglas’s threat to harm the victim if she informed anyone about the sexual abuse, there was significant evidence that the sexual acts occurred against the victim’s will or under conditions in which Douglas knew or should have known that the victim was mentally or physically incapable of resisting. Douglas failed to demonstrate that objectively reasonable counsel would have attempted to present a consent defense under the circumstances of this case. Moreover, as there was significant evidence that the victim did not consent, Douglas failed to demonstrate a reasonable probability that the outcome of the trial would have been different had counsel presented a consent defense. Therefore,

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

Sixth, Douglas argued his trial counsel was ineffective for failing to present text messages he asserted were sent by the victim and were of a sexual nature. Douglas contended the text messages could have supported his claim that the victim consented to the sexual activity. However, the record demonstrated that there was significant evidence that the sexual acts occurred against the victim's will or under conditions in which Douglas knew or should have known that the victim was mentally or physically incapable of resisting. Because there was significant evidence demonstrating that the victim did not consent to the sexual activity, Douglas failed to demonstrate a reasonable probability of a different outcome at trial had counsel attempted to utilize these text messages in an attempt to present a consent defense. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Seventh, Douglas argued his trial counsel was ineffective for failing to request a lesser-included instruction of statutory sexual seduction. "[S]tatutory sexual seduction is not a lesser-included offense of sexual assault." *Alotaibi v. State*, 133 Nev. 650, 657, 404 P.3d 761, 767 (2017). Therefore, Douglas did not demonstrate that any failure to request instruction on statutory sexual seduction as a lesser-included offense fell below an objective standard of reasonableness. Douglas also failed to demonstrate a reasonable probability of a different outcome had counsel

requested instruction on statutory sexual seduction. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Eighth, Douglas argued his trial counsel was ineffective for failing to move to sever the 2002 sexual assault charge from the 2008 sexual assault charge. NRS 173.115(1)(b) provides that joinder of offenses is proper when the offenses are based “on two or more acts or transactions connected together or constituting parts of a common scheme or plan.” Offenses are considered “connected together” when “evidence of either crime would be admissible in a separate trial regarding the other crime.” *Rimer v. State*, 131 Nev. 307, 321, 351 P.3d 697, 708 (2015) (internal quotation marks omitted). In addition, separate offenses are part of a “common scheme” when they “share features idiosyncratic in character.” *Farmer v. State*, 133 Nev. 693, 698, 405 P.3d 114, 120 (2017) (internal quotation marks omitted).

Here, the evidence produced at trial demonstrated Douglas sexually assaulted his daughter on two occasions and both crimes were performed in a similar manner. The evidence also demonstrated the offenses shared common features and would have been admissible in a separate trial regarding the other crime. See NRS 48.045(2), (3). Accordingly, the offenses were properly joined, and Douglas did not demonstrate it was objectively unreasonable for counsel to decline to move to sever these offenses. And because the offenses were cross-admissible, Douglas also failed to demonstrate a reasonable probability of a different

outcome had counsel moved to sever them. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Ninth, Douglas argued his trial counsel was ineffective for failing to cross-examine Detective Sanford and additional witnesses at trial. Douglas contended he may not have been present for Sanford's testimony because he did not remember it. The record demonstrated Sanford did not have a large role in the investigation of the crimes and Douglas did not identify any questions counsel should have posed to Sanford. Douglas's claim was therefore insufficient to demonstrate that his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel cross-examined the detective. Douglas also failed to demonstrate a reasonable probability of a different outcome had counsel posed more questions to additional witnesses. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Tenth, Douglas argued his trial counsel was ineffective for failing to challenge the evidence presented at the preliminary hearing or file pretrial motions or petitions in an effort to get the charges dismissed. Douglas failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness, because his counsel asked for dismissal of the charges following the preliminary hearing, but the request was denied. Douglas failed to demonstrate a reasonable probability of a different outcome had counsel made additional attempts to gain dismissal



of the charges prior to trial. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Eleventh, Douglas argued his trial counsel was ineffective for failing to move to suppress statements he made to officers. Douglas did not provide factual support for this claim. Accordingly, Douglas did not demonstrate that his trial counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel moved to suppress statements. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Twelfth, Douglas argued his trial counsel was ineffective at the sentencing hearing for failing to call witnesses to testify on his behalf or cross-examine the victim's mother. Douglas asserted that counsel should have undertaken efforts to demonstrate he was amenable to treatment, could be a productive member of society, and the victim and her mother consented to his actions because they interacted with him. At the sentencing hearing, counsel urged the sentencing court to review letters submitted on Douglas's behalf that stated he supported his extended family and was a benefit to society, and argued that Douglas could be rehabilitated. In addition, Douglas personally informed the district court that the victim and her mother often interacted with him prior to his arrest. In light of the information and statements presented at the sentencing hearing, Douglas did not demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had

counsel performed differently. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Thirteenth, Douglas argued his trial counsel was ineffective for failing to assert that he was improperly detained for more than 48 hours prior to his arraignment. "Failure to bring a defendant before a magistrate without unnecessary delay does not warrant reversal absent a showing of prejudice to the defendant's constitutional rights." *Elvik v. State*, 114 Nev. 883, 895, 965 P.2d 281, 289 (1998). Douglas did not identify prejudice that stemmed from any delay in bringing him before a magistrate. Accordingly, Douglas failed to demonstrate that objectively reasonable counsel would have raised the underlying issue or a reasonable probability of a different outcome had counsel done so. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourteenth, Douglas argued his trial counsel was ineffective for failing to object when the State vouched for the credibility of the complaining witness by referring to her as the victim. "The prosecution may not vouch for a witness; such vouching occurs when the prosecution places the prestige of the government behind the witness by providing personal assurances of [the] witness's veracity." *Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (internal quotation marks omitted). Douglas did not demonstrate that use of the term "victim" amounted to providing improper personal assurances of a witness's veracity. Accordingly, Douglas did not demonstrate it was objectively unreasonable for counsel to decline to object to the use of the term or a reasonable probability of a different

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

*Ineffective assistance of appellate counsel*

Next, Douglas argues the district court erred by denying his claims of ineffective assistance of appellate counsel without conducting an evidentiary hearing. To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in 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 v. Washington*, 466 U.S. 668, 687 (1984). 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). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific 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, Douglas argued his appellate counsel was ineffective for failing to assert the police lacked probable cause to arrest him. As explained previously, the police had probable cause to arrest Douglas. Accordingly, Douglas failed to demonstrate that it was objectively unreasonable for counsel to decline to raise the underlying claim on appeal or that there was

a reasonable likelihood of success on appeal had counsel done so. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Douglas argued his appellate counsel was ineffective for failing to assert on direct appeal that his DNA was illegally collected because the police did not obtain a valid search warrant to collect that evidence. Douglas appeared to assert that the search warrant was not based upon probable cause and was not properly signed by a magistrate. "Probable cause requires that law enforcement officials have trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched for are: seizable and will be found in the place to be searched." *Keese v. State*, 110 Nev. 997, 1002, 879 P.2d 63, 66 (1994) (internal quotation marks omitted). Moreover, "[m]agistrate means an officer having power to issue a warrant for the arrest of a person charged with a public offense and includes: . . . Others upon whom are conferred by law the powers of a justice of the peace in criminal cases." NRS 169.095(6).

The affidavit submitted with the warrant specified that Douglas's daughter had informed the authorities that Douglas had sexually abused her and was the father of her two children. The warrant therefore requested permission to take a buccal swab of Douglas. The information contained in the affidavit demonstrated that there was probable cause sufficient to support the search warrant. Moreover, the record demonstrated that the warrant was properly signed by an officer with the

powers of a justice of the peace. Accordingly, Douglas failed to demonstrate that it was objectively unreasonable for counsel to decline to raise the underlying claim on appeal or that there was a reasonable likelihood of success on appeal had counsel done so. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Douglas argued his appellate counsel should have contended on direct appeal that his trial counsel had a conflict of interest. As explained previously, Douglas did not demonstrate that his trial counsel had an actual conflict of interest. Accordingly, Douglas failed to demonstrate that it was objectively unreasonable for counsel to decline to raise the underlying claim on appeal or that there was a reasonable likelihood of success on appeal had counsel done so. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Douglas argued his appellate counsel was ineffective for failing to assert on appeal that his sexual assault charges should have been severed. As explained previously, Douglas failed to demonstrate that the two charges were improperly joined and that severance of the charges would have been warranted. Accordingly, Douglas failed to demonstrate that it was objectively unreasonable for counsel to decline to raise the underlying claim on appeal or that there was a reasonable likelihood of success on appeal had counsel done so. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Fifth, Douglas argued that his appellate counsel was ineffective for failing to assert on direct appeal that convictions for both sexual assault and incest concerning the same incidents violate the Double Jeopardy Clause. However, Douglas's counsel raised the underlying claim on direct appeal and the Nevada Supreme Court rejected it. *See Douglas v. State*, 130 Nev. 285, 294, 327 P.3d 492, 498 (2014). Accordingly, Douglas failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable likelihood of success on appeal had counsel raised the underlying claim in a different manner. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.<sup>1</sup>

Sixth, Douglas argued his appellate counsel was ineffective for failing to contend on direct appeal that the State improperly vouched for the credibility of the complaining witness by referring to her as the victim. As explained previously, Douglas did not demonstrate that the State improperly vouched for the credibility of the complaining witness by referring to her as the victim. Accordingly, Douglas failed to demonstrate that it was objectively unreasonable for counsel to decline to raise the underlying claim on appeal or that there was a reasonable likelihood of

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<sup>1</sup>To the extent Douglas raised the underlying double jeopardy claim independent of his ineffective-assistance claim, the doctrine of the law of the case prevents further consideration of this issue because the Nevada Supreme Court already considered and rejected it. *See Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

success on appeal had counsel done so. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Seventh, Douglas argued his appellate counsel was ineffective for failing to contend on appeal that the information was defective, the trial court lacked jurisdiction over his case, and voir dire was conducted improperly. Douglas did not support these claims with specific facts, and unsupported claims are insufficient to demonstrate a petitioner is entitled to relief. Accordingly, Douglas failed to demonstrate that it was objectively unreasonable for counsel to decline to raise the underlying claims on appeal or that there was a reasonable likelihood of success on appeal had counsel done so. Therefore, the district court did not err by denying these claims without conducting an evidentiary hearing.

*Cumulative effect of counsel's errors*

Next, Douglas argues he was entitled to relief due to the cumulative effect of counsel's errors. 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), Douglas failed to demonstrate he was entitled to relief even considering any errors cumulatively, because strong evidence of his guilt was presented at trial. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.


*Procedurally barred claims*

Finally, Douglas argued the arrest and seizure of his DNA were illegal because the police lacked probable cause and a valid warrant.

Douglas also contended that he could not have understood that the language of the statutes prohibiting incest and sexual assault would leave him criminally liable for both types of offenses. In addition, Douglas asserted the State improperly vouched for the credibility of the victim by referring to her as the victim, the charging documents were defective, the trial court lacked jurisdiction over his case, and his sentence was cruel and unusual. These claims could have been raised on direct appeal, and are therefore procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.810(1)(b), (3). Douglas failed to allege good cause for his failure to raise these claims on direct appeal. Therefore, the district court properly denied relief for these claims. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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



cc: Chief Judge, Eighth Judicial District Court  
Eighth Judicial District Court, Dept. 19  
Jean J. Schwartzer  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk