

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DONALD DOUGLAS EBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80207-COA

FILED

MAR 05 2021

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

DONALD DOUGLAS EBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80865-COA

ORDER AFFIRMING IN PART AND DISMISSING IN PART

Donald Douglas Eby appeals from orders of the district court denying a November 14, 2019, postconviction petition for a writ of habeas corpus and a motion to compel (Docket No. 80207). Eby also appeals from orders of the district court denying a motion for new trial, a motion to alter judgment, motion to vacate order, motion for post-judgment discovery, motion requesting inspection of the prosecution's casefile, a motion for an evidentiary hearing, and a motion requesting his casefile (Docket No. 80865). These cases were consolidated on appeal. See NRAP 3(b). Ninth Judicial District Court, Douglas County; Thomas W. Gregory, Judge.

Docket No. 80207

First, Eby argues the district court erred by denying claims of ineffective assistance of counsel. To demonstrate ineffective assistance of 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.

In his petition, Eby appeared to claim that his counsel was ineffective for failing to request disclosure of the victim's criminal history report and parole violation information. However, the record demonstrated that Eby's counsel requested disclosure of this information and the State disclosed it prior to trial. Accordingly, Eby failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel made additional requests for information regarding the victim's criminal history. Therefore, the district court did not err by denying this claim.

On appeal, Eby argues his trial counsel was ineffective for failing to properly cross-examine the victim regarding her criminal history or call witnesses to testify about her criminal history. However, Eby did not raise this claim in his petition, and we decline to consider it on appeal in the first instance. See *McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

Second, Eby argued the State withheld exculpatory, material evidence regarding the victim's criminal history report and parole violation information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). This claim could have been raised on direct appeal, and was therefore procedurally barred absent a demonstration of good cause and actual

prejudice. *See* NRS 34.810(1)(b), (3). A valid *Brady* claim can constitute good cause and prejudice sufficient to excuse the procedural bars. *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (“[P]roving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice.”). The record demonstrated that the State disclosed this information prior to trial. Eby thus did not meet his burden to plead and prove specific facts to establish that the State actually withheld exculpatory evidence. *See id.* Accordingly, we conclude the district court did not err by denying this good-cause claim.

Third, Eby argued the trial court improperly reviewed the victim’s criminal history in camera. This claim could have been raised on direct appeal, and was therefore procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.810(1)(b), (3). Eby did not attempt to demonstrate good cause. Therefore, Eby is not entitled to relief.

Fourth, Eby on appeal argues the district court erred by denying his motion to compel. In his motion, Eby requested discovery of information related to the victim’s criminal history report, parole violation information, and medical information. However, Eby did not demonstrate he was entitled to conduct discovery during the postconviction proceedings. *See* NRS 34.780(2). Accordingly, we conclude the district court did not err by denying Eby’s motion.

Docket No. 80865

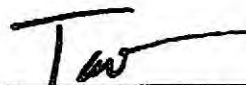
In his December 16, 2019, motion for new trial, Eby contended the State improperly refused to disclose information regarding the victim’s criminal history. Eby also asserted he was entitled to a new trial due to the

ineffective assistance of counsel. The district court has discretion in granting or denying motions for new trials and this court will not set aside a district court's ruling absent an abuse of discretion. *State v. Carroll*, 109 Nev. 975, 977, 860 P.2d 179, 180 (1993). As explained previously, the record demonstrated the State disclosed the information regarding the victim's criminal history. Moreover, claims concerning the ineffectiveness of counsel may only be raised through collateral postconviction habeas corpus proceedings, see *Franklin v. State*, 110 Nev. 750, 751-52, 877 P.2d 1058, 1059 (1994), *disapproved of on other grounds by Thomas v. State*, 115 Nev. 148, 150, 979 P.2d 222, 223-24 (1999), and, therefore, Eby's claim of ineffective assistance of counsel was not properly raised in his motion for new trial. Given the record before this court, Eby fails to demonstrate the district court abused its discretion by denying his motion.

Eby also appealed from the orders denying a motion to alter judgment, a motion to vacate order, a motion for post-judgment discovery, a motion requesting inspection of the prosecution's casefile, a motion for an evidentiary hearing, and a motion requesting his casefile. However, no statute or court rule permits an appeal from an order denying these motions. Therefore, we lack jurisdiction to consider this portion of Eby's appeal. See *Castillo v. State*, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990) (explaining the right to appeal is statutory; where no statute or court rule provides for an appeal, no right to appeal exists). Accordingly, we

ORDER the judgments of the district court AFFIRMED in part
and DISMISSED in part.¹


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Thomas W. Gregory, District Judge
Donald Douglas Eby
Attorney General/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk

¹We have reviewed Eby's September 22, 2020, motion requesting remand and evidentiary hearing. We have also reviewed the supporting documents Eby submitted with that motion. We conclude no relief based upon those submissions is warranted. To the extent Eby attempts to present claims or facts in those submissions which were not previously presented in the proceedings below, we decline to consider them on appeal in the first instance.