

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RAMON AGUSTIN MORGA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81716-COA

FILED

APR 12 2021

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

ORDER OF AFFIRMANCE

Ramon Agustin Morga appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 7, 2018, and later-filed supplements. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Morga first contends the district court erred by denying his claims of ineffective assistance of trial counsel. 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).

First, Morga claimed trial counsel was ineffective for failing to object to jury instruction number 10. Morga argues the instruction amounted to a directed verdict because it classified methamphetamine as a schedule I controlled substance rather than a schedule II controlled substance. Methamphetamine is a schedule I controlled substance. NAC 453.510(7); *see also Andrews v. State*, 134 Nev. 95, 96, 412 P.3d 37, 38 (2018) (recognizing methamphetamine is a schedule I controlled substance). The district court thus properly advised the jurors on the law, and Morga failed to demonstrate trial counsel acted below an objective standard of reasonableness by not objecting to the instruction or a reasonable probability of a different outcome at trial had his counsel objected. Therefore, we conclude the district court did not err by denying this claim.¹

Second, Morga argued trial counsel was ineffective for referencing his coconspirator's unrelated drug transactions. At the evidentiary hearing on Morga's petition, trial counsel testified his trial strategy was to show Morga's coconspirator as the dealer and Morga having little to no knowledge of the transactions. Morga failed to demonstrate counsel's strategy was objectively unreasonable and, thus, that trial counsel's performance was deficient. *See Ford v. State*, 105 Nev. 850, 853,

¹On appeal, Morga argues he should retroactively receive the benefit of the Nevada Supreme Court's recent holding in *Figueroa-Beltran v. United States*, 136 Nev., Adv. Op. 45, 467 P.3d 615 (2020), that the identity of the controlled substance is an element of the crime. His argument that the State did not prove the identity of the controlled substance in his case is belied by the record: The State proved the identity of the controlled substance was methamphetamine. Therefore, this argument lacks merit.

784 P.2d 951, 953 (1989) (“Tactical decisions are virtually unchallengeable absent extraordinary circumstances.”). Further, Morga has not demonstrated a reasonable probability of a different outcome at trial, because his actions were captured on video. Therefore, we conclude the district court did not err by denying this claim.

Third, Morga argued the cumulative effect of trial counsel’s errors in this case warrants reversal. Even if multiple instances of deficient performance may be cumulated for purposes of demonstrating prejudice, *see McConnell v. State*, 125 Nev. 243, 259 & n.17, 212 P.3d 307, 318 & n.17 (2009), Morga did not demonstrate any instance of deficient performance to cumulate, *see Morgan v. State*, 134 Nev. 200, 201 n.1, 416 P.3d 212, 217 n.1 (2018). Therefore, we conclude the district court did not err by denying this claim.

Morga also contends the district court erred by denying his claims regarding jury instructions, a violation of the Supremacy Clause, ambiguity in the Nevada Administrative Code, sufficiency of the evidence, and cumulative trial errors. These claims were reasonably available to be raised on direct appeal and are thus procedurally barred absent a demonstration of good cause and actual prejudice, *see NRS 34.810(1)(b)*, or that he was actually innocent such that it would result in a fundamental miscarriage of justice were his claims not decided on the merits, *see Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015).²

²The district court improperly considered these claims on the merits without first addressing the procedural bars. We nevertheless affirm the district court’s denial of these claims for the reasons discussed herein. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding that a correct result will not be reversed simply because it is based on the wrong reason).

First, Morga argued he could overcome the procedural bar because he was actually innocent: Methamphetamine is a schedule II drug rather than a schedule I drug, and the State did not admit any evidence regarding methamphetamine's schedule classification. "Actual innocence means factual innocence, not mere legal insufficiency." *Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (internal brackets and quotation marks omitted). As Morga's claim is one of "mere legal insufficiency," he has failed to make a colorable showing of actual innocence. Therefore, he has not demonstrated a fundamental miscarriage of justice sufficient to excuse the procedural bar to his petition. Accordingly, we conclude Morga was not entitled to relief based on this claim.

Second, Morga argued he had good cause because counsel did not properly inform Morga of his direct appeal rights or file an appeal. Prior to the appointment of postconviction counsel, the district court conducted an evidentiary hearing on whether Morga was denied his right to appeal.³ At the hearing, the district court announced findings that trial counsel discussed Morga's appeal rights, Morga decided not to file an appeal, and trial counsel was credible. In the subsequent evidentiary hearing after counsel was appointed, Morga did not submit any additional evidence to this point. Therefore, we conclude Morga did not demonstrate good cause, and he was not entitled to relief based on this claim.

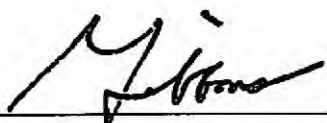
Third, Morga argued the State waived application of the procedural bar because the State failed to properly oppose his good cause and factual innocence claims. However, "the application of procedural bars

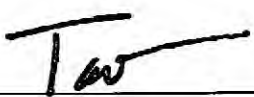
³This court takes judicial notice of the transcript of this hearing, which is contained in the record on appeal filed in *Morga v. State*, Docket No 76887. The hearing was held on August 24, 2018.

is mandatory” and cannot be waived. *Branham v. Warden*, 134 Nev. 814, 815, 434 P.3d 313, 315 (Ct. App. 2018); *cf. State v. Haberstroh*, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003) (holding that parties cannot stipulate to disregard procedural defects). In addition, “the petitioner has the burden of pleading and proving specific facts that demonstrate good cause and prejudice to overcome the procedural bars.” *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). As the petitioner, Morga had the burden to demonstrate good cause sufficient to overcome the procedural bars, and he failed to meet that burden. Therefore, we conclude Morga was not entitled to relief on this claim.

For the foregoing reasons, we conclude the district court did not err by denying Morga’s petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Ronald J. Israel, District Judge
Michael Lasher LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk