

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DARIAN CHRISTOPHER OWENS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82171-COA

FILED

JUL 12 2021

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

ORDER OF AFFIRMANCE

Darian Christopher Owens appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 13, 2018, and a supplemental petition filed on June 11, 2018. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

Ineffective assistance of trial counsel

Owens 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. 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, a 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, Owens claimed trial counsel was ineffective for failing to investigate the probable cause supporting a search warrant or move to suppress the evidence obtained pursuant to the search warrant. The police obtained a warrant to place a tracking device on a vehicle due to information they obtained indicating it was being utilized in the commission of robberies. Owens contended that counsel should have attempted to discover additional information concerning the anonymous source that provided information to the police concerning the robberies and should have argued the warrant was improper because the vehicle was not registered to him.

“[I]nstallation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a search.” *United States v. Jones*, 565 U.S. 400, 404 (2012) (internal quotation marks omitted). Non-owners of a vehicle generally do not have standing to challenge the search of that vehicle unless the non-owner has some sort of possessory interest in that vehicle. *Scott v. State*, 110 Nev. 622, 627-28, 877 P.2d 503, 507-08 (1994). Owens made no attempt to demonstrate he had possessory interest in the vehicle. *See id.* Owens also made no attempt to demonstrate he had a legitimate expectation of privacy in the vehicle. *See Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978) (“The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.”). Accordingly, Owens did not demonstrate counsel acted in an objectively unreasonable manner by failing to investigate the probable cause supporting the search warrant or by failing to move to suppress the evidence obtained pursuant

to the warrant. In addition, Owens did not demonstrate a reasonable probability of a different outcome had counsel performed an investigation or attempted to suppress the evidence obtained from the tracking device. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Owens claimed trial counsel was ineffective for failing to seek disqualification of the trial judge or a change of venue because the judge was biased against him. Owens contended the trial judge was biased against him because the judge approved the search warrant permitting the police to install the tracking device on a vehicle. However, the "rulings and actions of a judge during the course of official judicial proceedings do not establish" that a district court judge was biased against a party. *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789-90, 769 P.2d 1271, 1275 (1988). Because the trial judge's approval of the search warrant was insufficient to establish that the judge was biased, Owens did not demonstrate counsel's performance fell below an objective standard of reasonableness by failing to seek disqualification of the trial judge. Owens also failed to demonstrate a fair and impartial trial could not have been had in Clark County, *see* NRS 174.455, and, therefore, he did not demonstrate counsel should have sought a change of venue. In addition, Owens did not demonstrate a reasonable probability of a different outcome had counsel moved for disqualification of the trial judge or a change of venue due to bias toward Owens. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Owens claimed his trial counsel was ineffective for failing to investigate the circumstances surrounding his confession or file a motion to suppress his confession because his interview with the police was

not voluntary. Owens contended he was forced to sign documents he did not understand and asserted he was under the influence of a substance during that interview. "A confession is admissible only if it is made freely and voluntarily" and "must be the product of a rational intellect and a free will." *Passama v. State*, 103 Nev. 212, 213-14, 735 P.2d 321, 322 (1987) (internal quotation marks omitted). "Voluntariness must be determined by reviewing the totality of the circumstances," and "[t]he ultimate inquiry is whether the defendant's will was overborne by the government's actions." *Gonzales v. State*, 131 Nev. 481, 488, 354 P.3d 654, 658 (Ct. App. 2015).

Officers testified at trial that upon his arrest, Owens stated he had committed the crimes and offered those statements unprompted. Owens also informed a police officer where he had discarded a firearm. An officer testified he subsequently transported Owens to a police station and initiated an interview with Owens. The officer advised Owens of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Owens stated that he understood his rights and agreed to talk with the officer. Owens proceeded to discuss his involvement in the robberies in detail and provided clear responses to the officer's questions. Owens initialed surveillance photographs after admitting he was the person depicted in them. The record does not reveal that Owens informed the officer that he was under the influence of any substance during the interview and Owens did not provide an indication that he was unable to understand the interview process. The totality of the circumstances demonstrated that Owens' confession was voluntary and his will was not overborne by the officers' actions. Accordingly, Owens did not demonstrate counsel acted in an objectively unreasonable manner by failing to investigate the circumstances surrounding his confession or to move to suppress his confession. Owens

also did not demonstrate a reasonable probability of a different outcome had counsel investigated this issue or moved for suppression of the confession. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Owens claimed his trial counsel was ineffective for failing to request an instruction directing the jury to consider whether his confession was voluntary. As explained previously, the totality of the circumstances demonstrated that Owens' confession was voluntary and his will was not overborne by the officers' actions. Because Owens' confession was voluntary, he did not demonstrate a reasonable probability of a different outcome at trial had counsel requested an instruction concerning the voluntariness of his confession. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fifth, Owens claimed his trial counsel was ineffective for failing to use a peremptory challenge to strike a juror that stated he may have difficulties being fair because his father was a victim of a crime. The parties questioned the juror concerning his experience. The juror acknowledged his subconscious feelings may influence him, but stated that he would be fair to the best of his abilities. Owens' counsel challenged the juror for cause, but the trial court determined that the juror answered the questions in a cerebral manner and would be impartial. In light of the juror's statements, Owens did not demonstrate it was objectively unreasonable for counsel to decline to exercise a peremptory challenge upon that juror out of a concern that he would be unfair. Owens also failed to demonstrate a reasonable probability of a different outcome had counsel used a peremptory challenge

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

Ineffective assistance of appellate counsel

Next, Owens 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*, 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, Owens claimed appellate counsel was ineffective for failing to argue the trial court judge was biased against him because the judge approved the search warrant permitting the police to install a tracking device on a vehicle. As explained previously, the trial court judge's approval of a search warrant was not sufficient to establish improper bias. Accordingly, Owens did not demonstrate counsel's performance fell below an objective standard of reasonableness by failing to argue that the trial court judge should have been disqualified from this matter. In addition, Owens did not demonstrate a reasonable likelihood of success on appeal had counsel raised the underlying claim. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Owens claimed his appellate counsel was ineffective for failing to argue that the trial court erred by failing to instruct the jury to consider whether his confession was voluntary. As explained previously, the totality of the circumstances demonstrated that Owens' confession was voluntary and his will was not overborne by the officers' actions. Because Owens' confession was voluntary, he did not demonstrate a reasonable likelihood of success on appeal had counsel raised the underlying claim. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Owens claimed appellate counsel should have challenged the trial court's denial of the defense request to excuse two prospective jurors for cause. The Nevada Supreme Court has already considered and rejected these claims. *Owens v. State*, Docket No. 78864 (Order Affirming in Part, Reversing in Part and Remanding, June 24, 2020). Because these claims have already been considered and rejected, the doctrine of the law of the case prevents further consideration of these issues. *See Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Therefore, Owens was not entitled to relief based on these claims.

Claims of error concerning the postconviction proceedings

First, Owens argues the trial court judge should have been disqualified from presiding over the postconviction proceedings because it signed the search warrant. However, the Nevada Supreme Court has already considered and rejected this claim. *Owens v. State*, Docket No. 78864 (Order Affirming in Part, Reversing in Part and Remanding, June 24, 2020). Because this claim has already been considered and rejected, the doctrine of the law of the case prevents further consideration of this issue.


See Hall, 91 Nev. at 315-16, 535 P.2d at 798-99. Therefore, Owens was not entitled to relief based on this claim.

Second, Owens argues the State conceded error by failing to properly respond to all of the claims raised in his supplemental petition. However, we conclude the State appropriately opposed Owens' supplemental petition and did not concede that Owens' claims had merit. Therefore, Owens is not entitled to relief based upon this claim.

Finally, Owens appears to assert the district court erred by adopting the State's proposed order denying his petition. Owens does not identify any factual inaccuracy or legal reason why the district court should not have adopted and signed the proposed draft order. Moreover, Owens does not demonstrate the adoption of the proposed order adversely affected the outcome of the proceedings or his ability to seek full appellate review. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Therefore, we conclude Owens is not entitled to relief, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Cristina D. Silva, District Judge
Darian Christopher Owens
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk