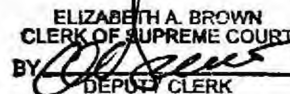
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EDMOND PAUL PRICE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82692-COA

FILED

JAN 05 2022



ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Edmond Paul Price appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on June 21, 2018, and a later-filed supplement. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

Price first argues 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

22-00353

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, Price claimed trial counsel was ineffective for failing to argue that he could only be found guilty of one count of conspiracy. Price was convicted of both conspiracy to commit robbery and conspiracy to commit kidnapping. He argued that this violated his rights under the Double Jeopardy Clause and the jury should have been instructed that it needed to find distinct, separate agreements before it could find Price guilty of both conspiracy counts. "The Double Jeopardy Clause protects against . . . multiple punishments for the same offense." *Jackson v. State*, 128 Nev. 598, 604, 291 P.3d 1274, 1278 (2012). It is constitutionally permissible to convict a defendant of two conspiracy charges if the State can prove "that two separate and distinct agreements to commit the two different crimes existed." *Garcia v. State*, 121 Nev. 327, 343, 113 P.3d 836, 846-47 (2005), *modified on other grounds by Mendoza v. State*, 122 Nev. 267, 130 P.3d 176 (2006).

The district court concluded that the State presented sufficient evidence of separate and distinct plans to rob and kidnap the victim. It based its conclusion on two findings of fact. The district court first found that the victim "testified that Defendant and his co-defendant first attempted to rob him at a rest stop but were unsuccessful." The district court next found that the "Defendant and co-defendant then resolved to kidnap [the victim]." These findings of fact are not supported by the record

before this court.[1] The victim's trial testimony was that, over a series of phone calls, he agreed to meet Price to buy some precious metals from him. Price wanted to meet at a rest stop, but the victim insisted on meeting at a hotel for security purposes. At some point during these calls, Price mentioned that he would be bringing a woman with him. The parties then met in a hotel room.

Because the district court's findings of fact are not supported by substantial evidence in the record before this court, we cannot defer to them. Price argued there was no separate agreement to kidnap the victim. He supported his argument with specific factual allegations that were not belied by the record and, if true, would have entitled him to relief. Therefore, we conclude the district court erred by denying the above-referenced ineffective-assistance-of-counsel claim without conducting an evidentiary hearing. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Accordingly, we reverse the district court's denial of this claim and remand for the district court to conduct an evidentiary hearing on this ineffective-assistance-of-counsel claim.[2]

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[1]In support of its findings, the district court's order cites only to the State's closing argument and not to any evidence presented at trial.

[2]Price also argued that presenting multiple counts of conspiracy to the jury violated the Double Jeopardy Clause. The State may prosecute all of the alleged offenses in a single case so long as the district court does not enter convictions that would violate the defendant's right against double jeopardy. *Jenkins v. Fourth Judicial Dist. Court*, 109 Nev. 337, 341, 849 P.2d 1055, 1057 (1993). Therefore, we conclude the trial court did not err by denying this portion of Price's claim.

Second, Price claimed trial counsel was ineffective for failing to object to the self-defense jury instruction. Price argued the jury was erroneously instructed that self-defense is not available to an original aggressor. A criminal defendant "has the right to have the jury instructed on [his] theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." *Crawford v. State*, 121 Nev. 744, 751, 121 P.3d 582, 586 (2005). An original aggressor may act in self-defense if he has satisfied the duty to retreat, *see Culverson v. State*, 106 Nev. 484, 489, 797 P.2d 238, 241 (1990), or after he has "endeavored to decline any further struggle," NRS 200.200(2).

Price argued that, even if he were the original aggressor, once the victim entered the hotel room and it was clear the victim was armed, Price was entitled to defend himself if he made a good faith effort to disengage. In support, Price argued the fact that the victim was bound and left with a knife to free himself was evidence that Price sought to disengage. The district court found these acts occurred only after Price beat the victim, and this finding is supported by substantial evidence in the record. The facts demonstrate that Price did not satisfy his duty to retreat or decline further struggle prior to engaging in the actions he claimed were in self-defense and, thus, that he was not entitled to his proffered instruction. Accordingly, Price failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel challenged the self-defense instruction. Therefore, we conclude the district court did not err by denying this claim.

Third, Price claimed trial counsel was ineffective for failing to request that the verdict form contain an option for conspiracy to commit false imprisonment as a lesser-included offense of conspiracy to commit kidnapping. Counsel's conduct must be evaluated "from counsel's perspective at the time" of the alleged deficiency in order "to eliminate the distorting effects of hindsight." *Kirksey v. State*, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996) (quoting *Strickland*, 466 U.S. at 689). The only evidence Price offered in support of his claim was that the jury acquitted him of kidnapping but found him guilty of the lesser-included offense of false imprisonment. He failed to explain why counsel should have foreseen this result. Price failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel requested a verdict option on conspiracy to commit false imprisonment. Therefore, we conclude the district court did not err in denying this claim.

Price next argues the district court erred by denying his claims of ineffective assistance of appellate counsel. 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*, 112 Nev. at 998, 923 P.2d at 1114. 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, Price claimed appellate counsel was ineffective for failing to argue on appeal that he could only be found guilty of one conspiracy count because the jury was required to find distinct, separate agreements to commit conspiracy for each count and the jury was not so instructed. For the reasons discussed above, we conclude the district court erred by denying this claim without conducting an evidentiary hearing. Accordingly, we reverse the district court's denial of this claim and remand this matter to the district court to hold an evidentiary hearing.

Second, Price claimed appellate counsel was ineffective for failing to argue on appeal that the trial court erroneously denied Price's request to represent himself pursuant to *Faretta v. California*, 422 U.S. 806 (1975). Criminal defendants have the right to represent themselves. *Tanksley v. State*, 113 Nev. 997, 1000, 946 P.2d 148, 150 (1997). "However, the right to self-representation is not absolute . . . ." *Watson v. State*, 130 Nev. 764, 782, 335 P.3d 157, 170 (2014).

At the time of Price's direct appeal, the record reflected only that, in the course of ex parte communication with the trial court, Price requested permission to return to representing himself and the trial court denied the request.[3] Further, counsel testified at the evidentiary hearing

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[3]The record consisted only of the district court's minutes. No transcript is available, and the record does not show that counsel attempted to initiate the process under NRAP 9(d) to prepare a statement of the evidence.

on the instant petition that he was aware Price had requested to return to representing himself, the topic of self-representation came up several times in their subsequent pretrial conversations, and counsel thought that Price was going to ask to represent himself but never did. The mere fact that Price requested and was denied self-representation did not necessarily give rise to a viable claim for a direct appeal. *See Tanksley*, 113 Nev. at 1000-01, 946 P.2d at 150 (providing examples of where a request for self-representation may properly be denied). Because the record available to counsel at the time of Price's appeal did not demonstrate that the trial court violated Price's right to self-representation, Price failed to demonstrate counsel was deficient for not arguing a *Faretta* violation or that, had counsel raised the argument, there was a reasonable probability of success on appeal. *See Cripps v. State*, 122 Nev. 764, 772, 137 P.3d 1187, 1192 (2006) (providing it would have been appellant's burden "to provide this court with an appellate record sufficient to demonstrate error").[4] Therefore, we cannot conclude that the district court erred by denying this claim.

Third, Price claimed appellate counsel was ineffective for failing to properly support the argument on direct appeal concerning a violation of

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[4]Price raised the underlying substantive claim as a stand-alone claim. However, because the claim could have been raised on direct appeal, it was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.810(1)(b). Price claimed the ineffective assistance provided by appellate counsel excused the procedural bar. However, for the reasons discussed above, Price failed to demonstrate counsel was ineffective and therefore failed to demonstrate good cause and actual prejudice sufficient to overcome the procedural bar. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

the speedy trial provision of the Interstate Agreement on Detainers Act (IAD). Price argued that counsel should have highlighted a split in authority and cited to nonbinding authority for the proposition that it is error under the IAD to grant a continuance outside the presence of the defendant. Price argued that, had counsel done so, Price's charges would have been dismissed because Price was not present at the hearing where the continuance was granted.

Price's factual allegations are belied by the record: The transcript of the relevant hearing indicates that Price was present.[5] And the nonbinding authority Price cited is consistent with Nevada law as to the defendant's presence. *Compare State v. Brown*, 953 A.2d 1174, 1179-80 (N.H. 2008) ("Article III(a) of the IAD permits a court to 'grant any necessary or reasonable continuance,' but only if 'good cause [is] shown in open court, the prisoner or his counsel being present.'") (citations omitted)), *with* NRS 178.620 (Art. III(a)) (providing that the IAD permits a court with jurisdiction to "grant any necessary or reasonable continuance" where "good cause [is] shown in open court, [and] the prisoner or the prisoner's counsel [is] present"). Accordingly, Price failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of success had counsel supported his argument on

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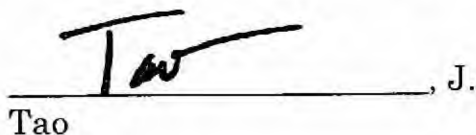
[5]In his opening brief on appeal, Price suggests that, even if he were present, he did not consent. Because Price did not make this argument below, we need not consider it for the first time on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). However, we note that allegation is also belied by the record, which shows that Price did consent to the continuance.

appeal with the authority Price offered. Therefore, we conclude the district court did not err by denying this claim.

Price also argues the district court erred by denying his claim that he was entitled to relief due to the cumulative effect of counsel's errors. The Nevada Supreme Court has not held that multiple deficiencies of counsel may be cumulated to establish prejudice. *See McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009). Price failed to demonstrate he was prejudiced by any cumulated deficiencies. 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



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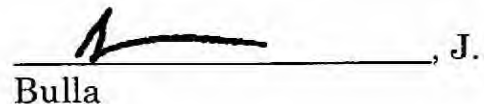

_______________, J.
Bulla

cc: Hon. Mary Kay Holthus, District Judge
Resch Law, PLLC d/b/a Conviction Solutions
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk