IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MELVYN PERRY SPROWSON, JR.,
Appellant,
vs.
TIM GARRETT, WARDEN,
Respondent.

No. 83060-COA

ORDER OF AFFIRMANCE

Melvyn Perry Sprowson, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Erika D. Ballou, Judge.

In his February 9, 2021, petition, Sprowson claimed that his appellate counsel was ineffective. 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). We give deference to the 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, Sprowson claimed his appellate counsel was ineffective for failing to challenge his first-degree kidnapping charge on direct appeal or in the trial court after his conviction was partially overturned. The Nevada Supreme Court reversed Sprowson's conviction for child abuse, neglect, or endangerment with substantial bodily harm and/or mental harm on direct appeal. *Sprowson v. State*, No. 73674, 2019 WL 2766854 (Nev. July 1, 2019) (Order Affirming in Part, Reversing in Part, and Remanding). Sprowson claimed his kidnapping conviction should have also been reversed because the State heavily relied upon the evidence that supported the child-abuse charge to prove that he committed kidnapping.

Counsel challenged the kidnapping charge on direct appeal and urged the Nevada Supreme Court to reverse that conviction. Further, the Nevada Supreme Court concluded that "[t]he evidentiary errors related to the victim's mental health affected only the child abuse conviction" and, therefore, reversal of Sprowson's remaining convictions was not warranted. *Id.* at *5. In light of counsel's challenge to the kidnapping charge and the Nevada Supreme Court's conclusions on direct appeal, Sprowson failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome on direct appeal had counsel raised additional challenges to the kidnapping charge. Therefore, we conclude the district court did not err by denying this claim.

Second, Sprowson claimed his appellate counsel was ineffective for failing to argue that the State committed prosecutorial misconduct by presenting false or misleading testimony during trial. Sprowson asserted in his petition that the victim previously engaged in relationships with older men, she sought to conceal that activity from her mother, and she ran away from home to be with other men on multiple occasions. Sprowson asserted that the State improperly permitted witnesses to refrain from explaining those issues to the jury and that doing so allowed the State to improperly assert he committed kidnapping by enticing the victim into staying away from her mother.

The trial court issued an order precluding the parties from referencing the victim's prior relationships with other men and her mental health issues stemming from those relationships. In light of the trial court's order concerning that information, Sprowson did not demonstrate that the State committed misconduct by refraining from questioning witnesses concerning those issues. Because Sprowson did not demonstrate improper conduct by the State, he did not demonstrate his counsel's performance fell below an objective standard of reasonableness by failing to argue that the State committed misconduct or a reasonable probability of a different outcome on direct appeal had counsel raised the argument. *See Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008) (providing appellate courts first review claims of prosecutorial misconduct for improper conduct and then determine whether reversal is warranted). Therefore, we conclude the district court did not err by denying this claim.

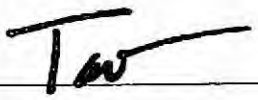
Third, Sprowson claimed his appellate counsel was ineffective for failing to argue that the crime of use of a child in the production of pornography was unconstitutional because the terms encourage, entice, and permit as used in the relevant statute are vague and overbroad. Pursuant to NRS 200.710(1), "[a] person who knowingly uses, encourages, entices or permits a minor to simulate or engage in or assist others to simulate or engage in sexual conduct to produce a performance is guilty" of unlawful use of a minor in producing pornography or as subject of sexual portrayal in performance.

A statute is presumed to be constitutional, and the party challenging its constitutionality "has the burden of making a clear showing of invalidity." *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010) (internal quotations marks omitted). A statute is void for vagueness "(1) if it fails to provide a person of ordinary intelligence fair notice of what is prohibited; or (2) if it is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* at 481-82, 245 P.3d at 553 (internal quotation marks omitted). Sprowson did not demonstrate that the terms "encourage," "entice," and "permit" as utilized in NRS 200.710(1) fail to provide a person of ordinary intelligence fair notice of what is prohibited or that those terms are so standardless that the statute authorizes or encourages seriously discriminatory enforcement. In addition, the Nevada Supreme Court has already concluded that statutes barring the sexual portrayal of minors, such as NRS 200.710, are not overbroad. *Shue v. State*, 133 Nev. 798, 805, 407 P.3d 332, 338 (2017). Thus, Sprowson failed to meet his burden of making a clear showing that NRS 200.710 is invalid.

Accordingly, Sprowson failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness by failing to raise the underlying claim or a reasonable probability of a different outcome on direct appeal had counsel done so. Therefore, we conclude the district court did not err by denying this claim, and we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

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cc: Hon. Erika D. Ballou, District Judge
Melvyn Perry Sprowson, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk