


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DENZEL DORSEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83644-COA

FILED

APR 11 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Denzel Dorsey appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on August 11, 2021. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

Dorsey claims the district court erred by denying his claims of ineffective assistance of trial-level counsel.¹ 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

¹Multiple attorneys represented Dorsey at the trial level. Of those, Dorsey alleged only the ineffective assistance of Keith C. Brower, Esq., who represented Dorsey in the justice court proceedings and through his initial arraignment in the district court before withdrawing due to a conflict of interest, and Caitlyn McAmis, Esq., who represented Dorsey at the time he entered his guilty plea but then later withdrew at Dorsey's request. Ms. McAmis was ultimately replaced by Gary Modafferi, Esq., who represented Dorsey through sentencing.

(1984) (adopting the test in *Strickland*). To demonstrate prejudice regarding the decision to enter a guilty plea, a petitioner must show a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry—deficiency and prejudice—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).

First, Dorsey claimed Ms. McAmis was ineffective for refusing to file a presentence motion to withdraw his plea. Mr. Modafferi filed a presentence motion to withdraw plea on Dorsey's behalf. The trial-level court denied the motion, and this court affirmed that decision on direct appeal. *See Dorsey v. State*, No. 79845-COA, 2021 WL 89382 (Nev. Ct. App. Jan. 8, 2021) (Order of Affirmance). Dorsey's bare claim failed to explain how the outcome of his motion would have been different had Ms. McAmis filed it. Accordingly, Dorsey failed to demonstrate he was prejudiced by counsel's inaction. Therefore, we conclude the district court did not err by denying this claim.

Second, Dorsey claimed Ms. McAmis was ineffective for failing to investigate or interview Dorsey's brother and T. Clemons. Dorsey claimed he told counsel about these witnesses and, had counsel investigated them, counsel would have learned that the brother admitted to being the perpetrator and Clemens would have provided an alibi. Dorsey further claimed that had counsel conducted the investigation, he would have had a

trial defense and, thus, would have not pleaded guilty but would have insisted on going to trial.

The evidence presented at the preliminary hearing was that the perpetrator fled the scene by driving away in a vehicle with no passengers. Police located the vehicle within a short period of time and arrested Dorsey, who had the key to the vehicle in his pocket and had on him a jacket and glove that bore evidence consistent with the crime. Based on these facts, Dorsey would have known whether he was the perpetrator or had an alibi, but he chose to plead guilty nonetheless. Moreover, Dorsey received a substantial benefit from his plea deal. In exchange for Dorsey's guilty plea, the State agreed not to seek habitual criminal treatment and not to oppose the dismissal of justice court case number 17F21598X wherein Dorsey was accused of committing three felony offenses. Accordingly, Dorsey failed to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial absent counsel's inaction. Therefore, we conclude the district court did not err by denying this claim.

Third, Dorsey claimed Mr. Brower failed to object to or otherwise challenge prosecutorial misconduct. Dorsey claimed the prosecutor committed witness tampering by improperly inducing an in-court identification of Dorsey from a State witness during his preliminary hearing. Dorsey failed to explain how the prosecutor's actions constituted witness tampering. See NRS 199.240 (describing elements of bribing or intimidating witness to influence testimony); *Witness Tampering*, Black's Law Dictionary (11th ed. 2019) (defining witness tampering as "[t]he act or an instance of obstructing justice by intimidating, influencing, or harassing a witness before or after the witness testifies").

Even assuming the State's efforts to get the witness to identify Dorsey were improper, the State, as detailed above, presented sufficient evidence aside from the witness identification to support the justice court's finding that there was probable cause to believe it was Dorsey who committed the crime. *See Sheriff, Washoe Cty. v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (explaining the State need only present slight or marginal evidence to demonstrate probable cause to support a criminal charge); *Kinsey v. Sheriff, Washoe Cty.*, 87 Nev. 361, 363, 487 P.2d 340, 341 (1971) ("To commit an accused for trial, the State is not required to negate all inferences which might explain his conduct, but only to present enough evidence to support a reasonable inference that the accused committed the offense."). Accordingly, Dorsey failed to demonstrate a reasonable probability that the justice court would not have found probable cause to believe Dorsey committed the crimes or that he would have refused to plead guilty and would have insisted on proceeding to trial absent counsel's inaction. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Dorsey claimed Mr. Brower was ineffective for failing to obtain *Brady*² material from the State for use at the preliminary hearing. Dorsey claimed counsel failed to obtain images taken by police of Dorsey's jacket, glove, and hand that could have been used for cross-examination. *Brady* requires prosecutors to disclose evidence favorable to the defense when the evidence is material to guilt or punishment. *Mazzan v. Warden*, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). Dorsey failed to explain how the images were favorable to him. Accordingly, Dorsey failed to demonstrate

²*See Brady v. Maryland*, 373 U.S. 83 (1963).

counsel's performance was deficient or a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial absent counsel's inaction. Therefore, we conclude the district court did not err by denying this claim.

Fifth, Dorsey claimed Ms. McAmis was ineffective for allowing Dorsey to enter a global plea deal that was negotiated, in part, by the attorney representing Dorsey in justice court case number 17F21598X ("other attorney"). Dorsey alleged the other attorney had a conflict of interest and used the conflict to coerce Dorsey into pleading guilty in this case. Dorsey failed to explain the alleged conflict of interest or what actions of the other attorney constituted coercion. Accordingly, Dorsey failed to demonstrate counsel's performance was deficient.

Additionally, Dorsey failed to explain how he was coerced or how the alleged conflict otherwise affected his decision to plead guilty. The decision whether to enter the plea was Dorsey's and not something that counsel could allow or prevent. *See McConnell v. State*, 125 Nev. 243, 253, 212 P.3d 307, 314 (2009) ("Although counsel certainly owes a duty to advise his client whether to plead guilty, counsel does not have the authority to override a defendant's decision to plead guilty."). Moreover, Dorsey received a substantial benefit from his plea deal. Accordingly, Dorsey failed to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial absent counsel's alleged error. Therefore, we conclude the district court did not err by denying this claim.

Dorsey also claimed the district court erred by denying his claims of ineffective assistance of appellate counsel.³ 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, Dorsey claimed counsel was ineffective for failing to raise on direct appeal that the State committed prosecutorial misconduct during the preliminary hearing and failed to turn over *Brady* material. Claims based on events arising before a guilty plea are generally waived unless they involve the voluntariness of the plea itself. *Gonzales v. State*, 137 Nev., Adv. Op. 40, 492 P.3d 556, 561 (2021); *Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984). Accordingly, Dorsey failed to demonstrate counsel's performance was deficient or a reasonable likelihood of success on appeal had he raised the claims. Therefore, we conclude the district court did not err by denying these claims.

Second, Dorsey claimed counsel was ineffective for failing to raise on direct appeal that Dorsey's plea was coerced because the other attorney used a conflict of interest to manipulate him into pleading guilty

³Dorsey's appellate counsel did not represent him in any of the trial-level proceedings.

in this case. For the reasons discussed previously, Dorsey failed to demonstrate counsel's performance was deficient or a reasonable likelihood of success on appeal had he raised the claim.⁴ Therefore, we conclude the district court did not err by denying this claim.

Third, Dorsey claimed counsel was ineffective for failing to raise on direct appeal that the trial-level court abused its discretion by denying Dorsey's presentence motion to withdraw his guilty plea. Appellate counsel raised the underlying claim on direct appeal, and this court determined the trial-level court did not abuse its discretion. *See Dorsey*, 2021 WL 89382, at *1. Dorsey failed to explain how counsel's challenge was inadequate or how any alleged inadequacy affected Dorsey's likelihood of success of appeal. Accordingly, Dorsey failed to demonstrate counsel's performance was deficient or a reasonable likelihood of success on appeal had counsel argued the claim differently. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Dorsey claimed his counsel was ineffective for failing to raise a claim of ineffective assistance of trial-level counsel on direct appeal. Such claims are generally inappropriate on direct appeal, and Dorsey did not allege his claim fell into an exception to that general rule. *See Pellegrini v. State*, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001) ("[W]e have generally declined to address claims of ineffective assistance of counsel on direct appeal unless there has already been an evidentiary hearing or where an evidentiary hearing would be unnecessary."), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018). Accordingly, Dorsey failed to demonstrate counsel's performance was

⁴Dorsey raised the underlying substantive claim as a stand-alone claim. For the reasons discussed above, we conclude the claim lacked merit.

deficient or a reasonable likelihood of success on appeal had he raised the claim. Therefore, we conclude the district court did not err by denying this claim.

Dorsey also claimed the district court erred by denying his claim that he was entitled to relief due to the cumulative effect of counsels' errors. The Nevada Supreme Court has not held that multiple deficiencies of counsel may be cumulated to establish prejudice. See *McConnell*, 125 Nev. at 259 n.17, 212 P.3d at 318 n.17. And Dorsey failed to demonstrate he was prejudiced by any cumulated deficiencies. Therefore, we conclude the district court did not err by denying this claim.

Dorsey also claimed the trial-level court abused its discretion by denying his presentence motion to withdraw his guilty plea. Dorsey challenged the denial of his motion to withdraw guilty plea on direct appeal, and this court affirmed his conviction. See *Dorsey*, 2021 WL 89382, at *1. That decision represents the law of the case and "cannot be avoided by a more detailed and precisely focused argument." *Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Therefore, we conclude the district court did not err by denying this claim.

Dorsey also claimed that the justice court erred by allowing the victim to make an improper in-court identification of Dorsey during the preliminary hearing and the State failed to provide *Brady* material. Dorsey's claims neither challenged the validity of his guilty plea nor alleged his plea was entered without the effective assistance of counsel. Dorsey's claims were thus outside the scope of claims permissible in a postconviction petition for a writ of habeas corpus arising from a guilty plea. NRS 34.810(1)(a); *Gonzales*, 137 Nev., Adv. Op. 40, 492 P.3d at 562. Therefore, we conclude the district court did not err by denying these claims.

Dorsey appears to claim in his informal brief on appeal that it was error for the Honorable Joe Hardy to preside over the hearing on Dorsey's petition because the judge had presided over Dorsey's trial-level proceedings and Dorsey alleged the judge abused his discretion. Petitions for postconviction relief must be assigned, whenever possible, to the original judge or court. See NRS 34.730(3)(b). Moreover, 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). Finally, we note that a judge other than Judge Hardy wrote and entered the written order. For the foregoing reasons, we conclude Dorsey is not entitled to relief on this claim, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Jacqueline M. Bluth, District Judge
Denzel Dorsey
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk