

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANDRE DOW,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 83271-COA

**FILED**

JUN 13 2022

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

*ORDER OF AFFIRMANCE*

Andre Dow appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Dow argues that the district court erred by denying his April 20, 2015, petition and later-filed supplement as procedurally barred. Dow filed his petition more than four years after issuance of the remittitur on direct appeal on June 21, 2010. *Dow v. State*, No. 52583, 2010 WL 3276222 (Nev. May 26, 2010) (Order of Affirmance). Thus, Dow's petition was untimely filed. *See* NRS 34.726(1). Dow's petition was procedurally time barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.*

Dow claimed that he had cause for the delay because he retained an attorney to file a postconviction petition, he reasonably believed that a petition would be filed, and the attorney essentially abandoned him without filing a petition. After an evidentiary hearing concerning this issue, the district court concluded Dow demonstrated that he was abandoned by counsel and that Dow filed his petition within a reasonable time of learning that a petition had not been filed. The district court thus concluded that Dow demonstrated an impediment external to the defense excused his delay, and the State does not challenge this conclusion on appeal. The

district court nevertheless denied Dow's petition because he could not demonstrate undue prejudice stemming from his underlying claims.

Dow argues on appeal that the district court erred by denying his petition without conducting an evidentiary hearing as to undue prejudice. Most of Dow's underlying claims involved the ineffective assistance of counsel. Dow first claimed that his trial counsel was ineffective. 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, Dow claimed that his trial counsel was ineffective for failing to properly investigate prior bad act evidence involving L. Laursen. Laursen was with Dow before and after the two murders in this matter and was a possible witness or codefendant. The trial court admitted evidence that Dow murdered Laursen. It did so pursuant to NRS 48.045(2), which allows the admission of other bad act evidence to prove identity. Dow contended that an investigation would have demonstrated that there was no physical evidence linking him to Laursen's murder.

A petitioner alleging that an attorney should have conducted a better investigation must demonstrate what the results of a better investigation would have been and how it would have affected the outcome of the proceedings. *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Dow's bare claim failed to specify what investigation counsel should have undertaken and how the results would have affected the outcome of his trial. Moreover, the Nevada Supreme Court concluded that the trial court did not err by admitting the evidence concerning Laursen's murder because of the similarities between her murder and the two murders in this matter, *Dow*, No. 52583, 2010 WL 3276222, at \*1, and Dow did not demonstrate that additional investigation by counsel would have rendered evidence concerning Laursen's murder inadmissible. Accordingly, Dow failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel conducted an investigation into Laursen's murder. Therefore, we conclude the district court did not err by denying this claim without considering it at the evidentiary hearing.

Second, Dow claimed that his trial counsel was ineffective for failing to investigate A. Moulton. Moulton testified concerning an in-person conversation he had with Dow while in Las Vegas in which Dow alluded to the crimes at issue in this matter. Dow contended that counsel should have investigated Moulton's custody status and would have discovered that Moulton was actually incarcerated in Georgia on the date that he supposedly talked with Dow. Dow did not allege any facts that would have caused objectively reasonable counsel to investigate Moulton's custody status. Moreover, even excluding any testimony from Moulton, the State presented significant evidence of Dow's guilt during trial. Dow invited the victims to Las Vegas, a witness saw one victim was with Dow on the night the victim was killed, and casino surveillance footage depicted both victims

with Dow on the night they were killed. The victims' bodies were discovered near a vehicle associated with Dow, and witnesses viewed a different vehicle associated with Dow driving away from the crime scene after the shooting. Finally, Dow wrote rap lyrics in which he referenced the murders. Accordingly, Dow failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel conducted an investigation concerning Moulton. Therefore, we conclude the district court did not err by denying this claim without considering it at the evidentiary hearing.

Third, Dow claimed that his trial counsel was ineffective for failing to object to admission of photographs depicting Laursen's body because they were prejudicial and inflammatory. "Admission of evidence is within the trial court's sound discretion." *Byford v. State*, 116 Nev. 215, 231, 994 P.2d 700, 711 (2000). Dow did not explain why he believed the photographs were prejudicial and, thus, failed to demonstrate that the trial court abused its discretion by admitting that evidence. *See id.* ("Despite gruesomeness, photographic evidence has been held admissible when it accurately shows the scene of the crime or when utilized to show the cause of death and when it reflects the severity of wounds and the manner of their infliction." (quotation marks omitted)). Accordingly, Dow failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness due to any failure to object to the admission of that evidence or a reasonable probability of a different result had counsel done so. Therefore, we conclude the district court did not err by denying this claim without considering it at the evidentiary hearing.

Fourth, Dow claimed that his trial counsel was ineffective for failing to object to the State's statement during closing arguments indicating that Dow executed three people. Dow contended that the State should not have argued that he killed Laursen, because he was not charged

or convicted of her murder and information concerning her murder was only admitted as prior-bad-act evidence.

During closing arguments, the State may “assert inferences from the evidence and argue conclusions on disputed issues.” *Truesdell v. State*, 129 Nev. 194, 203, 304 P.3d 396, 402 (2013). The State’s argument, when placed in context, urged the jury not to convict Dow because of his status as a gangster rapper but rather because of the evidence that demonstrated he caused the deaths of the victims in this matter. Given the nature of the State’s arguments, Dow did not demonstrate that his trial counsel’s performance fell below an objective standard of reasonableness by failing to object to the challenged statement. In addition, as there was substantial evidence of Dow’s guilt presented at trial, Dow failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected to the State’s arguments. Therefore, we conclude the district court did not err by denying this claim without considering it at the evidentiary hearing.

Dow next 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*, 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, Dow claimed that his appellate counsel was ineffective for failing to argue that the trial court erred by refusing to permit him to have

counsel of his choice. “The right to counsel of one’s choice is not absolute, . . . and a court has wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar.” *Patterson v. State*, 129 Nev. 168, 175, 298 P.3d 433, 438 (2013) (internal quotation marks and punctuation omitted). Appellate courts review the denial of a request for the substitution of counsel for an abuse of discretion. *Id.*

On the morning of the first day of trial, Dow informed the trial court that he wished to have substitute counsel. Dow noted that his substitute counsel was out of the jurisdiction and he would therefore need trial to be continued a few days to accommodate substitute counsel’s travel schedule. The district court rejected Dow’s request to continue trial but informed Dow that substitute counsel was free to join the defense when he was available to do so. In light of the timing of Dow’s request, Dow did not demonstrate that the trial court abused its discretion. *See id.* at 176, 298 P.3d at 438 (providing that the court reviewing a request for substitute counsel must “balance the defendant’s interest in new counsel against the disruption, if any, flowing from the substitution”). Accordingly, Dow failed to demonstrate that his counsel’s failure to raise the underlying claim on appeal fell below an objective standard of reasonableness. Dow also failed to demonstrate a reasonable probability of a different outcome had counsel raised the underlying claim. Therefore, we conclude the district court did not err by denying this claim without considering it at the evidentiary hearing.

Second, Dow claimed that his appellate counsel was ineffective for failing to argue that the trial court erred by denying his request to continue the trial so that he could call two defense witnesses. Dow contended that the district court’s decision to deny his request to continue the trial so that the out-of-state witnesses could appear precluded him from

presenting his defense. Appellate courts review the denial of a motion to continue trial for an abuse of discretion. *Rose v. State*, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007). “Each case turns on its own particular facts, and much weight is given to the reasons offered to the trial judge at the time the request for a continuance is made.” *Higgs v. State*, 126 Nev. 1, 9, 222 P.3d 648, 653 (2010).

Toward the end of trial, Dow requested a continuance so that he could present testimonies from out-of-state witnesses concerning the nature of the relationship between Dow and one of the victims. The trial court found that Dow had already presented similar information from other witnesses and a continuance of trial to allow additional presentation of that type of information was not necessary. Dow did not demonstrate that the trial court abused its discretion in this regard or that the trial court precluded him from presenting a defense. Accordingly, Dow did not demonstrate that his appellate counsel’s performance fell below an objective standard of reasonableness for failing to argue the trial court erred by denying a continuance to permit him the opportunity to procure witnesses. Dow also failed to demonstrate a reasonable probability of a different outcome had counsel raised the underlying claim. Therefore, we conclude the district court did not err by denying this claim without considering it at the evidentiary hearing.

Third, Dow claimed that his appellate counsel was ineffective for failing to argue that the trial court erred by ordering his former defense attorney to testify at trial. Dow asserted that the challenged testimony violated attorney-client privilege. The trial court ordered Dow’s former defense attorney to testify regarding a phone call the attorney made to Laursen. The attorney testified at trial that Laursen answered the call and Dow subsequently participated in the conversation. Even excluding the testimony of Dow’s former attorney, as explained previously, there was

significant evidence of Dow's guilt presented at trial. Thus, any error in admitting the communications with Dow's former attorney was harmless beyond a reasonable doubt. See *Manley v. State*, 115 Nev. 114, 122-23, 979 P.2d 703, 708 (1999) (stating that the admission of statements at trial in violation of attorney-client privilege is error of constitutional dimension and is reviewed for whether the error is harmless beyond a reasonable doubt). Accordingly, Dow failed to demonstrate a reasonable probability of a different outcome on appeal had counsel raised the underlying claim. Therefore, we conclude the district court did not err by denying this claim without considering it at the evidentiary hearing.

Fourth, Dow claimed that his appellate counsel was ineffective for failing to argue that the trial court erred by admitting his rap lyrics into evidence. Rap lyrics may properly be admitted at trial "when the defendant-authored writing incorporates details of the crime charged." *Holmes v. State*, 129 Nev. 567, 573, 306 P.3d 415, 419 (2013). "The real question is whether the lyrics' probative value was substantially outweighed by the danger of *unfair* prejudice." *Id.* at 575, 306 P.3d at 420. The trial court concluded that the lyrics incorporated details of Dow's crimes. And Dow did not demonstrate that the lyrics' probative value was substantially outweighed by a danger of unfair prejudice. Accordingly, Dow did not demonstrate that his appellate counsel's performance fell below an objective standard of reasonableness due to a failure to argue the trial court erred by admitting the rap lyrics or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err by denying this claim without considering it at the evidentiary hearing.

Next, Dow argued that he was entitled to relief due to the cumulative effect of counsel's errors. However, even assuming multiple deficiencies in counsel's performance may be cumulated to find prejudice under the *Strickland* test, see *McConnell v. State*, 125 Nev. 243, 259 n.17,



212 P.3d 307, 318 n.17 (2009), Dow failed to demonstrate that he was entitled to relief even considering any errors cumulatively, because strong evidence of his guilt was presented at trial. Therefore, we conclude the district court did not err by denying this claim without considering it at the evidentiary hearing.


For the reasons discussed above, Dow failed to demonstrate that his underlying ineffective-assistance-of-counsel claims had merit. He therefore failed to demonstrate undue prejudice sufficient to overcome the procedural time bar. *See Rippo v. State*, 134 Nev. 411, 425, 423 P.3d 1084, 1099 (2018) (“If a petitioner who seeks to excuse a procedural default based on ineffective assistance of counsel makes the showing of prejudice required by *Strickland*, he also has met the actual prejudice showing required to excuse the procedural default.”). Accordingly, we conclude the district court did not err by denying these claims as procedurally time barred without first considering them at the evidentiary hearing.


The remainder of Dow’s underlying claims involved allegations of trial court error. Dow claimed that the trial court erred by denying his request for counsel of his choice, denying him the ability to call two witnesses, and ordering his prior defense attorney to testify at trial. Dow also claimed he was entitled to relief due to the cumulative effect of the trial court’s errors. These claims could have been raised on direct appeal and were thus procedurally barred pursuant to NRS 34.810(1)(b) absent a showing of “both cause for the failure to present the grounds and actual prejudice to the petitioner.” NRS 34.810(1). Abandonment by postconviction counsel could not be cause for failing to raise a claim on a direct appeal, and Dow did not otherwise allege cause for the failure. Because these claims were also procedurally barred, we conclude the district court did not err by denying them without first considering them at the evidentiary hearing.

Finally, Dow argues on appeal that the State withheld evidence related to Moulton in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). However, Dow did not raise this claim in his 2015 petition and supplement, and we decline to consider it on appeal in the first instance. See *McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Michelle Leavitt, District Judge  
Chesnoff & Schonfeld  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk