

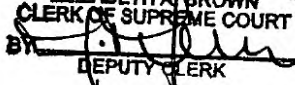
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOE EDWARD HUDSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84810-COA

FILED

FEB 14 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Joe Edward Hudson appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Tara D. Clark Newberry, Judge.

First, Hudson argues that the district court erred by denying his February 9, 2022, petition without first conducting an evidentiary hearing. 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).

Ineffective assistance of trial counsel

In his petition, Hudson first contended 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).

First, Hudson claimed that his trial counsel was ineffective for failing to ensure he had a meaningful opportunity to present his motion to dismiss. Prior to trial, Hudson drafted a handwritten motion to dismiss, and his counsel helped to file that document with the trial court. In his motion, Hudson alleged he was entitled to dismissal of the charges against him due to errors stemming from the appointment of his defense attorney, prosecutorial misconduct, and because the trial court lacked jurisdiction over his case. The trial court considered the motion during a hearing, concluded the motion lacked merit, and denied the motion. Hudson did not identify any actions counsel should have performed in order to help Hudson present his motion, and thus, Hudson failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness. Moreover, this court concluded on direct appeal that the district court did not err by denying Hudson's motion to dismiss. *Hudson v. State*, No. 80784-COA, 2021 WL 632758, *5 (Nev. Ct. App. Feb. 17, 2021) (Order of Affirmance). Accordingly, Hudson failed to demonstrate a reasonable probability of a different outcome had counsel offered more help in the presentation of his motion to the trial court. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Hudson claimed that his trial counsel was ineffective for representing conflicting interests. "Conflict of interest and divided loyalty situations can take many forms, and whether an actual conflict

exists must be evaluated on the specific facts of each case. In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties.” *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991)). A conflict of interest exists if “counsel ‘actively represented conflicting interests’” and the “conflict of interest adversely affected [the defendant’s] lawyer’s performance.” *Strickland*, 466 U.S. at 692 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350, 348 (1980)). Hudson did not allege that his counsel was in a situation conducive to divided loyalties. Moreover, Hudson made a bare and unsupported statement that his counsel represented conflicting interests as he did not provide factual support or explanation regarding his claim. Thus, Hudson’s allegation was insufficient to demonstrate that he was entitled to relief. Accordingly, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Hudson appeared to claim that his trial counsel was ineffective for failing to review statements made by witnesses prior to trial. During trial, counsel cross-examined the victims, their brother, and their mother at length. Counsel also questioned them regarding their prior statements and pointed to inconsistencies between those statements and their trial testimonies. During cross-examination of one victim, that victim acknowledged that he had made a statement to the police after the incident and that he had not been truthful in that statement. In light of counsel’s cross-examination of these witnesses and the responses to counsel’s questions, Hudson failed to demonstrate his counsel’s performance fell below an objective standard of reasonableness. Hudson also failed to demonstrate a reasonable probability of a different outcome at trial had counsel further reviewed the witness statements or performed additional

actions regarding that information. Therefore, we conclude that the district court did not err by denying this claim.

Fourth, Hudson appeared to claim that his trial counsel was ineffective for failing to argue that the State committed misconduct by prosecuting him based upon perjured testimony. Hudson did not support this claim with specific factual allegations concerning which witnesses he believed committed perjury. To the extent that Hudson contended that the witnesses made statements prior to trial that were inconsistent with their testimonies at trial, his claim was insufficient to demonstrate that the witnesses committed perjury or that the State knowingly presented perjured testimony at trial. *See United States v. Sloan*, 465 F.2d 406, 407 (9th Cir. 1972) (stating the mere fact that a witness has made inconsistent statements does not prove that the witness committed perjury, "let alone knowing presentation of perjured evidence by the government"). Accordingly, Hudson failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness due to any failure to raise the underlying perjured-testimony claim or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Fifth, Hudson claimed that his trial counsel was ineffective for failing to assert that the State improperly failed to file an amended information to allege that it was seeking a sentence under the habitual criminal enhancement. Hudson also appeared to contend that the State should have again provided notice of its intent to seek a sentence under the habitual criminal enhancement after his initial conviction was overturned on appeal.

The State did not file an amended information but rather filed a notice of its intent to seek punishment as a habitual criminal. Hudson did not demonstrate the State's notice was improper. *See* NRS 207.016(2). Moreover, "the clear purpose of [the notice requirement] is to ensure that the defendant has notice that the State will request habitual criminal adjudication." *LaChance v. State*, 130 Nev. 263, 276, 321 P.3d 919, 928 (2014). Because the record demonstrated that Hudson had notice of the State's intent to seek such a punishment, he did not demonstrate that the State had to again file its notice after the initial conviction was overturned on appeal. Accordingly, Hudson did not demonstrate his counsel's performance fell below an objective standard of reasonableness by any failure to object to the State's notice or to also assert that it was inadequate following Hudson's first direct appeal. Hudson also failed to demonstrate a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err by denying these claims without conducting an evidentiary hearing.

Sixth, Hudson appeared to claim that his trial counsel was ineffective for failing to challenge the validity of his prior convictions in an effort to demonstrate that he should not have been adjudicated as a habitual criminal. The State asserted that Hudson was eligible for adjudication as a habitual criminal because he had four prior felony convictions. Hudson did not identify any bases for which counsel should have challenged the validity of those convictions for purposes of habitual criminal adjudication. Accordingly, Hudson did not demonstrate his counsel's performance fell below an objective standard of reasonableness by any failure to challenge his prior convictions. Hudson also failed to demonstrate 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 conducting an evidentiary hearing.

Seventh, Hudson appeared to claim that his counsel was ineffective for failing to argue against adjudication as a habitual criminal because his prior convictions were stale and trivial, for failing to be prepared for the sentencing hearing, and for failing to present argument in mitigation.

At the sentencing hearing, counsel acknowledged that Hudson had previously been convicted of murder and bank robbery but urged the district court to impose a lenient sentence because the facts involved in the commission of this crime did not warrant a lengthy sentence. The sentencing court acknowledged that Hudson had prior convictions that occurred a long time ago. However, the sentencing court noted that when Hudson obtained his release onto parole after serving time in prison following those convictions, he soon after committed additional acts of violence. And the sentencing court ultimately concluded that Hudson should be sentenced as a habitual criminal.

In light of the argument presented at the sentencing hearing and the nature of Hudson's prior convictions, Hudson did not demonstrate that his counsel's performance fell below an objective standard of reasonableness due to any failure to argue that his prior convictions were stale or trivial. *See Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992) ("NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court."). Hudson also did not demonstrate that his counsel was unprepared or failed to present arguments for a lenient sentence.

Moreover, Hudson did not demonstrate a reasonable probability of a different outcome had counsel raised additional arguments or been further prepared as the sentencing court understood its sentencing authority and exercised its discretion to adjudicate Hudson as a habitual criminal based upon the crime and his criminal history. *See Hughes v. State*, 116 Nev. 327, 333, 996 P.2d 890, 893-94 (2000). Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Eighth, Hudson claimed that his trial counsel was ineffective for failing to “adequately prepare,” advising him to waive his right to a preliminary hearing, failing to argue that the trial court was biased against him, permitting him to be prosecuted through a defective charging instrument, and failing to move to suppress the arrest report. Hudson did not make specific factual allegations concerning these issues, explain why he believed that his counsel’s actions fell below an objective standard of reasonableness, or explain why he was prejudiced as a result of counsel’s (in)actions regarding these issues. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Ineffective assistance of appellate counsel

Hudson next appeared to assert 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).

Hudson appeared to claim that his appellate counsel was ineffective for failing to argue that the sentencing court lacked jurisdiction to adjudicate him as a habitual criminal because the State improperly failed to file an amended information to allege that it was seeking a sentence under the habitual criminal enhancement. Hudson also appeared to contend his counsel should have argued that the State should have again provided notice of its intent to seek a sentence under the habitual criminal enhancement after his initial conviction was overturned on appeal.

As stated previously, the State did not file an amended information but rather filed a notice of its intent to seek punishment as a habitual criminal. Hudson did not demonstrate the State's notice was improper, *see* NRS 207.016(2), or that the State had to again file its notice after the initial conviction was overturned on appeal as he already had notice of its intent to seek such a punishment. Accordingly, Hudson did not demonstrate his counsel's performance fell below an objective standard of reasonableness by any failure to raise the underlying claims on direct appeal 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 conducting an evidentiary hearing.

Cumulative effect of counsel's errors

Hudson next appeared to claim that he was entitled to relief due to the cumulative effect of counsel's errors. Even assuming any such errors may be cumulated, *see McConnell v. State*, 125 Nev. 243, 259 n.17,

212 P.3d 307, 318 n.17 (2009) (noting the Nevada Supreme Court has never adopted a standard to evaluate such claims in postconviction proceedings), Hudson failed to demonstrate multiple errors to cumulate. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing. *See Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015).

Claim raised on direct appeal

Hudson next claimed that his sentence violated his right against cruel and unusual punishment. This court considered and rejected this claim on direct appeal. *Hudson*, No. 80784-COA, 2021 WL 632758, at *2-3. As Hudson already raised this claim and it was rejected by this court, the doctrine of the law of the case prevents further consideration of this claim. *See Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Claims that could have been raised on direct appeal

Hudson next appeared to claim that the justice court improperly appointed someone other than the public defender to represent him, the trial court violated his right against double jeopardy, the State improperly engaged in selective prosecution, the State filed a defective criminal complaint, the State committed misconduct by permitting witnesses to make false allegations against him, the habitual criminal enhancement is unconstitutional, the jury was biased against him, the trial court erred by conducting a hearing that was closed to the public, the trial court erred by failing to record pretrial hearings, the trial court was biased against him, the trial court erred by denying his pretrial motion to dismiss, he was denied a speedy trial, he was absent when the trial court

communicated with the jury, the sentencing court failed to make appropriate findings when it imposed sentence, the sentencing court improperly denied him the opportunity to present mitigation evidence at the sentencing hearing and considered improper information contained within the Presentence Investigation Report, and the trial court lacked jurisdiction to convict and sentence him. Hudson also appeared to assert he was entitled to relief due to the cumulative effect of the trial-level errors.

These claims could have been raised on direct appeal, and Hudson did not allege good cause for the failure to do so. Therefore, he is not entitled to relief. *See* NRS 34.810(1)(b). Accordingly, we conclude that the district court did not err by denying relief for these claims without conducting an evidentiary hearing.

Postconviction proceedings

Hudson appears to argue the district court erred by denying his motion to appoint counsel. The appointment of counsel in this matter was discretionary. *See* NRS 34.750(1). When deciding whether to appoint counsel, the district court may consider factors, including whether the issues presented are difficult, whether the petitioner is unable to comprehend the proceedings, or whether counsel is necessary to proceed with discovery. *Id.*; *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 761 (2017). The district court found that the issues in this matter were not difficult, Hudson was able to comprehend the proceedings, and discovery with the aid of counsel was not necessary. For these reasons, the district court denied the motion to appoint counsel. The record supports the decision of the district court, and we conclude the district court did not abuse its discretion by denying the motion for the appointment of counsel.

Hudson next argues that the district court's order denying his petition is not a final order because it did not address all of his claims. "[A] final order [is] one that disposes of all issues and leaves nothing for future consideration." *See Sandstrom v. Second Judicial Dist. Court*, 121 Nev. 657, 659, 119 P.3d 1250, 1252 (2005). The district court's order considered Hudson's claims and denied the petition in its entirety. Thus, the order disposed of Hudson's issues and left nothing for future consideration. Accordingly, Hudson is not entitled to relief based on this claim.

Finally, Hudson appears to argue that the district court failed to provide sufficient findings of facts and conclusions of law when denying his claims. However, we conclude the district court's order contains findings and conclusions with sufficient specificity to permit this court to appropriately review its decision on appeal. Therefore, we conclude Hudson fails to demonstrate he is entitled to relief based upon this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Tara D. Clark Newberry, District Judge
Joe Edward Hudson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk