

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHNNY EARL BAGGETT, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84839-COA

FILED

MAR 14 2023

ELIZABETH BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Johnny Earl Baggett, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on July 15, 2020, and supplemental pleadings. Eighth Judicial District Court, Clark County; Jasmin D. Lilly-Spells, Judge.

Baggett contends the district court erred by denying his claims of ineffective assistance of trial counsel without first conducting an evidentiary hearing. 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. 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). 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, Baggett claimed his trial counsel was ineffective for failing to adequately oppose the State's motion to consolidate cases. Baggett claimed counsel cited only one statute and one case and "failed to adequately address the factors necessary to determine whether joinder is appropriate." Baggett's bare claim failed to identify any other statute or case that counsel should have cited. The claim also failed to identify any factor, other than similarity of conduct, that counsel should have argued or what the outcome of the argument would have been had counsel done so. Accordingly, Baggett failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome absent counsel's inaction. Therefore, we conclude that the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Baggett claimed his trial counsel was ineffective for failing to file a brief challenging the sufficiency of the evidence presented at the preliminary hearing. Baggett argued that had counsel filed a brief, there was a reasonable probability he would not have been bound over for trial or the case would have been dismissed. Counsel had challenged the sufficiency of the evidence at the preliminary hearing. The justice court questioned the State's evidence, stated it had "evidentiary concerns," allowed briefing on the matter, and took the matter under advisement. The State filed a brief with the justice court but counsel did not. Baggett did not allege what counsel should have briefed that was not already addressed by the arguments counsel had already made to the justice court and the

evidence that the justice court was already concerned with. Further, Baggett was convicted of all charges after trial, and the burden of proof is higher at trial. *Cf. Dettloff v. State*, 120 Nev. 588, 596, 97 P.3d 586, 591 (2004) (holding that a conviction at trial “under a higher burden of proof cured any irregularities that may have occurred during the grand jury proceedings”). Accordingly, Baggett failed to demonstrate counsel’s performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome absent counsel’s inaction. Therefore, we conclude that the district court did not err by denying this claim without first conducting an evidentiary hearing.¹

Third, Baggett claimed his trial counsel was ineffective for conceding during closing argument that Baggett committed the offenses that occurred at Caesar’s Palace. A concession of guilt is a trial strategy that should be reviewed for reasonableness. *Armenta-Carpio v. State*, 129 Nev. 531, 535-36, 306 P.3d 395, 398-99 (2013). During closing arguments, counsel stated that Baggett was depicted in surveillance images discharging a firearm at Caesar’s Palace but argued for verdicts of not guilty on other offenses that occurred elsewhere, including two counts of murder with the use of a deadly weapon, because similar evidence did not support those counts. Counsel’s strategic argument was reasonable under the circumstances. And Baggett did not allege that counsel’s statements were made over his objection. *See McCoy v. Louisiana*, 584 U.S. ___, ___, 138 S. Ct. 1500, 1510 (2018) (concluding “that counsel may not admit her client’s

¹Although the district court incorrectly determined this claim was waived, we nevertheless affirm its denial for the reason discussed above. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding that a correct result will not be reversed simply because it is based on the wrong reason).

guilt of a charged crime over the client's intransigent objection to that admission"). Accordingly, Baggett failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome absent counsel's statements. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.²

Baggett next contends that the district court erred by denying his claim of ineffective assistance of appellate counsel without first conducting an evidentiary hearing. 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).

Baggett claimed appellate counsel was ineffective for failing to challenge the sufficiency of the evidence related to his two counts of assault with the use of a deadly weapon because the evidence did not indicate that the victims felt threatened or saw the gun. Baggett was confronted about stealing from the victims' home during a party. A witness testified he got

²Although the district court incorrectly determined this claim was waived, we nevertheless affirm its denial for the reason discussed above. See *Wyatt*, 86 Nev. at 298, 468 P.2d at 341.

into a fight with Baggett and that Baggett pulled a gun from his waistband before firing it. One victim testified that Baggett's actions signaled he had a gun and that the signal was strong enough to cause the victim to run into the house. The other victim testified that he was outside the house, heard gunshots, and was nervous he was going to get shot. He described the situation as "dangerous" and "threatening." Based on this testimony, the jury could reasonably find that Baggett committed assault with a deadly weapon as to both victims by placing them in reasonable apprehension of immediate bodily harm. See NRS 200.471(1)(a)(2), 2(b). Accordingly, Baggett failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness due to any failure to raise the underlying claim on direct appeal 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 first conducting an evidentiary hearing.³

Finally, Baggett appears to contend that the district court erred by denying his claim of cumulative error without conducting an evidentiary hearing. Baggett appears to claim that the district court's determination that his guilt was not close is contradicted by the evidence. Even if multiple instances of deficient performance may be cumulated for purposes of demonstrating prejudice, see *McConnell v. State*, 125 Nev. 243, 259 & n.17, 212 P.3d 307, 318 & n.17 (2009), Baggett did not identify multiple instances of deficient performance to cumulate. Therefore, we conclude the district

³Although the district court incorrectly determined this claim was waived, we nevertheless affirm its denial for the reason discussed above. See *Wyatt*, 86 Nev. at 298, 468 P.2d at 341.

court did not err by denying this claim without first conducting an evidentiary hearing.

For the forgoing reasons, we

ORDER the judgment of the district court AFFIRMED.⁴


_____, C.J.
Gibbons


_____, J.
Bulla

cc: Hon. Jasmin D. Lilly-Spells, District Judge
Johnny Earl Baggett, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁴The Honorable Deborah L. Westbrook did not participate in the decision in this matter.