


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL WHITFIELD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85165-COA

FILED
MAY 08 2023
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Michael Whitfield appeals from district court orders dismissing in part and denying in part a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Whitfield argues the district court erred by dismissing in part and denying in part his March 8, 2021, petition and supplemental pleadings without considering all of his claims at the 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). 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).

Ineffective assistance of trial counsel

Whitfield 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, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

First, Whitfield claimed that trial counsel was ineffective for failing to properly advise him to accept the State's plea offer. Whitfield alleged the State extended an offer to plead guilty to one count of battery causing substantial bodily harm with a capped prison sentence of two to five years. Whitfield further alleged he was advised about the offer and told counsel in the presence of two other people that he wanted to accept the offer, but the offer had already expired. "[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 566 U.S. 134, 145 (2012). To demonstrate prejudice concerning the plea negotiation process, "a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler v. Cooper*, 566 U.S. 156, 163 (2012).

The district court conducted an evidentiary hearing concerning this claim. Whitfield testified he received a document while in custody containing the alleged plea offer, he tried to contact counsel to accept the offer, but counsel never responded and the offer expired before Whitfield could accept. Counsel testified that the offer alleged by Whitfield was not the one actually offered by the State, that the terms of the offer alleged by Whitfield were actually those of a counteroffer proposed by Whitfield that the State rejected, and that Whitfield did not want to accept the State's actual offer.

Whitfield did not present any other evidence regarding the plea offer allegedly extended by the State. The district court found counsel's testimony to be credible, and this court will not "evaluate the credibility of witnesses because that is the responsibility of the trier of fact." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). Whitfield thus failed to demonstrate by a preponderance of the evidence that the State extended the plea offer Whitfield alleged. Accordingly, Whitfield failed to demonstrate that counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel's alleged errors. Therefore, we conclude the district court did not err by denying this claim.

Second, Whitfield claimed that trial counsel was ineffective for failing to object to a continuance of trial sought by the State. Whitfield claimed that if counsel had adequately investigated the matter, he would have learned that the State's request for a continuance was made in bad faith. Whitfield did not allege how the State's request was made in bad faith or that there was a reasonable probability of a different outcome had

counsel objected to the request. Whitfield's bare claim failed to allege specific facts that, if true, would entitle him to relief. Accordingly, Whitfield failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome absent counsel's alleged errors. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Third, Whitfield claimed that trial counsel was ineffective for failing to adequately cross-examine the victim at the preliminary hearing about the victim's drug use.¹ Counsel attempted to cross-examine the victim about drugs during the preliminary hearing, and the victim invoked his Fifth Amendment right against self-incrimination. In response, counsel argued that this was the only time he would be able to cross-examine the victim before trial and that he was going to move to exclude the victim's testimony. Counsel stated that he thought the victim was lying and "covering up for something."

Whitfield did not allege what additional questions counsel should have asked or arguments counsel should have made. Whitfield failed to allege specific facts that, if true, would entitle him to relief. Accordingly, Whitfield failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome absent counsel's alleged errors. Therefore, we

¹On appeal, Whitfield appears to argue that trial counsel was ineffective for failing to adequately cross-examine the victim regarding additional subjects. These additional arguments were not made below, and we therefore decline to consider them on appeal in the first instance. See *McNelson v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Fourth, Whitfield claimed trial counsel was ineffective for allowing a preliminary hearing to be converted to a status hearing without Whitfield's consent. Whitfield was convicted of four of the five charges he was bound over on after trial. Because the burden of proof is higher at trial, *see Sheriff v. Middleton*, 112 Nev. 956, 961-62, 921 P.2d 282, 285-86 (1996), any errors related to the preliminary hearing regarding the four charges of which he was convicted were cured by Whitfield's subsequent conviction, *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"). In addition, Whitfield was acquitted of the fifth charge after trial such that any errors related to that charge were harmless. *See* NRS 178.598. Whitfield failed to allege specific facts that, if true, would entitle him to relief. Accordingly, Whitfield failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome absent counsel's alleged errors. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Fifth, Whitfield claimed that trial counsel was ineffective for moving to continue trial despite Whitfield invoking his statutory right to a speedy trial. Whitfield argued he was misled about expert-witness availability for trial and no defense witnesses were ultimately called. Whitfield failed to allege specific facts demonstrating a reasonable probability of a different outcome had counsel not sought a continuance of

the trial. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Sixth, Whitfield claimed that trial counsel was ineffective for failing to challenge the district court's orders regarding jury voir dire. Whitfield's bare claim failed to allege the specific grounds for any such challenge. Moreover, Whitfield failed to allege specific facts demonstrating a reasonable probability of a different outcome had counsel raised any such challenge. Accordingly, Whitfield failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome absent counsel's alleged errors. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Ineffective assistance of appellate counsel

Whitfield also 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). 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). Counsel's strategic or tactical decisions are "virtually unchallengeable absent extraordinary circumstances." *Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (internal quotation marks omitted).

First, Whitfield claimed appellate counsel was ineffective for failing to challenge the sufficiency of the hearing on Whitfield's request to dismiss trial counsel because an actual conflict of interest existed between Whitfield and trial counsel. "Absent a showing of adequate cause, a defendant is not entitled to reject his court-appointed counsel and request substitution of other counsel at public expense." *Young v. State*, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004). "Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense." *Gallego v. State*, 117 Nev. 348, 363, 23 P.3d 227, 237 (2001) (quotation marks omitted), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 776 n.12, 263 P.3d 235, 253 n.12 (2011).

The substance of Whitfield's *Young* hearing testimony was that the attorney-client relationship broke down after counsel changed the preliminary hearing to a status hearing without Whitfield's consent. Trial counsel testified Whitfield's primary concern was his right to a preliminary hearing within 15 days and that counsel was still able to try the case despite communication issues in their relationship.

The district court conducted an evidentiary hearing concerning this claim. Appellate counsel testified that his strategy on direct appeal was to raise only the strongest issues. He explained that he reviewed the transcript of the *Young* hearing and did not raise the conflict issue on appeal because he felt it was adequately addressed by the trial court. The district court found appellate counsel provided credible testimony and that his decision to not include this issue among those raised on appeal was strategic. Substantial evidence supports the district court's findings, and

Whitfield failed to demonstrate extraordinary circumstances to warrant challenging counsel's strategic decision. Accordingly, Whitfield failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of success had counsel raised this claim on appeal. Therefore, we conclude the district court did not err by denying this claim.

Second, Whitfield also claimed appellate counsel was ineffective for failing to argue that the Division of Parole and Probation (Division) improperly recommended an upward deviation in his sentence. Whitfield claimed the Division's recommendation was improperly increased based on his criminal history. The district court conducted an evidentiary hearing concerning this claim. Counsel testified that he did not believe the claim to be viable on appeal because the sentence imposed was within the applicable sentencing range. The district court found counsel provided credible testimony and that his decision to not include this issue among those raised on appeal was strategic. Substantial evidence supports the district court's findings, and Whitfield failed to demonstrate extraordinary circumstances to warrant challenging counsel's strategic decision. Further, a sentencing court is not bound by the Division's recommendation. *See Dunham v. State*, 134 Nev. 563, 569, 426 P.3d 11, 15 (2018). Accordingly, Whitfield failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of success had counsel raised this claim on appeal. Therefore, we conclude the district court did not err by denying this claim.

Third, Whitfield claimed that appellate counsel was ineffective for failing to challenge the district court's orders regarding jury voir dire.

Whitfield's bare claim failed to allege the specific grounds for any such challenge. Moreover, Whitfield failed to allege specific facts demonstrating a reasonable probability of success on appeal had counsel raised any such challenge. Accordingly, Whitfield failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability of success had counsel raised this claim on appeal. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. David A. Hardy, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk