IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENDRICK TYRONE BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87599-COA

ORDER OF AFFIRMANCE

Kendrick Tyrone Brown appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on July 19, 2021, and supplemental pleadings. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Brown argues the district court erred by denying his claims that trial counsel was ineffective without 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. 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 the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Brown argues that trial counsel was ineffective for failing to file a motion to dismiss his original indictment for a lack of probable cause. The State initially indicted Brown on three counts of possession of a firearm by a prohibited person and one count of possession of a controlled substance. Thereafter, the State obtained a second indictment against Brown charging him with four counts of possession of a firearm by a prohibited person, and the State dismissed the first indictment as duplicative. Because the first indictment was dismissed, Brown failed to allege specific facts indicating counsel was deficient or a reasonable probability of a different outcome had counsel filed a motion to dismiss that indictment. Accordingly, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Brown argues that trial counsel was ineffective for advising him not to testify and that counsel's advice was prejudicial because he could have testified and explained that another individual "possessed" the motel room where the firearms were recovered. He contends that the need to explain outweighed any concern that he would have been cross-examined regarding his six prior convictions because he had already stipulated to his status as a felon.

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Harris v. New York*, 401 U.S. 222, 225 (1971). Counsel may advise a defendant whether it is wise for them to testify, but ultimately the decision lies with the defendant. *See Ingle v. State*, 92 Nev. 104, 106, 546 P.2d 598, 599-600 (1976). At trial, counsel noted Brown's

desire to testify as well as her advice that he not testify because he would be subject to questioning regarding his prior convictions. The trial court advised Brown of his right to testify and informed him that the decision to testify was his to make, and Brown chose not to testify upon the advice of counsel. The district court found that counsel's advice to Brown was reasonable and strategic, and the record supports this finding. Further, it was Brown, not counsel, who freely waived his right to testify in his own defense.[1] *See Browning v. State*, 120 Nev. 347, 360-61, 91 P.3d 39, 49 (2004). Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Brown argues that trial counsel was ineffective for failing to fully investigate and present evidence of a "prior possessor" who controlled the motel room. A petitioner alleging counsel should have conducted a better investigation must specify what the results of a better investigation would have been and how it would have affected the outcome of the proceedings. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Brown contended that, had trial counsel investigated, she would have found and presented witnesses "who purportedly could have testified" about who possessed the motel room. Brown did not specify who these witnesses were or what information they would have provided had counsel contacted them. Rather, Brown merely speculated that unidentified witnesses might have testified regarding a "prior possessor." Further, the district court found that evidence was presented to the jury that another

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[1]On appeal, Brown claims that counsel effectively coerced him into not testifying by making an "extensive and oppressive" court record. This argument was not presented in his petition below, and we decline to consider this claim for the first time on appeal. *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989).

individual rented and used the motel room, and the record supports this finding. Therefore, Brown failed to allege specific facts indicating counsel was deficient or a reasonable probability of a different outcome but for counsel's failure to investigate the case. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Brown argues that trial counsel was ineffective for failing to object to evidence predicated on the statements of a confidential informant, which Brown contends resulted in a Confrontation Clause violation. The admission of statements made by a confidential informant does not violate the Confrontation Clause when their sole purpose is to serve as background information to explain why a government official made investigatory decisions. *See Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) (noting the Confrontation Clause "does not bar use of testimonial statements for purposes other than establishing the truth of the matter asserted"); *United States v. Cromer*, 389 F.3d 662, 676 (6th Cir. 2004).

Brown contends the confidential informant's statements went beyond background information because the informant also participated in the undercover firearm purchase precipitating Brown's arrest and criminal charges. However, the only statement by the confidential informant introduced at trial was the informant's tip to detectives about a possible firearm sale, which resulted in the detectives setting up the undercover purchase. Because the only statement introduced was not offered for the truth of the matter asserted but to explain the detectives' actions, the introduction of this evidence did not violate the Confrontation Clause. While the confidential informant was present during the purchase, none of the informant's statements made during the purchase were introduced into

evidence; indeed, the record reflects that both trial counsel and the State agreed not to introduce any of the confidential informant's statements beyond his initial tip to law enforcement. Thus, Brown's counsel was not ineffective for failing to object on this basis, and we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Brown also contends that he received ineffective assistance of appellate counsel. 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, 1113-14 (1996). As with a claim of ineffective assistance of trial counsel, both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687. Further, 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).

Brown first argues that appellate counsel was ineffective for failing to raise a Fourth Amendment claim on direct appeal. He asserts the district court should have held an evidentiary hearing on this claim to uncover why appellate counsel chose not to raise the Fourth Amendment issue. Brown's bare claim failed to specify how his Fourth Amendment rights were violated or why his claim had merit. Rather, Brown merely noted that a motion to suppress was filed by trial counsel based on a purported Fourth Amendment violation and that appellate counsel "inexplicably did not challenge the denial of the" motion even though a

hearing was held by the trial court. *See Chappell v. State*, 137 Nev. 780, 788, 501 P.3d 935, 950 (2021) (reiterating "a petitioner must do more than baldly assert that his attorney could have, or should have, acted differently" but must instead "specifically explain how his attorney's performance was objectively unreasonable" (quotation marks omitted)). Therefore, Brown failed to allege specific facts indicating counsel was deficient or a reasonable probability of success on appeal had counsel raised a Fourth Amendment claim. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Brown argues appellate counsel was ineffective for failing to adequately demonstrate on appeal what prejudice resulted from the State's failure to preserve evidence. The State's failure to preserve material evidence may lead to dismissal of charges if the defendant can show bad faith by the government *or* that he was prejudiced by the loss of the evidence. *See Daniels v. State*, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998). Appellate counsel argued on direct appeal that the State, in bad faith, failed to preserve evidence, and thus, no additional showing of prejudice was required. Brown does not argue that appellate counsel was ineffective for arguing that the State failed to preserve evidence in bad faith. Further, Brown failed to allege specific facts indicating a reasonable probability of success on appeal had counsel adequately argued that prejudice resulted from the failure to preserve evidence. *See Brown v. State*, No. 79131-COA, 2020 WL 4249367, at *4 (Nev. Ct. App. July 23, 2020) ("Brown fails to demonstrate the underlying predicate that the evidence that he identifies—fingerprints and DNA—ever actually existed in a form that was subject to being tested."). Accordingly, we conclude that the

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

Next, Brown argues that the trial court improperly adjudicated him as a habitual criminal without the proper notice or a procedural hearing and that his rights were violated because the State did not call the confidential informant to testify. These claims could have been presented to the trial court or raised on direct appeal and were therefore procedurally barred pursuant to NRS 34.810(1)(b).[2] Brown did not allege good cause or actual prejudice to overcome the procedural bar, and we conclude the district court did not err by denying these claims without conducting an evidentiary hearing.

Additionally, Brown contends the trial court erroneously permitted the State to dismiss the first indictment without a showing of good cause pursuant to NRS 174.085(7). Brown raised this claim on direct appeal, and this court found no error. *See Brown*, No. 79131-COA, 2020 WL 4249367, at *3. Further consideration of this claim was barred by the doctrine of the law of the case. *See Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

Brown also argues that trial counsel was ineffective for failing to file a pretrial petition for a writ of habeas corpus and that appellate counsel was ineffective for failing to raise other unspecified issues on

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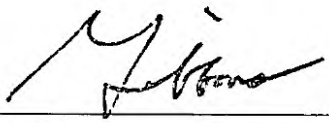
[2]The district court failed to consider whether these claims were barred by NRS 34.810. *See State v. Eighth Jud. Dist. Ct. (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) ("Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory."). We nevertheless affirm the district court's denial of these claims for the reasons stated herein. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding a correct result will not be reversed simply because it is based on the wrong reason).

appeal. Brown did not provide cogent argument as to why these instances amounted to deficient performance or how these issues prejudiced him. Bare claims, such as these, are insufficient to demonstrate a petitioner is entitled to relief. *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Because Brown failed to allege specific facts indicating counsel was deficient or a reasonable probability of a different outcome, the district court did not err in denying these claims without an evidentiary hearing.

Lastly, Brown argues that he was entitled to relief under the doctrine of cumulative error. As we discern no error, Brown's cumulative error claim fails. *See Watson v. State*, 130 Nev. 764, 790 n.11, 335 P.3d 157, 175 n.11 (2014). Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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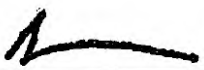

_____, J.
Bulla

_____, J.
Westbrook

cc: Chief Judge, Eighth Judicial District Court
Department 14, Eighth Judicial District Court
Law Office of Rachael E. Stewart
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk