IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN PHILLIP RASPPERRY,
Appellant,
vs.
BRIAN WILLIAMS, WARDEN; WARDEN HDSP; AND THE STATE OF NEVADA,
Respondents.

No. 87841-COA

ORDER OF AFFIRMANCE

Kevin Phillip Raspperry appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on June 22, 2023. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Raspperry 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, Raspperry contended trial counsel was ineffective for failing to negotiate his case. Specifically, Raspperry contended counsel provided unreasonable advice regarding the plea negotiations and "allowed various deals to expire." Raspperry's bare claim failed to specify what advice counsel gave him, what the terms of any expired plea deals were, or whether such deals were conveyed to him. Therefore, Raspperry failed to allege specific facts indicating counsel was deficient or a reasonable probability of a different outcome but for counsel's errors. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

To the extent Raspperry argues he could not support this and other claims because appellate counsel refused to provide him with trial counsel's file, this claim is belied by the record. The record indicates appellate counsel sent Raspperry a copy of the five-volume appendix that was filed with his direct appeal approximately three months before the instant petition was filed. The record further indicates that, although appellate counsel kept the original case file for safekeeping, including discovery he had received from trial counsel, appellate counsel was willing to provide these materials to Raspperry upon request. Raspperry did not allege that he subsequently requested this material from appellate counsel or that appellate counsel refused to provide this material upon such a request. Therefore, we conclude Raspperry is not entitled to relief on this claim.

Second, Raspperry contended trial counsel was ineffective for failing to advise him of his speedy trial rights or to advise him that certain pretrial actions might be construed as waiving said rights. The supreme court previously concluded that Raspperry's speedy trial rights were not violated and that the nearly 22-month delay was "attributable to motion practice, the COVID-19 pandemic, and accommodating the district court's calendar." *See Raspperry v. State*, No. 83894, 2022 WL 17037738, at *1 (Nev. Nov. 16, 2022) (Order of Affirmance). Thus, even assuming counsel was deficient for failing to advise Raspperry of his speedy trial rights, *but see New York v. Hill*, 528 U.S. 110, 115 (2000) ("Scheduling matters are plainly among those for which agreement by counsel generally controls."), Raspperry failed to demonstrate prejudice because the Nevada Supreme Court rejected his speedy-trial claim on direct appeal, *Raspperry*, No. 83894, 2022 WL 17037738, at *1. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Raspperry contended trial counsel was ineffective with regard to his pretrial motion to dismiss. Raspperry appeared to contend that counsel delayed the proceedings by bringing said motion (and a motion for reconsideration) and that counsel should have sought to dismiss the reckless driving charges as violating his right against double jeopardy. As previously discussed, counsel's motion practice did not violate Raspperry's speedy trial rights. *See Raspperry*, No. 83894, 2022 WL 17037738, at *1.

Moreover, Raspperry failed to demonstrate that a double jeopardy claim would have had merit. Although the Double Jeopardy Clause prohibits simultaneous convictions for an offense and a lesser-included offense, *see Williams v. State*, 118 Nev. 536, 548, 50 P.3d 1116, 1124 (2002), reckless driving is not a lesser-included offense of driving

under the influence.[1] *Compare* NRS 484B.653(1)(a) (stating a person commits the offense of reckless driving if they "[d]rive a vehicle in willful or wanton disregard of the safety of persons or property"), *with* NRS 484C.110(1) (stating a person commits the offense of driving under the influence if they drive a vehicle and are under the influence of intoxicating liquor, have a concentration of alcohol of 0.08 or more in their blood or breath, or are found to have such a concentration of alcohol in their blood or breath within two hours thereafter); *see also Williams*, 118 Nev. at 548, 50 P.3d at 1124 (stating an offense is a lesser-included offense if its elements are "entirely included within the elements of a second offense" (quotation marks omitted)); *Johnson v. State*, 111 Nev. 1210, 1214, 902 P.2d 48, 50 (1995) (recognizing that although "reckless driving is *closely related* to the offense of driving under the influence[,] . . . no statute . . . presumes that intoxication is evidence of . . . reckless driving" (emphasis added)).

Therefore, Raspperry failed to allege specific facts indicating counsel was deficient or a reasonable probability of a different outcome but for counsel's errors. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims."). Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Raspperry contended trial counsel was ineffective for failing to object to the amended indictment. Raspperry contended that the State did not file a motion to amend the indictment and that the State "add[ed] or change[d] offenses." "The court may permit an indictment or

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[1]For this reason, we reject Raspperry's related claims that counsel was ineffective for failing to request jury instructions stating reckless driving is a lesser-included offense of driving under the influence or that he could not be convicted of both offenses.

information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." NRS 173.095(1). The amended information removed the charge of second-degree murder, and the first and second amended informations removed references to Raspperry's prior DUI convictions and his revoked license. These amendments did not charge additional or different offenses, nor did they prejudice Raspperry's substantial rights. Therefore, Raspperry failed to allege specific facts indicating counsel was deficient or a reasonable probability of a different outcome but for counsel's errors. *See Ennis*, 122 Nev. at 706, 137 P.3d at 1103. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fifth, Raspperry contended trial counsel was ineffective for failing to prevent a witness from testifying remotely. On direct appeal, the supreme court concluded Raspperry's confrontation right was violated when a witness was allowed to testify remotely because the district court failed to make case-specific findings that the witness was especially vulnerable to COVID-19 and needed the accommodation. *Raspperry*, No. 83894, 2022 WL 17037738, at *3. However, the supreme court concluded "[t]he harmlessness of the error [was] not debatable given that other witnesses provided similar testimony as the challenged witness . . . and other evidence linked [Raspperry] to the" crime. *Id.* The supreme court stated it was "confident that a rational jury would have found [Raspperry] guilty without the remote testimony" and that "it would be futile to reverse and remand because another trial would reach the same result."[2] *Id.* Thus,

[2]Multiple witnesses testified that they saw a vehicle run a red light at approximately 85 to 100 miles per hour, that the vehicle collided with another vehicle, and that Raspperry was subsequently removed from the

even assuming counsel was deficient for failing to object to the witness testifying remotely, Raspperry failed to allege specific facts indicating a reasonable probability of a different outcome but for counsel's errors.[3] Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Sixth, Raspperry contended trial counsel was ineffective for failing to object to evidence of uncharged misconduct. Although Raspperry referred to "testimony about the vehicle control module," he did not specify what testimony counsel should have objected to that referred to uncharged misconduct. To the extent Raspperry referenced the claim of uncharged misconduct that he raised on direct appeal, the supreme court concluded that the challenged testimony—which referenced a vehicle control module being "full" of data—was not an "unmistakable reference to [Raspperry's] prior bad acts" because the record indicated the vehicle was registered to Raspperry's mother and that the module may have included data from "all events involving that car regardless of who was at fault." *Id.* at *3. Therefore, Raspperry failed to allege specific facts indicating counsel was deficient or a reasonable probability of a different outcome but for counsel's errors. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

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driver's seat of the speeding vehicle. Witness testimony, surveillance video, and forensic evidence also indicated Raspperry was significantly impaired at the time of the crash.

[3]To the extent Raspperry challenges the supreme court's order affirming his judgment of conviction, such a challenge is inappropriate in a postconviction habeas petition. *See* NRAP 40 (petition for rehearing); NRAP 40A (petition for en banc reconsideration); *see also Clem v. State*, 119 Nev. 615, 620, 81 P.3d 521, 525 (2003) ("The law of the case doctrine holds that the law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same.").

Seventh, Raspperry contended trial counsel was ineffective for not objecting when the trial court failed to inquire into juror bias. Raspperry did not specify how any juror was biased. To the extent Raspperry referenced the claim of juror bias that he raised on direct appeal, the supreme court determined Raspperry failed to demonstrate the challenged juror was biased. *Id.* at *4. Thus, even assuming counsel was deficient for not objecting when the trial court failed to inquire into juror bias, Raspperry failed to allege specific facts indicating a reasonable probability of a different outcome but for counsel's errors. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Eighth, Raspperry contended trial counsel was ineffective for failing to object to prosecutorial misconduct. Specifically, Raspperry contended counsel should have objected when the prosecutor called his defense "ridiculous." Raspperry did not provide context for the allegedly improper statement; thus, it is unclear from Raspperry's allegations whether counsel was deficient for failing to object to this statement. *See Knight v. State*, 116 Nev. 140, 144-45, 993 P.2d 67, 71 (2000) (observing that "[a] prosecutor's comments should be viewed in context" when considering whether a defendant should be afforded relief).

To the extent Raspperry intended to raise the same allegation of prosecutorial misconduct that he raised in his direct appeal, he failed to allege specific facts indicating counsel was deficient as the supreme court previously concluded "the challenged comments, when considered in context, did not belittle the defense case or tactics." *Raspperry*, No. 83894, 2022 WL 17037738, at *4; *see also Earl v. State*, 111 Nev. 1304, 1311, 904 P.2d 1029, 1033 (1995) (stating a prosecutor may "not . . . ridicule or belittle the defendant or the case"). Furthermore, given the overwhelming evidence of Raspperry's guilt, Raspperry failed to allege specific facts indicating a

reasonable probability of a different outcome but for counsel's errors. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Ninth, Raspperry contended trial counsel was ineffective for failing to consult or hire experts for trial. Specifically, Raspperry contended counsel should have consulted with (1) an accident reconstructionist "to challenge the State's version of events" and to assist counsel regarding "defense theories of mechanical issues with the car, the control module, and the preservation of the scene"; (2) a toxicologist "to either retest the samples and/or to discuss the effect of the substances detected on the ability to operate and drive a vehicle"; (3) an expert who could "perform a drug/alcohol addiction assessment on [him]"; and (4) "a mitigation expert to assist [counsel] and/or present evidence of how other DUI cases [are] handled in Clark County."

Raspperry failed to specify what any such witnesses would have testified to at trial, what retesting the blood samples would have revealed, or what a drug and alcohol assessment would have revealed. Therefore, Raspperry failed to allege specific facts indicating counsel was deficient or a reasonable probability of a different outcome but for counsel's errors. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (providing that a petitioner claiming counsel did not conduct an adequate investigation must allege what the results of a better investigation would have been and how it would have affected the outcome of the proceedings). Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Tenth, Raspperry contended trial counsel was ineffective for failing to present evidence of his drug and alcohol addiction at sentencing. Raspperry further contended an alcohol and drug assessment by an expert could have explained how his addictions affected his behavior. Raspperry

did not allege any details regarding his drug or alcohol addiction that counsel should have presented to the sentencing court, and as previously discussed, he did not specify what an alcohol and drug assessment would have revealed. Moreover, the sentencing court was aware Raspperry had a substance abuse problem. At the sentencing hearing, the State argued that Raspperry had multiple prior DUIs and that prior treatment did not work, and counsel indicated Raspperry was susceptible to substance abuse. Several letters of support also indicated Raspperry had a substance abuse problem,[4] and counsel filed a sentencing memorandum which informed the sentencing court that Raspperry's parents were both alcoholics while he was growing up. Therefore, Raspperry failed to allege specific facts indicating counsel was deficient or a reasonable probability of a different outcome but for counsel's errors. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Raspperry also argues that he received ineffective assistance of appellate counsel. To demonstrate ineffective assistance of appellate counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted

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[4]To the extent Raspperry contended counsel was ineffective for failing to vet his letters of support, Raspperry only identified one such letter: a letter from his nephew that stated, "I understand that this accident was his fault and could have been avoided if he had made different choices. But I also feel that the state of Nevada is at fault in that he should have been more severely punished after the first and second DWI that he had." This letter asked the court to be as lenient as possible in sentencing Raspperry and informed the sentencing court that Raspperry was remorseful and was working to be a better person by reading self-help books and the Bible, exercising regularly, and drawing. Raspperry failed to allege what counsel should have done with this letter or how this "letter of support" was detrimental to his case. Therefore, he failed to allege specific facts indicating counsel was deficient or a reasonable probability of a different outcome but for counsel's errors.

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).

First, Raspperry contended appellate counsel was ineffective with respect to each of his claims on direct appeal.[5] In particular, Raspperry contended that none of his claims were successful, that counsel should have argued trial counsel was ineffective in various ways, that counsel should have hired experts or obtained additional evidence to support his claims, and that counsel failed to raise other arguments in support of his claims.

Raspperry failed to demonstrate appellate counsel could have argued trial counsel's ineffectiveness in his direct appeal or expanded the record with additional evidence to support his claims. *See Pellegrini v. State*, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001) (stating the Nevada appellate courts "generally decline[ ] to address claims of ineffective assistance of counsel on direct appeal unless there has already been an evidentiary hearing or where an evidentiary hearing would be unnecessary"

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[5]On direct appeal, Raspperry contended that (1) his speedy trial rights were violated, (2) there was insufficient evidence of his driving the vehicle and possessing the controlled substances, (3) the trial court erred in admitting blood alcohol evidence, (4) his confrontation right was violated because a witness testified remotely, (5) the trial court erred in admitting evidence of uncharged conduct, (6) the trial court erred in not inquiring into juror bias, (7) the State committed prosecutorial misconduct in its closing argument, (8) the trial court abused its discretion at sentencing, and (9) cumulative error required a new trial. *Raspperry*, No. 83894, 2022 WL 17037738.

(internal footnote omitted)), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n. 12, 423 P.3d 1084, 1097 n.12 (2018); *see also Rippo*, 134 Nev. at 429, 423 P.3d at 1102 (stating it was "difficult to fault appellate counsel's performance" because "appellate counsel could not have expanded the record before this court to include evidence that was not part of the trial record"); *Tabish v. State*, 119 Nev. 293, 312 n.53, 72 P.3d 584, 596 n.53 (2003) ("The appellate court record in this case consists of the record made and considered in the district court below. This court cannot consider matters not properly appearing in the record on appeal . . . .").

To the extent Raspperry contended counsel should have raised additional arguments in support of his claims beyond the ineffectiveness of trial counsel, Raspperry failed to allege specific facts demonstrating counsel was deficient for failing to raise such arguments or a reasonable probability of success on appeal had counsel raised such arguments. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Raspperry contended appellate counsel was ineffective for failing to raise the issue of double jeopardy on direct appeal. As previously discussed, Raspperry's simultaneous convictions for driving under the influence and reckless driving did not violate his right against double jeopardy. Moreover, a defendant may be convicted of multiple counts of driving under the influence or reckless driving where a single incident results in harm to multiple victims. *See Galvan v. State*, 98 Nev. 550, 555, 655 P.2d 155, 157 (1982) (stating it has been "long established in Nevada[ ] that a course of conduct resulting in harm to multiple victims gives rise to multiple charges of the offense"). Therefore, Raspperry failed to allege specific facts indicating counsel was deficient or a reasonable probability of success on appeal had counsel raised this argument. Accordingly, we

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

Raspperry also contended the cumulative effect of trial and appellate counsel's errors required that his convictions be reversed. Even if multiple instances of deficient performance could 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), Raspperry failed to demonstrate counsel's alleged errors, considered cumulatively, would have entitled him to relief. *See Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000) (stating the relevant factors to consider in evaluating a claim of cumulative error). Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

On appeal, Raspperry argues the district court erred in denying his petition based on an opposition "that did not exist." Raspperry filed his petition and a motion to appoint counsel on June 22, 2023. Thereafter, the State filed a response to the motion to appoint counsel on August 25, 2023. On August 30, 2023, the district court held a hearing in which it stated it had reviewed the petition, motion, and "the State's opposition," and that it was denying the petition and motion. On November 1, 2023, the district court issued a minute order clarifying that the State had not responded to the petition, only to the motion, and that it was denying Raspperry's motion. Thereafter, the State filed a response to the petition, and the district court issued a written order denying both the petition and motion.

To the extent the district court erroneously indicated the State had filed an opposition to Raspperry's petition at the August 30 hearing, we conclude any error was harmless in light of the district court's subsequent clarification and its consideration of Raspperry's petition following the State's response to the petition. *See* NRS 178.598 ("Any error, defect,

irregularity or variance which does not affect substantial rights shall be disregarded.").

Raspperry also argues the district court erred in denying his petition and motion to appoint counsel without allowing him to file a reply brief. The district court was not required to allow further pleadings, *see* NRS 34.750(5), and Raspperry has not shown the district court abused its discretion by ruling on the petition and motion to appoint counsel without allowing additional pleadings, *see State v. Powell*, 122 Nev. 751, 758, 138 P.3d 453, 458 (2006) (providing the district court has "broad authority" regarding the permission to file supplemental postconviction pleadings (quotation marks omitted)). Thus, we conclude Raspperry is not entitled to relief on this claim.

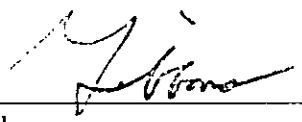
Finally, Raspperry argues the district court erred by denying his motion to appoint counsel. The appointment of counsel in this matter was discretionary. *See* NRS 34.750(1). When deciding whether to appoint counsel, the district court may consider factors, including whether the issues presented are 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). Raspperry appears to meet the threshold requirements for the appointment of counsel. *See* NRS 34.750(1); *Renteria-Novoa*, 133 Nev. at 76, 391 P.3d at 760-61. However, the district court denied the motion because it found the issues in this matter were not difficult or complex, Raspperry was able to comprehend the proceedings, and discovery with the aid of counsel was not necessary. The record supports the decision of the

district court,[6] and we conclude the district court did not abuse its discretion by denying the motion to appoint counsel.[7]

In light of the foregoing, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Bulla



_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Tierra Danielle Jones, District Judge
Kevin Phillip Raspperry
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[6]To the extent Raspperry contended postconviction counsel was needed so he could obtain his entire case file, as previously discussed, the record indicates appellate counsel gave Raspperry the five-volume appendix that was filed with his appeal and was willing to give Raspperry his original case file upon request.

[7]In light of this disposition, we deny Raspperry's "motion for a stay of proceedings after remand to district court for appointment of counsel and other relief" filed on January 14, 2025.