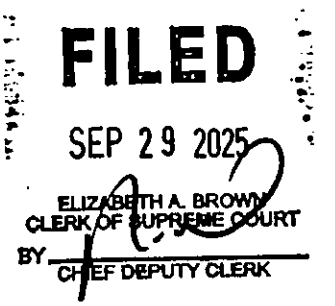
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT MAURICE WILSON,
Appellant,
vs.
PERRY RUSSELL, WARDEN NNCC;
AND THE STATE OF NEVADA,
Respondents.

No. 88690-COA



ORDER OF AFFIRMANCE

Robert Maurice Wilson appeals from district court orders dismissing in part and denying in part a postconviction petition for a writ of habeas corpus filed on March 30, 2021, and a supplement. Eleventh Judicial District Court, Mineral County; Jim C. Shirley, Judge.

Wilson filed his petition more than one year after issuance of the remittitur on direct appeal on March 9, 2020. *See Wilson v. State*, No. 77142-COA, 2020 WL 729684 (Nev. Ct. App. Feb. 11, 2020) (Order of Affirmance). Thus, Wilson's petition was untimely filed. *See* NRS 34.726(1). Wilson's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.*

Wilson did not allege cause for the delay on the face of his petition. *See Chappell v. State*, 137 Nev. 780, 787, 501 P.3d 935, 949 (2021) (providing "a petitioner's explanation of good cause and prejudice for each procedurally barred claim must be made on the face of the petition"). After the State alleged in its response to Wilson's petition that it was untimely filed, Wilson filed a reply explaining that he submitted the petition timely, as evidenced by the certificate of service, but the clerk of the court returned

the petition unfiled and unstamped. Wilson also appeared to contend in his reply that he was entitled to an extension of time to file his petition due to disruptions caused by the COVID-19 pandemic and that he filed a motion for an extension of time arguing such. The district court concluded that Wilson had cause for the delay.

It is uncertain from our review of the record whether Wilson demonstrated cause for the delay. Nevertheless, we affirm the district court's denial of Wilson's petition because, as outlined below, he failed to demonstrate undue prejudice to overcome the procedural bar.

To demonstrate prejudice to overcome the procedural time bar, a petitioner must show "[t]hat dismissal of the petition as untimely will unduly prejudice the petitioner." NRS 34.726(1)(b). "A showing of undue prejudice necessarily implicates the merits of the . . . claim." *Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018). In his opening brief on appeal, Wilson argues the district court erred by denying his claims of ineffective assistance of trial counsel. 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). 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, Wilson argues the district court erred by denying his claims that trial counsel was ineffective regarding his handling of the search warrant authorizing the search of Wilson's home. Wilson contends that counsel failed to: (1) properly investigate false information Sgt. Boyles provided in support of the search warrant application, (2) correct "false testimony" on the search warrant application; (3) subpoena the witnesses who provided information to law enforcement in support of the warrant application (a confidential informant (CI), and A. Lazzaratto) to test the veracity of the information used in the search warrant application, and (4) challenge the search warrant application pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), on the ground that Boyles displayed reckless disregard for the truth based on his statements in the warrant affidavit regarding the CI.

As is relevant to our discussion of Wilson's claims, Boyles represented in the warrant application that the CI "previously provided information determined through further investigation to have been reliable." However, during the preliminary hearing, Boyles testified that he had not worked with the CI before and that he "would not have knowledge" and was "not aware" that the CI had ever provided criminal evidence to law enforcement in the past.

A search warrant may issue only upon facts sufficient to satisfy a magistrate that probable cause exists to believe that contraband will be found if the search is conducted. *See* NRS 179.045(1). "Whether probable cause is present to support a search warrant is determined by the totality of circumstances." *Doyle v. State*, 116 Nev. 148, 158, 995 P.2d 465, 471

(2000). "A deficiency in either an informant's veracity and reliability or his basis of knowledge may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Id.* (internal quotation marks omitted). When evaluating a magistrate's decision to issue a search warrant, "[t]he duty of the reviewing court is simply to determine whether there is a substantial basis for concluding that probable cause existed." *Id.* at 158, 995 P.2d at 472. "A defendant is not entitled to suppression of the fruits of a search warrant, even based on intentional falsehoods or omissions, unless probable cause is lacking once the false information is purged and any omitted information is considered." *Id.* at 159, 995 P.2d at 472.

Trial counsel moved to suppress the evidence obtained from the search of Wilson's home, in relevant part, on the grounds that the CI's statements to Boyle lacked the requisite veracity and basis of knowledge. Counsel did not cite *Franks* in the motion but argued at the hearing held on the motion that suppression was warranted under the reasoning in *Franks* because Boyle's statements in the warrant application amounted to a reckless disregard for the truth. The trial court denied the motion, finding in part that Wilson failed to meet his burden of showing he was entitled to a *Franks* hearing because he failed to allege that Boyles' actions "constituted a reckless disregard for the truth."

On direct appeal, Wilson challenged the trial court's denial of his motion to suppress. *See Wilson*, No. 77142-COA, 2020 WL 729684. Specifically, Wilson argued the search warrant affidavit failed to establish probable cause because it "was *based on a tip from an unused and unconfirmed confidential informant* and the Mineral County Sheriff's Office *lacked any independent indicia of the informant's veracity, reliability, or*

basis of knowledge." *Id.* at *1 (emphases added). After citing *Doyle*, this court held the trial court did not err because there was a substantial basis for the magistrate's finding of probable cause based on the following evidence in the record:

> [T]he magistrate was informed that the Mineral County Sheriff's Office had received numerous tips from concerned citizens about activity consistent with illegal drug sales at Wilson's home, Wilson's mother had contacted the sheriff's office and stated that she was concerned about the welfare of Wilson's children because she believed Wilson was "using his own product" and was becoming increasingly paranoid. A confidential informant witnessed Ann Lazzaratto buy heroin at Wilson's house. And Lazzaratto, who was participating in drug court, subsequently tested presumptively positive for opiates.

Id. This conclusion is the law of the case. *See Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). Thus, Wilson failed to demonstrate trial counsel was deficient for failing to undertake any additional action regarding the search warrant. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (stating counsel is not deficient for failing to make futile objections and motions).

Wilson is also unable to demonstrate prejudice. Despite the benefit of an evidentiary hearing on his petition, Wilson did not call the witnesses who provided information to Boyles or offer any evidence, other than his testimony that he disputed what the witnesses told Boyles, demonstrating what an investigation into the search warrant would have uncovered. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (discerning no prejudice under *Strickland* where petitioner failed to show what evidence a more thorough investigation would have yielded). Further, because this court previously concluded there was a substantial basis for

the magistrate's finding of probable cause, Wilson failed to demonstrate a reasonable probability of a different result at trial but for counsel's inaction. Therefore, we conclude Wilson failed to demonstrate undue prejudice to overcome the procedural time bar with respect to this claim.

Next, Wilson argues the district court erred by denying his claim that trial counsel was ineffective for failing to conduct discovery; investigate and question potential witnesses; and preserve issues for appellate review. An appellant alleging the district court erred by denying their claims of ineffective assistance of counsel must specifically articulate counsel's alleged deficiency *and prejudice* for each claim in their appellate briefing. *See Chappell*, 137 Nev. at 787-88, 501 P.3d at 949-50 (noting "a petitioner's appellate briefs must address ineffective-assistance claims with specificity, not just in a pro forma, perfunctory way or with a conclusory catchall statement that counsel provided ineffective assistance" (internal quotation marks and punctuation omitted)). Wilson's argument in his opening brief on appeal fails to describe the discovery counsel failed to obtain, the substance of what any of the witnesses would have said, the issues counsel failed to preserve, or the effect counsel's inaction had on the outcome of his trial. Therefore, we conclude Wilson failed to demonstrate undue prejudice to overcome the procedural time bar with respect to this claim.

Next, Wilson argues the district court erred by denying his claim that trial counsel was ineffective for failing to object to changes made to jury instruction nos. 35 and 36. Wilson contends the changes rendered the instructions ambiguous and relieved the State of its burden of proving every element. Instruction nos. 35 and 36 addressed Count 6 of the amended information charging Wilson with possession of hydrocodone with

the intent to sell. Instruction no. 5 recounted the charge as alleged in the amended information and provided that the State alleged Wilson "unlawfully possessed" hydrocodone "for the purpose of and with the intent to sell" it. During the settling of jury instructions, the parties agreed to a separate instruction stating that possession meant actual or constructive possession. Instruction no. 35 described the elements the State was required to prove to convict Wilson of Count 6. Instruction no. 36 addressed the elements required to convict Wilson of the lesser-included offense of possession of hydrocodone.

However, both instruction nos. 35 and 36 initially stated that actual possession was required to convict and instruction no. 35 lacked language regarding "intent to sell." After reading instruction nos. 35 and 36 to the jury, the trial court held a sidebar. Thereafter, instruction no. 35 was amended to include language that Wilson could be convicted of Count 6 if he had "actual or constructive possession" of the hydrocodone and that such possession "was for the purpose of and with the intent to sell" the hydrocodone. Similarly, instruction no. 36 was amended to provide that possession meant "actual or constructive possession." The trial court noted to the jury that, during the reading of the instructions, it caught errors in the instructions and provided the jury with copies of the corrected instructions.

"[W]e presume that the jury followed the district court's orders and instructions." *Allred v. State*, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004). And the changes made to instruction nos. 35 and 36 ensured the instructions contained correct statements of the law. *See* NRS 453.336(1) (providing the elements of unlawful possession of a controlled substance not for sale); NRS 453.338 (providing the elements of unlawful possession for

sale of a schedule III, IV, or V controlled substance); *Sheriff v. Steward*, 109 Nev. 831, 832, 835, 858 P.2d 48, 49, 51 (1993) (holding that possession of a controlled substance may be established by demonstrating that a defendant "had actual or constructive possession" of the controlled substance); *see also LaChance v. State*, 130 Nev. 263, 273, 321 P.3d 919, 927 (2014) (providing that "[n]o sale of narcotics is possible without possession, actual or constructive" (*quoting Lisby v. State*, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966))). Because the instructions ultimately provided to the jury included correct statements of the law, the court informed the jury that the previously read instructions contained errors, and the jury is presumed to follow the court's orders and instructions, we conclude the instructions were not ambiguous and did not relieve the State of its burden of proving every element. Accordingly, we conclude Wilson failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at trial had counsel challenged the changes to the instructions. *See Donovan*, 94 Nev. at 675, 584 P.2d at 711. Therefore, we conclude Wilson failed to demonstrate undue prejudice to overcome the procedural time bar with respect to this claim.

Finally, Wilson argues the district court erred by denying his claim that appellate counsel was ineffective for failing to raise a claim that a non-seated juror tainted the trial by stating during voir dire that her husband worked in law enforcement and that she knew of Wilson. 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).

In his opening brief on appeal, Wilson provides no caselaw regarding how the juror's comments improperly tainted his trial entitling him to relief. Thus, he fails to cogently argue how appellate counsel was deficient or a reasonable probability of success had counsel raised this claim on appeal. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (recognizing that "[i]t is appellant's responsibility to present relevant authority and cogent argument"). Therefore, we conclude Wilson failed to demonstrate undue prejudice to overcome the procedural time bar with respect to this claim.[1]

Because Wilson failed to demonstrate he would be unduly prejudiced if his petition was dismissed as untimely, we conclude Wilson's petition was procedurally barred pursuant to NRS 34.726. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

[1]Wilson also argues that appellate counsel was ineffective for failing to raise the jury instruction issue on direct appeal. Wilson did not make this argument below. Therefore, we decline to consider it on appeal in the first instance. *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989).

cc: Hon. Jim C. Shirley, District Judge
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