



IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY RASHAD HARRIS,
Appellant,
vs.
WILLIAM GITTERE, ESP WARDEN,
AND THE STATE OF NEVADA,
Respondents.

No. 91083

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Christy L. Craig, Judge. Appellant Barry Rashad Harris argues that the district court erred in concluding that he did not receive ineffective assistance of counsel.

To demonstrate ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and that 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*); see also *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996) (applying *Strickland* to claims of ineffective assistance of appellate counsel). 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), and both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697. For purposes of the deficiency prong, counsel is strongly presumed to have provided adequate assistance and exercised

reasonable professional judgment in all significant decisions. *Id.* at 690. We give deference to the district court’s factual findings that are supported by substantial evidence and not clearly wrong but review its application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Harris raised several claims of ineffective assistance of counsel related to a continuance of the preliminary hearing before trial. The victim failed to appear for Harris’s preliminary hearing in justice court. As a result, the State moved to continue the preliminary hearing, and the justice court granted the motion over a defense objection, finding good cause. Harris petitioned the district court for a writ of mandamus, arguing that the continuance was improper. The district court denied the petition, again finding good cause. Harris did not challenge that district court order. The preliminary hearing was later held, and Harris was ultimately convicted following a jury trial.

Harris first argues that counsel who represented him at the time should not have advised him that appealing the district court order would delay a trial. Counsel’s advice that an interlocutory appeal would cause delay was accurate. *See State Taxicab Auth. v. Greenspun*, 109 Nev. 1022, 1025, 862 P.2d 423, 425 (1993) (“Interlocutory appeals cause delay.”). And Harris has failed to show that counsel’s accurate advice constituted deficient performance. *See People v. Sutton*, 200 N.Y.S.3d 480, 483 (App. Div. 2023) (concluding that “defense counsel’s frank advice regarding the strength of the People’s case against defendant and the potential increased sentencing exposure did not amount to coercive or threatening conduct” and thus did not support a claim of ineffective assistance (citation modified)). The district court therefore did not err in denying this claim.

Harris next argues that trial counsel should have appealed the district court order denying mandamus relief or filed a mandamus petition with this court. At the evidentiary hearing, trial counsel testified that he thought the continuance issue was a strong one and consulted with Harris and the appeals team on the matter. Counsel further testified that Harris declined to seek relief in this court given the delay that would cause and elected to promptly proceed with a rescheduled preliminary hearing. In light of counsel's thorough consideration of the issue and Harris's informed preference to proceed rather than delay the proceedings, we conclude that Harris has failed to show that counsel's performance was objectively unreasonable. The district court therefore did not err in denying this claim.

Harris next argues that appellate counsel should have challenged the propriety of the continuance on direct appeal. Strategic decisions rest with counsel, *Rhyne v. State*, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002), and those decisions are virtually unchallengeable, absent a showing of extraordinary circumstances, *see Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004). Appellate counsel testified at the evidentiary hearing that she extensively researched the continuance issue and found very few instances where such a claim was meritorious on direct appeal. Counsel thus elected to omit that claim in favor of other issues identified as more likely to prevail. Substantial evidence thus supports the district court's finding that appellate counsel made a strategic decision to omit the continuance issue. Harris has failed to show extraordinary circumstances warranting a challenge to that strategic decision, particularly as counsel

made that decision upon extensive research.¹ *See Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) (“Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.”). The district court therefore did not err in denying this claim.

Lastly, Harris argues that the cumulative effect of errors warrants relief. Even if multiple instances of deficient performance may be cumulated to demonstrate prejudice, *McConnell v. State*, 125 Nev. 243, 259 & n.17, 212 P.3d 307, 318 & n.17 (2009), Harris did not demonstrate any instances of deficient performance to cumulate, *Morgan v. State*, 134 Nev. 200, 201 n.1, 416 P.3d 212, 217 n.1 (2018).

Having concluded that Harris has not shown that relief is warranted, we

ORDER the judgment of the district court AFFIRMED.



Herndon, C.J.



Bell, J.



Stiglich, J.

¹To the extent that Harris independently argues that the continuance was improper, that claim should have been raised, if at all, on direct appeal and is waived absent a showing of good cause and actual prejudice, which he has not made. *See* NRS 34.810(1)(b)(2); NRS 34.810(4); *Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (explaining that issues that could be raised on direct appeal must be raised on direct appeal or they will be waived in subsequent proceedings), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999).

cc: Hon. Christy L. Craig, District Judge
Ewing WN Enterprises LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk