IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY EUGENE SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61659

FILED

JAN 16 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Norman C. Robison, Senior Judge.

Appellant argues that the district court erred in denying his claims of ineffective assistance of trial counsel. To prove ineffective assistance of trial counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *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 697, 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, appellant argues that trial counsel was ineffective for failing to investigate whether appellant's wife had a motive to fabricate her testimony. He contends that his wife, who was a key witness for the State, had a motive to lie because she and appellant argued over finances, she was angry with him, she wanted him to give her control over the banking accounts, and she filed for divorce. Appellant failed to demonstrate deficiency or prejudice. At the evidentiary hearing, trial counsel testified that he had reviewed the wife's interview with the police and had his investigator meet with the wife in person. Trial counsel denied that appellant told him that he and his wife were fighting over finances or that the wife had attempted to coerce appellant into signing over a power of attorney to her. Appellant admitted that he did not inform counsel of these matters. Therefore, appellant failed to demonstrate that trial counsel's performance was deficient. Furthermore, appellant failed to demonstrate prejudice, given that he admitted to the police that he touched the victim's genitals and the victim testified at trial about the touching. Thus, we conclude that the district court did not err in denying this claim.

Second, appellant contends that trial counsel was ineffective for failing to communicate with him. He further contends that his counsel had a conflict of interest and that the district court had a duty to inquire further into the problems with counsel after appellant filed a proper person motion to dismiss counsel. Appellant failed to demonstrate

deficiency or prejudice. Trial counsel testified that he met with appellant several times in jail, spoke with him by phone numerous times, and also met with him in court. Appellant failed to explain how further communication would have helped with his defense or changed the outcome of the trial. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004); *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). To the extent that he claimed counsel had a conflict of interest, he waived this claim by failing to present it on direct appeal, and he did not demonstrate cause and prejudice for the waiver as he failed to identify a conflict. *See* NRS 34.810(b); *Hargrove*, 100 Nev. at 502, 686 P.2d at 225. Thus, we conclude that the district court did not err in denying this claim.

Third, appellant argues that trial counsel was ineffective for failing to ensure that the district court provided appellant with notice of sex offender registration prior to sentencing. Appellant failed to argue this claim below, and thus we decline to address it in the first instance. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004).

Next, appellant claims that appellate counsel provided ineffective assistance on direct appeal. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such 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). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. 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).

Appellant argues that appellate counsel was ineffective for failing to withdraw on direct appeal after appellant sent him a letter requesting him to withdraw. This argument was not raised below, and we need not consider it on appeal in the first instance. *See Davis*, 107 Nev. at 606, 817 P.2d at 1173. Furthermore, appellant provides no cogent argument as to why appellate counsel should have withdrawn or how appellant was prejudiced. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

Next, appellant argues that the imposition of a sentence of life in prison, coupled with the imposition of a sentence of lifetime supervision, violated the Double Jeopardy Clause. Appellant raised this claim below only in the context of ineffective assistance of appellate counsel for failing to raise the double-jeopardy argument on direct appeal. He does not make any argument in this court about the ineffective assistance of appellate counsel in regard to this claim and thus fails to explain how the district court erred in denying the claim. *See id.* Further, as a separate and independent ground to deny relief, we conclude that appellant failed to demonstrate that appellate counsel was ineffective. The lifetime-supervision statute evinces a legislative intent to impose cumulative punishments for a single offense, *see* NRS 176.0931(1), (2), and double jeopardy is not implicated where the state legislature "has clearly authorized multiple punishments for the same offense," *Jackson v. State*,

128 Nev. ___, ___, 291 P.3d 1274, 1278 (2012), *cert. denied*, 134 S. Ct. 56 (2013). Thus, appellant did not show that this issue would have had a reasonable probability of success on appeal.

Appellant also argues that the lifetime-supervision statute, NRS 176.0931, is unconstitutional because (1) it enhances a defendant's sentence without a jury-finding on the facts supporting the enhancement, in violation of *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000); and (2) it infringes on appellant's constitutional right to travel. Other than a brief statement about being entitled to effective assistance of counsel on direct appeal, appellant makes no argument in his opening brief as to the ineffective assistance of counsel. Because this claim was raised below only in the context of ineffective assistance of appellate counsel, we need not address this claim. *See Davis*, 107 Nev. at 606, 817 P.2d at 1173. Further, as a separate and independent ground to deny relief, we conclude that appellant failed to demonstrate that appellate counsel was ineffective. First, lifetime supervision is not a sentencing enhancement that must be decided by a jury or fact-finder; rather it is an automatically imposed mandatory sentence for commission of various sexual crimes. *See* NRS 176.0931; *Palmer v. State*, 118 Nev. 823, 827, 59 P.3d 1192, 1194-95 (2002). Second, his claim that the lifetime-supervision conditions infringe on his right to travel would not have been ripe for review on direct appeal, as he is serving a life sentence for his crime and the specific conditions of lifetime supervision will not be imposed until he is released from parole. *See Palmer*, 118 Nev. at 827, 59 P.3d at 1194-95.

Having considered appellant's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Cherry

cc: Chief Judge, Second Judicial District Court
Hon. Norman C. Robison, Senior Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk