

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HYRUM JOSEPH WEST,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66650

FILED

APR 15 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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. Fifth Judicial District Court, Nye County; Lee A. Gates, Senior Judge.

Appellant Hyrum West claims that the district court erred in denying several of his ineffective-assistance-of-appellate-counsel claims raised in his petition filed on November 12, 2013, and in his supplemental petition filed on June 25, 2014. 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). 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). Both components of the inquiry

must be shown. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). We give deference to the 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 that are supported by specific factual findings that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, West claims that the district court should have held an evidentiary hearing regarding his *Faretta*¹ canvass and conflict-of-interest claims. West also makes a vague claim regarding ineffective assistance of trial and appellate counsel. We conclude that West failed to support this claim with sufficient facts that, if true, entitled him to relief. *Id.* Therefore, the district court did not err in denying this claim without an evidentiary hearing.

Second, West claims that the district court erred in denying his claim that appellate counsel should have raised a claim on direct appeal that the State presented impermissible hearsay. Specifically, he claims that his right to confrontation was violated when police officers testified that they had received a tip from a confidential informant that West was transporting illegal drugs. West fails to demonstrate deficiency or prejudice because he fails to demonstrate that this claim had a reasonable probability of success on appeal. The information regarding

¹*Faretta v. California*, 422 U.S. 806 (1975).

the tip was not offered for the truth of the matter asserted but rather to explain why the police were interested in stopping West. *See Wallach v. State*, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990) (“A statement merely offered to show that the statement was made and the listener was affected by the statement, and which is not offered to show the truth of the matter asserted, is admissible as non-hearsay.”). Therefore, the district court did not err in denying this claim without an evidentiary hearing.

Third, West claims that the district court erred in denying his claim that appellate counsel was ineffective for failing to argue that the jury instructions given during the first trial, which ended in a mistrial, were the law of the case for the second trial. Specifically, West claims that jury instructions 19 and 20 from the first trial regarding consent, warrants, and probable cause to search the vehicle should have been given at the second trial based on the law of the case doctrine. West fails to demonstrate that appellate counsel was deficient or that he was prejudiced because he fails to demonstrate that this claim had a reasonable probability of success on appeal. West fails to demonstrate that the law of the case doctrine applies between district courts. *See Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (“The law of the first *appeal* is the law of the case on all subsequent appeals in which the facts are substantially the same.” (emphasis added and internal quotation marks omitted)); *United States v. Maybusher*, 735 F.2d 366, 370 (9th Cir. 1984) (“The doctrine typically applies to the same case when the parties in the subsequent proceeding were also parties to the former *appellate* decision.” (emphasis added)). The case law cited by West does not support

his contention that the law of the case doctrine applies to a district court ruling. Therefore, the district court did not err in denying this claim without an evidentiary hearing.

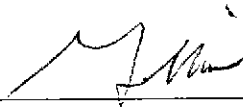
Fourth, West claims that the district court erred in denying his claim that appellate counsel was ineffective for failing to argue that the reasonable doubt instruction lowered the State's burden of proof. West fails to demonstrate that appellate counsel was deficient or that he was prejudiced because he fails to demonstrate that this claim had a reasonable probability of success on appeal. The instruction given at trial was the statutorily required instruction, NRS 175.211, and the Nevada Supreme Court has repeatedly rejected West's contention. *See Garcia v. State*, 121 Nev. 327, 340 n.26, 113 P.3d 836, 844 n.26 (2005) (collecting cases). Therefore, the district court did not err in denying this claim without an evidentiary hearing.

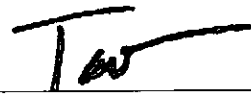
Fifth, West claims that the district court erred in denying his claim that its order denying his motion to suppress was different than its oral pronouncement denying the motion. This claim could have been raised on direct appeal, NRS 34.810(1)(b)(2), and West fails to demonstrate good cause and prejudice for failing to raise it on direct appeal. NRS 34.810(1)(b)(3). Therefore, the district court did not err in denying this claim without an evidentiary hearing.

Finally, West argues that the district court erred in denying the claims raised in his proper person petition. West merely lists the claims and fails to provide any cogent argument as to how or why the district court erred in denying these claims without conducting an

evidentiary hearing. "It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court." *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Thus, we need not address these claims.

Having concluded that West is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Lee A. Gates, Senior Judge
Christopher R. Oram
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk