

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HYRUM JOSEPH WEST,
Appellant,
vs.
BRIAN WILLIAMS, WARDEN
SOUTHERN DESERT CORRECTIONAL
FACILITY,
Respondent.

No. 68119

FILED

NOV 19 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus.¹ Fifth Judicial District Court, Nye County; Lee A. Gates, Senior Judge.

With the consent of the district court and the district attorney, appellant Hyrum West entered a conditional plea of guilty to one count of sale of a controlled substance—reserving the right to appeal the district court's adverse rulings on his motion to dismiss the information. See NRS 174.035(3). Pursuant to the parties' stipulation, the district court sentenced West to a prison term of 72 to 180 months and imposed the sentence to run concurrently with the sentence in a previously prosecuted case (CR-6429). On appeal, the Nevada Supreme Court determined the district court did not abuse its discretion by denying West's pretrial motion to dismiss and affirmed the judgment of conviction. See *West v. State*, Docket No. 59973 (Order of Affirmance, December 13, 2012).

¹This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).

In his habeas petition filed on December 6, 2013, West claimed, among other things, appellate counsel was ineffective for failing to argue his right to a speedy trial was violated, insufficient evidence supported his conviction, and his protection from double jeopardy was violated when an issue previously litigated in CR-6429 was relitigated in the instant case. The district court summarily denied West's petition because his conviction was based on a guilty plea, his petition did not contest the validity of the guilty plea, and his constitutional claims should have been raised on direct appeal. We conclude the district court got the right result but rejected West's ineffective-assistance-of-appellate-counsel claims for the wrong reason. See *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (observing a judgment or order of the district court will be affirmed if it reached the right result albeit for a wrong reason).

NRS 34.810(1)(a) limits the type of claims permissible in a habeas petition challenging the validity of a judgment of conviction when the conviction was based on a guilty plea, and the Nevada Supreme Court has determined that claims appropriate for direct appeal must be pursued on direct appeal or they will be considered waived. See *Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999). However, when a petitioner has reserved the right to appeal from a district court's adverse pretrial ruling pursuant to NRS 174.035(3), he is entitled to effective assistance of appellate counsel, *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996) ("The constitutional right to effective assistance of counsel extends to a direct appeal."), and may challenge appellate counsel's effectiveness in a postconviction petition for a writ of habeas corpus, see *Rippo v. State*, 122 Nev. 1086, 1095, 146 P.3d 279, 285 (2006) ("Claims of ineffective assistance of trial or appellate counsel are properly raised for the first time in a timely first post-conviction petition.").

Accordingly, West's ineffective-assistance-of-appellate-counsel claims were not barred by NRS 34.810(1)(a) or Nevada Supreme Court precedent.

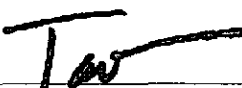
To establish ineffective assistance of appellate counsel, a petitioner must demonstrate counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have had a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both deficiency and prejudice must be shown, *Strickland v. Washington*, 466 U.S. 668, 697 (1984), 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).

West failed to demonstrate appellate counsel's performance was deficient. The speedy-trial and insufficient-evidence claims West raises in his habeas petition were not raised in the pretrial motion to dismiss and, therefore, were not reserved for appellate review. The specific issue-preclusion argument West raises in his habeas petition was not part of the double-jeopardy argument he presented to the district court in his motion to dismiss, see *McKenna v. State*, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998) ("Where a defendant fails to present an argument below and the district court has not considered its merit, we will not consider it on appeal."), and, even if it had been, it had no reasonable probability of success on appeal, see *West v. State*, Docket No. 59973 (Order of Affirmance, December 13, 2012 at 2) (explaining because West's "prosecutions arose from two separate and distinct criminal transactions they did not implicate the Double Jeopardy Clause"). Further, to the extent West claimed appellate counsel was ineffective for failing to federalize the double-jeopardy claim on direct appeal in order to preserve it for federal review, West has failed to demonstrate prejudice because he has not shown that he would have received a more favorable standard of

review on appeal if the claim had been federalized. *See Browning v. State*, 120 Nev. 347, 365, 91 P.3d 39, 52 (2004).

Having concluded West is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Fifth Judicial District Court
Lee A. Gates, Senior Judge
Hyrum Joseph West
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk

²We have reviewed all documents West has submitted in this matter, and we conclude no relief based upon those submissions is warranted. To the extent West has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we decline to consider them in the first instance.