

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARTIN KARL MILLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73221

FILED

MAY 15 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Martin Karl Miller appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Miller argues the district court erred by denying his claims of ineffective assistance of trial counsel raised in his February 18, 2016, petition and supplement. To prove ineffective assistance of 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 there is a reasonable probability, 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, Miller argued his trial counsel was ineffective for failing to request an instruction on the lesser-included offense of misdemeanor resisting a public officer. Miller asserted it was possible for the jury to find Miller did not use a dangerous weapon when resisting the officer. Miller failed to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, trial counsel testified he did not think it would have been reasonable to argue Miller did not use a deadly weapon given the nature of the knife, which counsel described as a tactical combat weapon, and Miller's brandishing the knife at the officer. Given these circumstances, Miller failed to demonstrate counsel acted in an objectively unreasonable manner by not seeking a lesser-included-offense instruction. The district court also found, given the nature of the knife and way in which Miller used it, Miller did not demonstrate a reasonable probability the jury would have convicted him of a misdemeanor, rather than the felony offense, had counsel sought such a lesser-included instruction. Substantial evidence supports this conclusion. See NRS 199.280(2), (3); *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (explaining that under the *Strickland* prejudice standard, the likelihood of a different result must be substantial, not just conceivable.). Therefore, we conclude the district court did not err by denying this claim.

Second, Miller argued his trial counsel was ineffective for failing to request an instruction regarding NRS 171.123(3), as a theory-of-

the-case instruction.¹ Miller asserted NRS 171.123(3) only permits an officer to detain him to ask him his identity, he can walk away from the officer if the officer does not have probable cause to arrest, and his counsel should have sought an instruction to that effect. Miller failed to demonstrate his trial counsel's performance was deficient or resulting prejudice.

Miller was charged with resisting a public officer with the use of a dangerous weapon. See NRS 199.280. To prove a defendant committed that offense, the State must show the officer was engaged in discharging or attempting to discharge a legal duty when the defendant resisted. See *id.* At the evidentiary hearing, counsel testified he sought to demonstrate and argue the State failed to prove the officer had enough information regarding Miller's alleged brandishing of a knife at a homeless shelter to detain Miller. Therefore, counsel sought to show the State failed to prove beyond a reasonable doubt the officer had been discharging or attempting to discharge a legal duty when he approached Miller and Miller was justified in walking away from the officer. Counsel stated the instruction regarding the elements of the offense encompassed the defense he attempted to present and, therefore, he did not need additional instructions regarding the defense theory of the case. Given counsel's testimony and the record

¹NRS 171.123 permits an officer to detain a person upon reasonable suspicion that the person is involved in criminal activity and then investigate the suspicious circumstances. NRS 171.123(3) states "[t]he officer may detain the person pursuant to this section only to ascertain the person's identity and the suspicious circumstances surrounding the person's presence abroad. Any person so detained shall identify himself or herself, but may not be compelled to answer any other inquiry of any peace officer."

before this court, Miller failed to demonstrate trial counsel's actions regarding the instructions fell below an objectively reasonable standard.

The district court also found Miller did not demonstrate prejudice for this issue. The evidence produced at trial showed the police officer was informed Miller brandished a knife at a homeless shelter, Miller disobeyed the officer's commands to stop, and then Miller brandished a knife at the officer. Given the circumstances of the incident and Miller's actions during the incident, he did not demonstrate a reasonable probability of a different outcome at trial had counsel sought an instruction based upon NRS 171.123(3). Substantial evidence supports the district court's decision. Therefore, we conclude the district court did not err by denying this claim.

Next, Miller argued his appellate counsel was ineffective. 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).

Miller argued his appellate counsel was ineffective for failing to challenge instruction no. 18, which stated "[n]o person has the right to resist legal or illegal detention by police officials absent a felonious application of force by the officer." Miller asserted this instruction is inaccurate, as he


had had the right to resist an illegal detention. Miller failed to demonstrate his counsel's performance was deficient or resulting prejudice.


At the evidentiary hearing, Miller's counsel testified he conducted research regarding this issue after the trial court approved instruction no. 18 and concluded it was appropriate for the State to request this instruction. Because counsel correctly found the instruction to be an accurate statement of the law, Miller failed to demonstrate his counsel acted in an objectively unreasonable manner when counsel did not raise the underlying issue on direct appeal. See *State v. Lisenbee*, 116 Nev. 1124, 1132, 13 P.3d 947, 952 (2000) (Maupin, J., concurring) (“[N]o person has the right to resist legal or illegal detention by police officials absent a felonious application of force by the officer.”); *Batson v. State*, 113 Nev. 669, 676, 941 P.2d 478, 483 (1997) (“[A] person may defend another [against a police officer] only where that person has witnessed a police officer's unlawful and excessive use of force, and only where the individual being 'rescued' is facing imminent and serious bodily harm at the hands of the police officer.”).

The district court also found Miller did not demonstrate he was prejudiced. The district court concluded the evidence in this matter demonstrated that Miller was legally restrained because the officer received a report that Miller had threatened a shelter volunteer, disobeyed the officer's commands to stop, and then brandished a knife at the officer. The district court found, because the officer legally restrained Miller, Miller did not demonstrate a reasonable likelihood of success on appeal had appellate counsel challenged instruction no. 18 on direct appeal. Substantial evidence supports the district court's conclusion, and the district court did not err as a matter of law. Therefore, we conclude the district court did not err by denying this claim.

Finally, Miller asserted he was entitled to relief due to the cumulative errors of counsel, taken together with the harmless error found on direct appeal regarding the admission of evidence of Miller's uncharged misconduct. Miller failed to demonstrate any errors were committed by his counsel, and accordingly, there were no errors to cumulate. Therefore, we conclude the district court did not err by denying this claim.

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
Richard F. Cornell
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk