

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVON XAVIER LYONS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 72899

**FILED**

JUL 17 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Davon Xavier Lyons appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Lyons argues the district court erred by denying the claims of ineffective assistance of counsel raised in his September 19, 2016, petition and in his later 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*). To demonstrate prejudice regarding the decision to enter a guilty plea, a petitioner must demonstrate a reasonable probability, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). 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, Lyons argued his counsel was ineffective for failing to support his request for a continuance of the trial. Lyons failed to demonstrate his counsel's performance was deficient or resulting prejudice. At a hearing one week before trial was scheduled to begin, Lyons personally asked the trial court to continue the trial because he had not reviewed all of the discovery and needed further opportunities to discuss the case with counsel. However, counsel stated a continuance was not necessary because he was ready for the trial to proceed as scheduled and indicated he would be able to have a discussion with Lyons to alleviate Lyons' concerns. Subsequent to this hearing, Lyons accepted a plea offer from the State and entered his guilty plea. Given counsel's statements, Lyons failed to demonstrate his counsel's actions fell below an objectively reasonable standard. Lyons failed to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial had counsel supported Lyons' request for a continuance of the trial date. Therefore, we conclude the district court did not err by denying this claim.

Second, Lyons argued his counsel was ineffective for failing to file a pretrial petition for a writ of habeas corpus asserting the kidnapping charges were incidental to the robbery charges. The State presented evidence to the grand jury that he and his codefendants moved the victims at gunpoint from the victims' open garages into their homes, then held the victims at gunpoint while they searched for valuables. Lyons claimed this evidence demonstrated that the movement of the victims was necessary to

complete the robberies and, therefore, was merely incidental movement. Lyons failed to demonstrate his counsel's performance was deficient or resulting prejudice.

The record reveals that Lyons' counsel discussed this issue with the trial-level court during a larger discussion concerning motions Lyons wanted counsel to pursue. Counsel informed the court that Lyons wished for counsel to file a pretrial petition for a writ of habeas corpus arguing that the kidnapping charges were incidental to the robbery charges. Counsel informed the trial-level court that he had explained to Lyons that, based on counsel's past experience, a pretrial petition for a writ of habeas corpus was not the best way to raise this issue and that the defense would utilize this argument at a different time. Tactical decisions such as this "are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which Lyons did not demonstrate.

Lyons also failed to demonstrate a reasonable probability a pretrial petition for a writ of habeas corpus would have been successful because the record demonstrates the State presented sufficient evidence to support the grand jury's probable cause finding for the kidnapping and robbery charges. *See Sheriff, Washoe Cty. v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, (1980) (explaining that State need only present slight or marginal evidence to demonstrate probable cause to support a criminal charge); *see also Gonzales v. State*, 131 Nev. 481, 499, 354 P.3d 654, 666 (Ct. App. 2015) (concluding a kidnapping was not incidental to a robbery because moving the victim from an open garage and into the house was not necessary to complete the robbery, increased the danger to the victim, and allowed the crime to continue for a longer period of time). Therefore, we conclude the district court did not err by denying this claim.

Third, Lyons argued his counsel was ineffective for promising him he would receive a total sentence of 5 to 15 years. Lyons failed to demonstrate his counsel's performance was deficient or resulting prejudice. In the written plea agreement, Lyons acknowledged he had not been promised or guaranteed any particular sentence. In addition, Lyons acknowledged in the written plea agreement counsel had explained the potential consequences he faced by entry of his guilty plea and that the district court had the discretion to impose the appropriate sentence. Under these circumstances, Lyons failed to demonstrate his counsel acted in an objectively unreasonable manner or a reasonable probability he would have refused to plead guilty and insisted on proceeding to trial had counsel explained the guilty plea and possible sentences in a different manner. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Lyons argued his counsel was ineffective for failing to object when the sentencing court did not discuss the statutory factors supporting its sentencing decisions for the deadly weapon and victim over 60 enhancements. Lyons failed to demonstrate resulting prejudice. The record reveals the sentencing court failed to state, on the record, that it had considered the factors enumerated in NRS 193.165(1) and in NRS 193.167(3) prior to imposing the sentences for the deadly weapon and victim over 60 enhancements. *See Mendoza-Lobos v. State*, 125 Nev. 634, 643, 218 P.3d 501, 507 (2009). Notwithstanding the sentencing court's failure to make findings regarding the enhancements, the parties discussed the information contained within those factors and the record provides sufficient support for the sentence imposed. Given the record before this court, we conclude Lyons failed to demonstrate a reasonable probability of a different outcome had counsel objected when the sentencing court failed to discuss on the record the factors supporting the enhancement penalties

when it imposed sentence. *See id.* at 644, 218 P.3d at 507 (holding there was no plain error when the district court's failure to make findings did not affect the sentencing decision). Therefore, we conclude the district court did not err by denying this claim.

Next, Lyons 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*, 105 Nev. at 853, 784 P.2d at 953.

First, Lyons claimed his appellate counsel was ineffective for failing to assert the sentencing court erred by not discussing the statutory factors supporting its sentencing decisions for the deadly weapon and elderly victim enhancements. Lyons failed to demonstrate resulting prejudice. As previously discussed, the parties discussed the information contained within the factors and the record provides sufficient support for the sentence imposed. Given the record before this court, Lyons failed to demonstrate a reasonable likelihood of success had counsel raised this claim on direct appeal. Therefore, we conclude the district court did not err by denying this claim.

Second, Lyons claimed his appellate counsel was ineffective for failing to properly argue on direct appeal that his sentence constituted cruel and unusual punishment. Lyons failed to demonstrate his counsel's

performance was deficient or resulting prejudice. This court already concluded Lyons' sentence did not amount to cruel and unusual punishment. *Lyons v. State*, Docket No. 67444 (Order of Affirmance, August 25, 2015). As this court already considered and rejected the underlying issue, Lyons failed to demonstrate his counsel's arguments on appeal fell below an objectively reasonable standard or a reasonable likelihood of success had counsel raised additional arguments concerning this issue. Therefore, the district court did not err by denying this claim.


Finally, Lyons claimed the cumulative effect of the errors committed by his counsel demonstrate that his guilty plea was invalid. Lyons failed to demonstrate any errors, even if considered cumulatively, amounted to a reasonable probability of altering the outcome of Lyons' criminal proceedings or required withdrawal of his plea to correct a manifest injustice, *see* NRS 176.165. Therefore, we conclude the district court did not err by denying this claim.

Having concluded Lyons is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.

 \_\_\_\_\_, C.J.

Silver

 \_\_\_\_\_, J.

Tao

 \_\_\_\_\_, J.

Gibbons

cc: Hon. Carolyn Ellsworth, District Judge  
The Law Office of Travis Akin  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk