

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTHONY DEWANE BAILEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 75489-COA

FILED

APR 16 2019

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

ORDER OF AFFIRMANCE

Anthony Dewane Bailey appeals from a district court order denying a postconviction petition for a writ of habeas filed on May 18, 2016.¹ Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Bailey claims the district court erred by denying his ineffective-assistance-of-appellate-counsel claims. 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 v. Washington*, 466 U.S. 668, 697 (1984). Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

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). 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).

First, Bailey claimed appellate counsel was ineffective for failing to argue the district court erred by allowing an amendment to the charging document. Specifically, he claimed the district court informed the jury they could find him guilty of sexual assault without the use of a deadly weapon when he was charged with sexual assault with the use of a deadly weapon. Bailey failed to demonstrate counsel was deficient or resulting prejudice because this claim did not have a reasonable probability of success on appeal. The substantive crime Bailey was charged with was sexual assault. The deadly weapon language referred to a possible enhancement he could receive if the jury found he committed the sexual assault with a deadly weapon. The jury found Bailey did not commit the sexual assault with a deadly weapon, and therefore, it was proper for the judgment of conviction to reflect he had been found guilty of sexual assault with no enhancement in accordance with the jury instruction given. Therefore, we conclude the district court did not err by denying this claim.

Second, Bailey claimed appellate counsel was ineffective for failing to argue Bailey was convicted of a non-existent statutory offense. Bailey claims sexual assault without the use of a deadly weapon does not exist in the statutes. This claim is belied by the record. Counsel raised this

claim on appeal, and it was rejected by the Nevada Supreme Court. *See Bailey v. State*, Docket No. 67108 (Order of Affirmance, September 30, 2016). Therefore, we conclude the district court did not err by denying this claim.

Third, Bailey claimed appellate counsel was ineffective for failing to argue the courts of Nevada lacked jurisdiction to prosecute him because the victim made false statements in her 911 call and because the victim never swore out a criminal complaint against him. Bailey failed to demonstrate counsel was deficient or that this claim had a reasonable probability of success on appeal because his claim did not implicate the jurisdiction of the courts of Nevada. *See Nev. Const. art. 6, § 6; NRS 171.010*. Therefore, we conclude the district court did not err by denying this claim.²

Fourth, Bailey claimed appellate counsel was ineffective for failing to argue the victim committed perjury at trial. Bailey failed to demonstrate counsel was deficient or that this claim had a reasonable possibility of success on appeal because he failed to demonstrate the victim committed perjury at trial. Therefore, we conclude the district court did not err by denying this claim.

Fifth, Bailey claimed appellate counsel was ineffective for failing to argue that his right to confront witnesses was violated when a nurse, who did not perform the sexual assault examination, testified about

²To the extent Bailey argued pre-trial counsel was ineffective for failing to raise this claim in justice court or in the district court, this claim fails for the same reason as his appellate counsel claim.

the report at trial. Bailey failed to demonstrate counsel was deficient or that this claim had a reasonable probability of success on appeal. Bailey did not object to the nurse testifying at trial, and he used several aspects of the report to support his claim that he did not sexually assault the victim. It appears Bailey's decision not to object to the testimony may have been a strategic decision. *See Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81. Also, because Bailey did not object, to warrant relief on appeal, counsel would have had to demonstrate plain error. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Given the evidence presented at trial, we conclude Bailey failed to demonstrate the testimony violated his substantial rights. *See id.* Therefore, we conclude the district court did not err by denying this claim.

Sixth, Bailey claimed appellate counsel was ineffective for failing to argue there was insufficient physical evidence to demonstrate his guilt for the sexual assault. Bailey failed to demonstrate counsel was deficient or resulting prejudice because he failed to demonstrate this claim had a reasonable probability of success on appeal. The testimony of the victim alone was enough to convict him of sexual assault. *See Gaxiola v. State*, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005). Therefore, we conclude the district court did not err by denying this claim.³

³To the extent Bailey argued pre-trial counsel was ineffective for failing to raise this claim, Bailey failed to demonstrate counsel was deficient or a reasonable probability of a different outcome had pretrial counsel raised this claim. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). At the pretrial stage, this claim would have had to be raised in a

Seventh, Bailey claimed appellate counsel was ineffective for failing to argue spoliation where the State lost, withheld, or destroyed a toxicology report regarding the victim's use of PCP. While this exact claim was not raised on appeal, counsel argued the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) by failing to provide Bailey with the report. The Nevada Supreme Court concluded Bailey failed to demonstrate the State violated *Brady* because the State never had possession of the report and Bailey could have obtained the report through diligent effort. Further, the Nevada Supreme Court concluded the victim testified at trial she had ingested PCP on the night of the sexual assault so the information Bailey sought to introduce through the report was actually presented at trial. Bailey failed to demonstrate counsel was deficient or a reasonable probability of a different outcome on appeal had counsel raised a spoliation argument because it would have been denied for the same reasons. Accordingly, we conclude the district court did not err by denying this claim.

Eighth, Bailey claimed appellate counsel was ineffective for failing to argue the State offered false forensic reports which caused him to be erroneously confined prior to trial. Bailey failed to demonstrate deficiency or that this claim had a reasonable probability of success on appeal because he failed to demonstrate these reports were the only reason he was confined prior to trial. Further, he failed to allege or demonstrate

pretrial petition for a writ of habeas corpus, and Bailey failed to demonstrate the State failed to present slight or marginal evidence to support the charges. See *Sheriff v. Dhadda*, 115 Nev. 175, 180, 980 P.2d 1062, 1065 (1999).

his pretrial confinement affected his ability to prepare for trial. Accordingly, we conclude the district court did not err by denying this claim.

Ninth, Bailey claimed appellate counsel was ineffective for failing to argue he should have been allowed to introduce forensic reports to contradict other evidence presented at trial. Bailey failed to demonstrate deficiency or that this claim had a reasonable probability of success on appeal because counsel raised a similar claim on appeal, and it was rejected. *See Bailey v. State*, Docket No. 67108 (Order of Affirmance, September 30, 2016). Bailey attempted to introduce the forensic reports at trial, and the district court denied that request. On appeal, counsel argued Bailey should have been able to cross-examine his forensic expert with these reports to impeach her and other witnesses. The Nevada Supreme Court concluded Bailey did not have the right under the confrontation clause to impeach his own expert and the evidence of an irregular DNA report and subsequent corrective report would have only confused the jury as the reports came to the same conclusion. Accordingly, we conclude the district court did not err by denying this claim.

Tenth, Bailey claimed appellate counsel was ineffective for failing to argue the State committed prosecutorial misconduct when it argued during closing argument, "You cannot find him not guilty, he is suing us for 10 million dollars." Bailey failed to demonstrate counsel was deficient or that the claim had a reasonable possibility of success on appeal. Bailey introduced evidence during his testimony that he was suing the State for \$10 million. The State, in its closing argument, argued Bailey had a motive to lie because of his lawsuit, and it did not make the statement as

quoted above. Bailey did not object to this statement, and therefore, to warrant relief on appeal, counsel would have had to demonstrate plain error. *See Valdez*, 124 Nev. at 1190, 196 P.3d at 477. Even assuming it was improper for the State to comment on Bailey's motive to lie, Bailey failed to demonstrate the statement affected his substantial rights. *See id.* Therefore, we conclude the district court did not err by denying this claim.

Eleventh, Bailey claimed appellate counsel was ineffective for failing to argue Bailey filed a timely motion to vacate the verdict in which he argued the forensic evidence was in direct contradiction to the sexual examination report. Bailey failed to demonstrate notifying the Nevada Supreme Court of the fact that he had filed a motion to vacate the verdict would have caused his appeal to be successful. Therefore, we conclude the district court did not err by denying this claim.

Twelfth, Bailey claimed appellate counsel was ineffective for failing to argue the State engaged in improper ex-parte communication to obtain a material witness warrant for the victim. Bailey claimed the State sought the warrant to ensure the victim provided perjured testimony and he should have been able to inform the jury the victim was threatened with arrest. Bailey failed to demonstrate counsel was deficient or that this claim had a reasonable probability of success on appeal. Bailey failed to demonstrate it was improper for the State to seek the material witness warrant. *See NRS 178.494*. Further, the material witness warrant was never served and Bailey failed to demonstrate the victim had knowledge the warrant was sought and that it caused her testimony to be untruthful. Therefore, we conclude the district court did not err by denying this claim.

Thirteenth, Bailey claimed appellate counsel was ineffective for failing to argue the district court erred by failing to address his objections to the presentence investigation report. Bailey failed to demonstrate counsel was deficient or that this claim would have had a reasonable probability of success on appeal because the district court addressed Bailey's alleged errors in the presentence investigation report during the sentencing hearing. Therefore, we conclude the district court did not err by denying this claim.

Fourteenth, Bailey claimed appellate counsel was ineffective for failing to argue he should not have been sentenced as a habitual criminal because some of his convictions were overturned, he did not appeal the convictions, they were stale or remote, or they had been previously used to enhance his sentences. Bailey failed to demonstrate his counsel was deficient or that this claim had a reasonable probability of success on appeal. Bailey failed to demonstrate the district court relied on convictions that were overturned to sentence him as a habitual criminal. Further, "NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of [prior] convictions," *Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992), and Bailey failed to demonstrate the district court could not consider convictions that he did not appeal. Bailey failed to demonstrate the district court abused its discretion when sentencing him as a habitual criminal.⁴ See NRS 207.010(2); *O'Neill v. State*, 123 Nev. 9,

⁴We note Bailey received the same sentence as a habitual criminal that he would have received had he been sentenced for the underlying crime. See NRS 200.366(2)(b).

12, 153 P.3d 38, 40 (2007). Therefore, we conclude the district court did not err by denying this claim.

Finally, Bailey claimed that because counsel was an "independent contractor" hired by the State to represent him, counsel was ineffective. Bailey failed to demonstrate the fact his appellate counsel was appointed to represent him affected counsel's ability to effectively represent him on appeal. Counsel testified at the evidentiary hearing he raised all of the issues he felt were meritorious and he raised one issue he knew was important to Bailey but did not believe was meritorious. Bailey failed to demonstrate any omitted issues would have been meritorious on appeal. Therefore, we conclude the district court did not err by denying this claim.

Having concluded Bailey is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.⁵


_____, C.J.
Gibbons


_____, J.
Bulla

⁵To the extent Bailey argues the district court erred by denying his claims without holding an evidentiary hearing, this claim is belied by the record. The district court held an evidentiary hearing on the claims raised in Bailey's petition.

The Honorable Jerome T. Tao did not participate in the decision in this matter.

cc: Hon. Eric Johnson, District Judge
Anthony Dewane Bailey
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk