

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KATHY ANN PERRAULT,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 74968-COA

FILED

APR 16 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

Kathy Ann Perrault appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Perrault argues the district court erred by denying claims of ineffective assistance of counsel raised in her April 19, 2016, petition. 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, Perrault argued her counsel was ineffective for failing to investigate the victim's father for allegedly sexually assaulting Perrault. At the evidentiary hearing, Perrault's counsel testified he and his investigator reviewed Perrault's claims concerning the alleged sexual assault. Counsel testified Perrault altered her version of events on numerous occasions and her stories did not match the additional evidence concerning the incident. Counsel testified that, based upon the defense investigation, he did not believe Perrault's allegations to be truthful and did not believe additional investigation would have provided favorable evidence to the defense. For those reasons, counsel testified he chose not to undertake further investigation. "Tactical decisions are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which Perrault did not demonstrate. The district court also found her allegations were investigated by the police department and the investigation was closed based upon insufficient evidence. The district court found the evidence presented at the evidentiary hearing demonstrated Perrault's allegations were appropriately investigated and Perrault's counsel did not perform below an objectively unreasonable standard. Substantial evidence supports that finding.

The district court also found overwhelming evidence of Perrault's guilt of kidnapping was presented at trial and her allegations concerning sexual assault would not have alleviated her criminal liability

for kidnapping a young child. Substantial evidence supports the district court's findings. Accordingly, Perrault failed to demonstrate a reasonable probability of a different outcome at trial had counsel performed further investigation into her allegations of sexual assault. Therefore, we conclude the district court did not err by denying this claim.

Second, Perrault argued her counsel was ineffective for failing to retain an expert concerning sexual assault. The record before this court demonstrates Perrault did not show her counsel's performance was deficient or resulting prejudice. "Where counsel and the client in a criminal case clearly understand the evidence and the permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources" when preparing a defense for trial. *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). At the evidentiary hearing, counsel testified he investigated Perrault's sexual assault allegations, concluded the allegations were not truthful, and decided it would be improper for him to seek an expert to evaluate untruthful allegations. Counsel also feared the expert would provide unfavorable information, which could have been harmful to the defense at trial. For those reasons, counsel declined to retain a sexual assault expert. Tactical decisions are virtually unchallengeable absent extraordinary circumstances," *id.*, which Perrault did not demonstrate. Accordingly,

Perrault failed to demonstrate her counsel's performance fell below an objective standard of reasonableness.<sup>1</sup>

In addition, the district court found there was overwhelming evidence of Perrault's guilt presented at trial and, therefore, Perrault failed to demonstrate a reasonable probability of a different outcome had counsel retained an expert concerning sexual assault. Substantial evidence supports the district court's finding. Therefore, we conclude the district court did not err by denying this claim.

Third, Perrault argued her counsel was ineffective for advising her not to testify because the trial court wanted a short trial. Perrault failed to demonstrate her counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified that he never told Perrault she should not testify because the trial court wanted the trial to be short and the trial court's scheduling issues played no part in the defense's approach to the trial. The district court concluded counsel's testimony was

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<sup>1</sup>The district court found counsel was deficient for failing to retain a sexual assault expert, but did not explain why it found counsel's decision not to pursue such an expert to be an unreasonable decision. Recognizing "[a] court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance," *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (internal quotation marks omitted), and considering counsel's testimony concerning his investigation and decisions concerning Perrault's allegations, the district court should have found counsel's tactical decision not to retain a sexual assault expert to have been a reasonable one. However, we affirm because the district court reached the right result by denying relief. See *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

credible and substantial evidence supports this finding. Accordingly, Perrault failed to demonstrate her counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome at trial had counsel performed different actions. Therefore, we conclude the district court did not err by denying this claim.

Next, Perrault argued her 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.


Perrault claimed her appellate counsel was ineffective for failing to argue on direct appeal that the district court erred by requiring the trial to conclude by a certain day. Perrault failed to demonstrate her appellate counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he was aware the trial court wished to conclude the trial by a certain day, but that deadline had no bearing upon the defense approach to the trial. Counsel testified that because the deadline had no bearing upon the defense, he did not raise it as a claim of error on appeal. The district court found counsel's testimony was credible


and substantial evidence supports this finding. Accordingly, Perrault failed to demonstrate her appellate counsel's performance fell below an objectively reasonable standard or that the underlying claim had a reasonable probability of success on direct appeal. Therefore, we conclude the district court did not err by denying this claim.

Finally, Perrault argued she was entitled to relief due to the cumulative effect of the errors committed by counsel. Perrault failed to demonstrate there were multiple deficiencies which could have been cumulated, *see McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n. 17 (2009), and, therefore, she failed to demonstrate she was entitled to relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. William D. Kephart, District Judge  
Pitaro & Fumo, Chtd.  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk