

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JEREMY DAVID NAYLOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 77972-COA

FILED

FEB 11 2020

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

ORDER OF AFFIRMANCE

Jeremy David Naylor 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.

Naylor argues the district court erred by denying the claims of ineffective assistance of trial counsel raised in his January 17, 2017, petition and later-filed 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, Naylor argued his trial counsel was ineffective for advising him to reject a plea offer and failing to convey additional plea offers. At the evidentiary hearing, Naylor's counsel testified he advised Naylor the State offered to reduce the charges to one count of robbery. Counsel testified he explained the potential consequences of accepting the plea offer versus rejecting the offer and proceeding to trial. Counsel testified that he did not advise Naylor to reject the plea offer, but that Naylor made that decision on his own. In addition, Naylor's counsel was unaware of additional plea offers that were not conveyed to Naylor. The district court concluded counsel's testimony was credible and that Naylor failed to demonstrate there were plea offers that were not conveyed to him. For those reasons, the district court found Naylor failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel performed different actions concerning plea offers. Substantial evidence supports the district court's findings. Therefore, we conclude the district court did not err by denying this claim.

Second, Naylor argued his counsel was ineffective for conceding his guilt by acknowledging he was present during the robbery. Naylor contended that, rather than acknowledging his guilt, counsel should have utilized a mistaken identity defense. Naylor's claim that counsel conceded his guilt is belied by the record. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Counsel did not concede Naylor's guilt but instead stated Naylor had no idea his codefendant would rob the victim. Counsel also argued that the evidence merely demonstrated that Naylor

was "a dumb friend who was driving" and was in no way responsible for the robbery. Given the record, Naylor failed to demonstrate his counsel's performance fell below an objectively reasonable standard.

Naylor also failed to demonstrate a reasonable probability of a different outcome at trial had counsel utilized a different defense given the strong evidence of Naylor's guilt. The evidence included the victim's testimony wherein he stated Naylor displayed a firearm during the robbery. The victim also testified he followed Naylor and the codefendant while they drove to a casino following the robbery. The victim further testified he talked with a 911 dispatcher while he followed Naylor's vehicle. Officers arrived at the casino and discovered Naylor's empty vehicle. An officer waited by Naylor's vehicle and Naylor soon returned with the codefendant. The officer brought Naylor to the victim and the victim positively identified Naylor as one of the persons that robbed him. The officer next obtained a search warrant for Naylor's vehicle and discovered items belonging to the victim inside of Naylor's vehicle. The officer also discovered a firearm in the vehicle. Therefore, we conclude the district court did not err by denying this claim.

Next, Naylor argued that 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).

Naylor argued his counsel was ineffective for only raising one, non-meritorious issue on direct appeal as counsel should have argued there was insufficient evidence to support the jury's guilty verdict.¹ Naylor contended that as a result of counsel's failure to raise additional claims, he was deprived of a proper direct appeal. The record reveals the victim testified he was over 60 years of age and Naylor displayed a firearm in an effort to cause the victim to fear he would be harmed if he refused to permit the codefendant to take his belongings. A firearm and the victim's belongings were later discovered in Naylor's vehicle. Given this testimony and evidence, the jury could reasonably find Naylor committed conspiracy to commit robbery and robbery of a victim 60 years of age or older. See NRS 193.167(1); NRS 199.480(1); NRS 200.380(1); see also *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). As there was sufficient evidence presented at trial to support the jury's verdict, Naylor failed to demonstrate his counsel acted in an objectively unreasonable manner by failing to raise the underlying claim on direct appeal. Naylor also failed to demonstrate a reasonable likelihood of success on appeal had counsel raised additional issues. Therefore, the district court did not err by denying this claim.

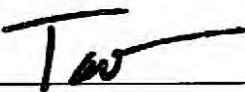
Finally, Naylor claimed there was insufficient evidence of his guilt presented at trial and his right to control his own defense was violated. However, Naylor did not raise these claims before the district court and we

¹To the extent Naylor argued he was denied a direct appeal, this claim is belied by the record. Therefore, the district court did not err by denying this claim.

decline to consider them in the first instance on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Carolyn Ellsworth, District Judge
Benjamin Durham Law Firm
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk