

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL ATTARD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 79047-COA

FILED

JUN 05 2020

ELIZABETH A. BROWNE  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

Michael Attard appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

Attard argues the district court erred by denying the claims of ineffective assistance of counsel raised in his September 21, 2012, 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, Attard claimed his counsel was ineffective for failing to object or otherwise challenge the State's untimely notice of a witness. At the evidentiary hearing, counsel testified that the witness, a sheriff's deputy, had not made a written report concerning the incident, but counsel was aware of the nature of the deputy's role in this case. Counsel testified that after the deputy was called as a witness, the trial court gave counsel time to talk with the deputy to learn of his potential testimony. Counsel further testified that he believed the trial court's decision to give him time to talk with the deputy was the proper remedy for the untimely notice. The district court found counsel's decisions were reasonable under the circumstances in this case.<sup>1</sup> Substantial evidence supports this finding. See *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) ("Tactical decisions are virtually unchallengeable absent extraordinary circumstances").

The district court also found the evidence of Attard's guilt was overwhelming because he consented to the search of his vehicle that revealed the methamphetamine and he confessed the methamphetamine belonged to him. In light of the overwhelming evidence of Attard's guilt presented at trial, he failed to demonstrate a reasonable probability of a

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<sup>1</sup>Attard also appeared to assert that counsel was ineffective for failing to contend that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), when it did not disclose the deputy's written report. However, counsel testified that the deputy did not create a written report concerning this matter. As the deputy did not create a written report, Attard did not demonstrate objectively reasonable counsel would have asserted the State improperly failed to disclose such a report or a reasonable probability of a different outcome had counsel raised this underlying claim.



record supports the district court's findings, and we conclude the district court did not err by denying this claim.<sup>2</sup>

Next, Attard contended his counsel was ineffective for advising him that he did not find any meritorious claims to raise in a direct appeal. 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.

At the evidentiary hearing, counsel testified that he wrote a letter to Attard advising him concerning a direct appeal and the time he had in which to file a notice of appeal. Counsel also testified that he reviewed the case and he informed Attard that he did not believe that there

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<sup>2</sup>Attard also appeared to claim counsel was ineffective because counsel should have moved to suppress Attard's incriminating statements, improperly stipulated to admission of those statements at trial, and improperly asserted that the jury should find Attard guilty of a lesser-included offense. The district court found that Attard admitted to the deputy that the methamphetamine belonged to him and Attard did not demonstrate objectively reasonable counsel would have filed a motion to suppress. The district court also found the evidence of Attard's guilt was very strong and counsel performed reasonably when viewed in the context of the nature of the evidence against Attard. Substantial evidence supports the district court's findings and Attard failed to demonstrate he was entitled to relief based upon these issues.

were any meritorious issues that could be raised on direct appeal. Counsel further testified that he requested Attard to inform him of issues that should be raised on direct appeal but Attard did not inform him of any issues and did not ask him to file a notice of appeal. The district court found counsel's decisions were reasonable under the circumstances in this case. Substantial evidence supports the district court's finding. *See Ford*, 105 Nev. at 853, 784 P.2d at 953. The district court also found Attard did not identify any issue that had a reasonable likelihood of success on direct appeal. The record also supports this finding, and we conclude the district court did not err by denying this claim.

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

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

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

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

cc: Hon. Leon Aberasturi, District Judge  
Karla K. Butko  
Attorney General/Carson City  
Lyon County District Attorney  
Third District Court Clerk