

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79908

FILED

JUN 05 2020

ERIC S. A. GROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Robert Johnson appeals from a district court order denying a postconviction petition for a writ of habeas corpus and a motion for the appointment of counsel filed on June 24, 2019. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

Petition for a writ of habeas corpus

Johnson claimed that he was deprived of effective assistance of trial and appellate counsel. To prevail on a claim of ineffective assistance of trial counsel, a petitioner must demonstrate counsel's performance was deficient because it fell below an objective standard of reasonableness, and resulting prejudice in 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 (1984).

To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate counsel's performance was deficient and resulted in prejudice. *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). Appellate counsel's performance is prejudicial if an "omitted issue would have a reasonable probability of success on appeal." *Id.* at 998, 923 P.2d at 1114.

The petitioner must demonstrate both components of the ineffective-assistance inquiry—deficiency and prejudice. *Strickland*, 466 U.S. at 697. We give deference to the district court's factual findings if supported by substantial evidence and not clearly wrong 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, Johnson claimed that trial counsel was ineffective for failing to investigate three women who witnessed the events giving rise to the criminal charges. Johnson further claimed that appellate counsel was ineffective for failing to investigate these witnesses and for failing to raise a claim regarding these three witnesses on appeal. The district court made the following findings. Johnson did not make it clear who these women were or what they would have said to render a more favorable outcome probable. And appellate counsel was not tasked with investigating these women and could not have raised an ineffective-assistance-of-counsel claim on direct appeal. We conclude these findings are supported by the record, Johnson's underlying claim consisted of a bare allegation, and the district court did not err by rejecting these claims. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (a petitioner is not entitled to postconviction relief if his claims are bare and lack specific factual allegations).

Second, Johnson claimed that trial counsel was ineffective for waiving the preliminary hearing. He further claimed that appellate counsel was ineffective for failing to raise this ineffective-assistance-of-counsel claim on appeal. The district court made the following findings. The instant case was brought by way of an indictment; therefore, there was no preliminary hearing to waive. And appellate counsel could not have raised

an ineffective-assistance-of-counsel claim on direct appeal. We conclude these findings are supported by the record, Johnson's underlying claim is belied by the record, and the district court did not err by rejecting these claims. *See Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) ("A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made.").

Third, Johnson claimed that trial counsel was ineffective for failing to impeach Holguin's testimony with Friesen's testimony. The district court made the following findings. It was not clear how trial counsel could have impeached Holguin with Friesen's testimony because Holguin testified before Friesen. Trial counsel cross-examined Holguin regarding what Holguin saw and the inconsistencies between Holguin's trial testimony and his previous statements. And both Holguin and Friesen testified as to their perceptions. We conclude these findings are supported by the record, Johnson failed to meet his burden to prove ineffective assistance of counsel, and the district court did not err by rejecting this claim. *See Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (petitioner bears the burden of proving ineffective assistance by a preponderance of the evidence).

Fourth, Johnson claimed that trial counsel was ineffective for failing to investigate the stolen motorcycle. He further claimed that appellate counsel was ineffective for failing to raise a claim as to whether the motorcycle was actually stolen on appeal. The district court made the following findings. There was sufficient evidence to show that the motorcycle was stolen and further investigation would not have shown anything to the contrary. Johnson did not explain how further investigation would have led to a more favorable outcome. And appellate counsel raised

sufficiency-of-the-evidence claims as to the robbery and grand larceny charges on direct appeal. We conclude these findings are supported by the record and the district court did not err by rejecting these claims. See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (a petitioner claiming counsel did not conduct an adequate investigation must show how a better investigation would have made a more favorable outcome probable); *Johnson v. State*, Docket No. 74407-COA (Order of Affirmance, December 26, 2018).

Fifth, Johnson claimed that trial counsel was ineffective for failing to address the fact that he was not served with a notice to appear or participate before the grand jury. He further claimed that appellate counsel was ineffective for failing to raise the lack-of-notice claim on appeal. The district court found that Johnson had failed to demonstrate that trial counsel and appellate counsel were ineffective because the State faxed a *Marcum*¹ notice to Johnson's counsel on July 1, 2016, and any prejudice was cured when Johnson was convicted of the charges under a higher burden of proof. We conclude these findings are supported by the record and the district court did not err by rejecting these claims. See *United States v. Mechanik*, 475 U.S. 66, 70 (1986) (Holding a "petit jury's . . . guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt . . . [therefore,] any error in the grand jury proceedings connected with the charging decision was harmless beyond a reasonable doubt."); *Lisle v. State*, 114 Nev. 221, 224-25, 954 P.2d 744, 746-47 (1998) (addressing a challenge involving a *Marcum* notice).

¹See *Sheriff v. Marcum*, 105 Nev. 824, 783 P.2d 1389 (1989).

Sixth, Johnson claimed that trial counsel was ineffective for failing to object to admission of the alleged weapon because it was wrapped in paper and plastic and therefore obscured from the jury's view. The district court made the following findings. The pipe was wrapped in brown paper. The State did not take the pipe out of the brown paper because there were fingerprints on the pipe and a biohazard sticker on the necessary bag. The State also stated that the pipe was wrapped in plastic because it was contaminated. The State also stated that a proper chain of custody had been maintained. There is no evidence that trial counsel to request the pipe be unwrapped from the evidence. The State's claim that there was no objection to the pipe being wrapped in plastic is not supported. We conclude that the State's claim that trial counsel failed to object to the pipe being wrapped in plastic is not supported. The district court did not err by rejecting the claim. See Johnson, 113 N.W.2d 674, 675 (Minn. 1964).

Seventh, Johnson claimed that trial counsel was ineffective during voir dire because counsel failed to object to the questioning of prospective juror number 377 and failed to object to the prospective jurors who were victims of a crime, associated with the movement, or had a language barrier. He further claimed that appellate counsel was ineffective for failing to challenge prospective juror number 377's dismissal and prospective juror number 346's language limitations on appeal. The district court found that trial counsel objected to the State's for-cause challenge to prospective juror number 377 and that Johnson failed to show how any of the empanelled jurors were actually biased against him are supported by the record. However, the district court's finding that prospective juror number 346's for-cause is belied by the record. Nevertheless, Johnson failed to show that any of the empanelled jurors were

fair or impartial or had a language barrier problem, we conclude the district court did not err by rejecting these claims. See *Weber v. State*, 121 Nev. 554, 581, 119 P.3d 107, 122-26 (2006) (if appellant "does not establish that any of the jurors who sat in judgment against him were not fair and impartial, his claim warrants no review."); see also on other grounds by *Farmer v. State*, 133 Nev. 770, 805 P.3d 310, 313 (2017).

Johnson also requested an evidentiary hearing to review the three eyewitnesses as well as to review whether or not the motorcycle was in fact stolen. The district court found that Johnson's claims were either bare or belied by the record and denied his request for an evidentiary hearing. We conclude the district court did not err by denying this request. See *Hargrave*, 131 Nev. at 307, 989 P.2d at 325 (a petitioner is not entitled to an evidentiary hearing if his claims are bare or belied by the record).

Motion for Appointment of Counsel

Johnson asked the district court to appoint counsel to assist him with his petition because he was unable to afford counsel, his issues were complex, his issues required investigation, and his knowledge of the law was limited. "We review the district court's decision to deny the appointment of counsel for an abuse of discretion." *Renteria-Novoa v. State*, 133 Nev. 75, 76, 891 P.3d 760, 761 (2017). Here, the district court found that Johnson's issues were not difficult, the record did not indicate that he could not comprehend the proceedings, and there was no need for discovery. The record supports these findings, and we conclude the district court did not abuse its discretion by denying Johnson's motion for the appointment of counsel. See NRS 33.730(4); *Renteria-Novoa*, 133 Nev. at 76, 891 P.3d at 760-61.

