

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

No. 82053-COA

FILED

APR 12 2021

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

ORDER OF AFFIRMANCE

Robert Berman appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 26, 2020. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

First, Berman argues the district court erred by denying his claims of ineffective assistance of appellate counsel. To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in 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). 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). Both components of the inquiry must be shown. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Berman first claimed appellate counsel should have argued that retroactive application of the sex offender registration requirements

contained in A.B. 579 violates the Ex Post Facto Clause. Berman contended he told appellate counsel to argue this claim but appellate counsel failed to argue the claim on direct appeal. Retroactive application of A.B. 579 does not violate the Ex Post Facto Clause. *State v. Eighth Judicial Dist. Court (Logan D.)*, 129 Nev. 492, 510, 306 P.3d 369, 382 (2013); *see also Am. Civil Liberties Union of Nevada v. Masto*, 670 F.3d 1046, 1053 (9th Cir. 2012) (holding A.B. 579 does not violate the Ex Post Facto Clause). Because A.B. 579 does not violate the Ex Post Facto Clause, Berman has failed to demonstrate appellate counsel's performance fell below an objective standard of reasonableness or that this issue would have had a reasonable probability of success on appeal. Therefore, we conclude the district court did not err in denying this claim.

Berman also appeared to argue appellate counsel was ineffective for failing to communicate regarding the contents of the direct appeal. Berman failed to identify any meritorious issues that counsel did not raise or a reasonable probability of success on appeal had counsel communicated better. Therefore, we conclude the district court did not err in denying this claim.

Second, Berman contends in his informal brief on appeal that the district court erred by filing its order before reviewing his reply brief. Berman notes the district court filed its minute order prior to his reply brief. Berman has not demonstrated he was entitled to file a reply brief. *See NRS 34.750(5)*. Therefore, we conclude Berman is not entitled to relief on this claim.

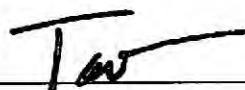
Third, Berman appears to argue the district court judge was prejudiced against him because she did not review his reply brief. "A judge is presumed to be unbiased," and "disqualification for personal bias requires

'an extreme showing of bias [that] would permit manipulation of the court and significantly impede the judicial process and the administration of justice.'" *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1254-55, 148 P.3d 694, 701 (2006) (alteration in original). Further, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Whitehead v. Nev. Comm'n on Judicial Discipline*, 110 Nev. 380, 427, 873 P.2d 946, 975 (1994) (emphasis and quotation marks omitted). Other than Berman's bare assertion that the district court was prejudiced, Berman has not demonstrated any showing of bias by the district court. Accordingly, we conclude Berman is not entitled to relief on this claim.

Fourth, Berman raises claims of ineffective assistance of trial counsel. These claims were not raised in the court below, and we decline to consider them for the first time on appeal. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. 5
Robert Berman
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk