IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEVON RAY HOCKEMIER,
Appellant,
vs.
RENEE BAKER, WARDEN LOVELOCK CORRECTIONAL CENTER (LLC),
Respondent.

No. 83147-COA

ORDER OF AFFIRMANCE

Devon Ray Hockemier appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 12, 2017, and a supplemental petition filed on September 11, 2017. Fourth Judicial District Court, Elko County; Kriston N. Hill, Judge.

Hockemier argues the district court erred by denying his claims that trial-level and appellate counsel were ineffective. To demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *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*).

To demonstrate prejudice regarding the decision to enter a guilty plea, a petitioner must show a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). To demonstrate prejudice for ineffective assistance of appellate counsel claims,

the petitioner must demonstrate the omitted issue would have had a reasonable probability of success on appeal. *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114.

Both components of the inquiry—deficiency and prejudice—must be shown, *Strickland*, 466 U.S. at 687, 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, Hockemier claimed trial-level counsel was ineffective for failing to present witnesses at sentencing. He claimed his mother, siblings, friends, and employers could have testified on his behalf. Hockemier failed to allege what these witnesses would have testified to at sentencing and did not present any of these witnesses at the evidentiary hearing. Thus, Hockemier failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome at sentencing had the witnesses been presented. Therefore, we conclude the district court did not err by denying this claim.

Second, Hockemier claimed trial-level counsel was ineffective for failing to inform the district court at sentencing that Hockemier was actually 16 years old at the time of the crimes and not 17 years old.[1] Hockemier failed to demonstrate a reasonable probability of a different

[1]Hockemier's age had been misstated by counsel and the State in motions and at the sentencing hearing.

outcome at sentencing given the nature of the crimes committed[2] and the district court's determination that consecutive sentences were appropriate because there were two victims. Therefore, we conclude the district court did not err by denying this claim.

Third, Hockemier claimed trial-level counsel was ineffective for failing to inform the district court at sentencing that Hockemier may have been sexually abused as a child because this information would have mitigated his behavior in this case. This information was in the presentence investigation report, which the district court received and considered. Because this information was presented to the district court, Hockemier cannot demonstrate a reasonable probability of a different outcome at sentencing had counsel also presented it. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Hockemier claimed trial-level counsel was ineffective for failing to file a pretrial writ of habeas corpus to challenge the sufficiency of the evidence presented at the preliminary hearing regarding the kidnapping charges. Hockemier did not allege how the evidence was insufficient. Thus, Hockemier failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had a pretrial writ been filed. Therefore, we conclude the district court did not err by denying this claim.

Fifth, Hockemier claimed trial-level counsel was ineffective for failing to properly question the police officer at the preliminary hearing about when the officer learned Hockemier's identity. Hockemier claimed that had counsel done this, counsel may have discovered that the police

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[2]Hockemier pleaded guilty to two counts of lewdness with a minor under the age of 14.

officer learned about Hockemier's identity prior to his 21st birthday and, accordingly, that the justice court lacked jurisdiction over the case. *See* 2013 Nev. Stat., ch. 483, § 1, at 2902 (formerly NRS 62B.330(3)(e)(2)) (stating that category A or B felonies committed by persons who are between the ages of 16 and 18 years, but who are not identified until they are 21 years or older, are not delinquent acts and the juvenile court lacks jurisdiction).

Hockemier unsuccessfully litigated the age issue prior to the preliminary hearing. Counsel filed a motion to transfer the case to juvenile court wherein he asserted that police officers learned the identity of Hockemier prior to his turning 21 years old and, therefore, that the juvenile court and not the justice court had jurisdiction over the case. The justice court held a hearing on the motion, the police officer testified, and the justice court denied the motion. At the subsequent preliminary hearing, counsel did not question the police officer regarding the date the officer learned Hockemier's identity.

Hockemier failed to demonstrate counsel was objectively unreasonable for not reraising at the preliminary hearing the issue he had just unsuccessfully litigated. Hockemier also failed to demonstrate a reasonable probability of a different outcome at the preliminary hearing than he obtained in the motion to transfer his case. Therefore, we conclude the district court did not err by denying this claim.

Finally, Hockemier claimed trial-level and appellate counsel[3] were ineffective for failing to raise the above-referenced jurisdictional arguments in either a pretrial petition for a writ of habeas corpus or on

[3]Trial-level and appellate counsel were the same person.

appeal. At the evidentiary hearing on Hockemier's postconviction petition, counsel stated that he had considered challenging the justice court's ruling but ultimately agreed with the justice court's decision. Hockemier failed to demonstrate counsel's conclusion was objectively unreasonable. Further, Hockemier has failed to provide this court with a copy of the transcript of the hearing on the motion to transfer.[4] The transcript is necessary to determine whether there would have been a reasonable probability of success had counsel challenged the lower courts' jurisdiction in either a pretrial petition or on direct appeal. Therefore, we cannot conclude the district court erred by denying these claims. *See Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."); *see also* NRAP 30(b)(3). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

[4]Hockemier does not allege that he attempted to get the transcript, it was unavailable, or he attempted to follow the procedure set forth in NRAP 9(d) for a "statement of the evidence when the proceedings were not recorded or when a transcript is not available."

cc: Hon. Kriston N. Hill, District Judge
Ben Gaumond Law Firm, PLLC
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk