

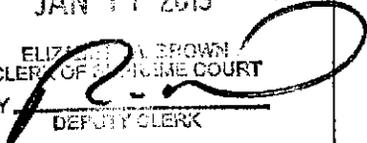
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTHONY CASTANEDA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74988-COA

FILED

JAN 17 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Anthony Castaneda 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.

Castaneda argues the district court erred by denying the claims of ineffective assistance of trial counsel raised in his May 10, 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).

First, Castaneda argued his trial counsel was ineffective for failing to file a timely notice of expert witness. Castaneda asserted expert witness testimony concerning computers was necessary to rebut testimony

from a detective concerning Castaneda's electronic devices. The district court found Castaneda failed to demonstrate his trial counsel's performance fell below an objective standard of reasonableness because counsel could not have anticipated the detective's testimony and, therefore, would not have reasonably believed a computer expert witness was necessary. The district court further found Castaneda failed to demonstrate a reasonable probability of a different outcome at trial had counsel performed differently because the information contained in the offer of proof concerning the expert's testimony contained similar information to that produced during questioning of the detective.

In his appendices, Castaneda did not include copies of the trial transcript or the offer of proof for the computer expert's testimony. As Castaneda is the appellant, it is his burden to provide this court with an adequate record for review. *See McConnell v. State*, 125 Nev. 243, 256 n.13, 212 P.3d 307, 316 n.13 (2009). Because Castaneda did not provide an adequate record to review this claim, he failed to meet his burden to demonstrate he is entitled to relief. Therefore, we affirm the denial of this claim.

Second, Castaneda argued his trial counsel was ineffective for failing to contact witnesses from the company for the software security program Castaneda utilized on his computer. Castaneda failed to demonstrate his counsel's performance was deficient or resulting prejudice. Castaneda did not support this claim with any factual assertions regarding the witnesses' potential testimony and, therefore, his claim was insufficient to demonstrate he was entitled to relief. *See Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Castaneda failed to demonstrate a reasonable probability of a different outcome at trial had counsel performed

further investigation into Castaneda's software security program. See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Therefore, the district court did not err in denying this claim.

Third, Castaneda argued his trial counsel was ineffective for failing to move to suppress evidence because the warrant permitting the search stemmed from an affidavit that included intentional false statements. Castaneda asserted the warrant was obtained using false statements made by Tammy Hines and that she admitted during trial she had lied at the preliminary hearing about the discovery of Castaneda's flash drive containing illegal images. The district court found Castaneda did not demonstrate the affidavit supporting the warrant contained intentionally or recklessly false statements, see *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978), and, therefore, failed to demonstrate reasonable counsel would have filed a motion to suppress evidence based upon the underlying claim. The district court further found the search warrant was still supported by probable cause even without considering Hines' alleged false statements. See *id.* Castaneda's claim is based upon Hines' trial testimony. However, Castaneda did not provide this court with a copy of the portion of the trial transcript when Hines allegedly admitted to lying during the preliminary hearing. As Castaneda is the appellant, it is his burden to provide this court with an adequate record for review. See *McConnell*, 125 Nev. at 256 n.13, 212 P.3d at 316 n.13. Because Castaneda did not provide an adequate record to review this claim, he failed to meet his burden to demonstrate the district court erred by denying relief. Therefore, we affirm the denial of this claim.

Fourth, Castaneda argued his trial counsel was ineffective for failing to request a jury instruction explaining the State had the burden to

prove he had actual knowledge of the presence of the improper files on his devices and he had the software required to access the files. The district court found the evidence produced at trial demonstrated Castaneda had access and control over the files at issue, particularly when considering Castaneda's background in computers and testimony demonstrating Castaneda constantly used the computer containing the illegal images. Therefore, the district court found Castaneda did not demonstrate a reasonable probability of a different outcome at trial had counsel requested the proposed instruction. Given the district court's findings and Castaneda's failure to provide this court with a copy of the trial transcripts, we conclude he failed to meet his burden to demonstrate the district court erred by denying relief. Therefore, we affirm the denial of this claim.

Next, Castaneda argued 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, 1113-14 (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).

Castaneda argued his appellate counsel was ineffective for failing to assert the trial court erred when it did not instruct the jury the State had the burden to prove he had actual knowledge of the presence of the improper files on his devices and he had the software required to access

the files. Castaneda acknowledged he did not request his proposed instruction, and, therefore, he would have had to demonstrate failure to give his proposed instruction constituted plain error. *See Ramirez v. State*, 126 Nev. 203, 208, 235 P.3d 619, 622-23 (2010) (reviewing unpreserved jury instruction challenges for plain error); *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (“[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice.”). The district court found the evidence produced at trial demonstrated Castaneda had access and control over the files at issue. Accordingly, the district court found Castaneda failed to demonstrate his appellate counsel’s failure to raise this claim on appeal was objectively unreasonable or a reasonable likelihood of success had counsel done so. Given the record before this court, we affirm the denial of this claim.

Finally, Castaneda argued he was entitled to relief due to the cumulative effect of the errors committed by counsel. Castaneda failed to demonstrate there were multiple deficiencies which could have been cumulated, *see McConnell*, 125 Nev. at 259 n.17, 212 P.3d at 318 n. 17, and, therefore, he failed to demonstrate he was entitled to relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹


_____, J.
Tao


_____, J.
Gibbons

¹The Honorable Michael L. Douglas did not participate in the decision in this matter.

cc: Hon. Carolyn Ellsworth, District Judge
Terrence M. Jackson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk