IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHAWN RUSSELL HARTE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78978

ORDER OF AFFIRMANCE

Shawn Russell Harte appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus filed on May 5, 2017, and supplemental petition filed on February 2, 2018. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Harte contends the district court erred by dismissing his claims of ineffective assistance of trial and appellate counsel as barred by the law of the case. He also contends the district court erred by dismissing his claims of ineffective assistance of counsel without first conducting an evidentiary hearing.

The district court dismissed Harte's ineffective-assistance claims, finding the Nevada Supreme Court resolved the same claims on appeal from Harte's judgment of conviction and concluding they, thus, were barred by the law of the case. The supreme court did not address any claim of ineffective assistance of counsel in resolving Harte's appeal. *See Harte v. State*, 132 Nev. 410, 373 P.3d 98 (2016). We therefore conclude the district court erred by dismissing these claims as barred by the law of the case. Nevertheless, we affirm the district court's dismissal of these claims because, as demonstrated below, the district court reached the correct result

even if for the wrong reason. *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

Ineffective assistance of trial counsel:

To demonstrate ineffective assistance of trial 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*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Harte claimed trial counsel failed to "preserve . . . properly" the issues of whether the sentencing court erred by allowing evidence of Harte's codefendants' sentences and whether his sentence violated the Eighth Amendment prohibition against cruel and unusual punishment. Harte failed to allege that, had counsel preserved either issue, the outcome of the sentencing hearing would have been different. Harte thus failed to allege specific facts that are not belied by the record and, if true, would entitle him to relief. We therefore conclude Harte was not entitled to an evidentiary hearing and relief is not warranted on these claims.[1]

Harte claims in his opening brief on appeal that trial counsel was ineffective because the sentencing judge allowed the prosecutor to give

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[1]Counsel filed a motion in limine to exclude evidence of Harte's codefendants' sentences. The sentencing court denied it.

the first and last arguments. This claim was not raised below, and we decline to consider it on appeal in the first instance. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).[2]

Ineffective assistance of appellate counsel:

To demonstrate ineffective assistance of appellate 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 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—and will be most effective when he does not—raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983), *as limited by Smith v. Robbins*, 528 U.S. 259, 288 (2000); *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Again, both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and an evidentiary hearing is warranted only if a petitioner raises claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief, *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225.

First, Harte claimed counsel failed to properly argue the issue of whether the district court erred by allowing evidence of Harte's codefendants' sentences. Counsel argued that evidence of codefendants'

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[2]Harte argued in the district court that the sentencing court had erred by allowing the State to give both the first and last arguments. The district court properly denied the claim as barred by the law of the case. *See Harte*, 132 Nev. at 413-14, 373 P.3d at 101 (holding the district court did not abuse its discretion by allowing the State to open and conclude the closing arguments); *Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) ("The law of a first appeal is the law of the case on all subsequent appeals." (quotation marks omitted)).

sentences should never be admissible, and Harte claimed counsel should have argued that, under the facts of his case, it was an abuse of the district court's discretion to admit the evidence. For purposes of the deficiency prong, counsel is strongly presumed to have provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *Strickland*, 466 U.S. at 690. Harte failed to demonstrate that counsel's argument was objectively unreasonable. Further, he failed to allege a different outcome on appeal had counsel raised such an argument. Harte thus failed to allege specific facts that are not belied by the record and, if true, would entitle him to relief. We therefore conclude Harte was not entitled to an evidentiary hearing and relief is not warranted on this claim.

Second, Harte claimed counsel failed to argue that his sentence violated the Eighth Amendment prohibition against cruel and unusual punishment. Although counsel did not phrase the challenge to the length of Harte's sentence as a violation of the Eighth Amendment, the Nevada Supreme Court analyzed his claim as such and concluded his sentence was not cruel and unusual. *See Harte*, 132 Nev. at 414-15, 373 P.3d at 101-02. Harte failed to demonstrate how a different argument would have resulted in a different outcome on appeal. Harte thus failed to demonstrate he was entitled to an evidentiary hearing, and we conclude relief is not warranted on this claim.

Harte next contends the district court erred by dismissing his claim that the sentencing jury was improperly instructed. The district court denied this claim as barred by the law of the case. Harte did not challenge his jury instructions on direct appeal, and we therefore conclude the district court erred by dismissing the claim on this basis. However, Harte's claim could have been raised in his direct appeal and was thus barred absent a

demonstration of good cause and actual prejudice. *See* NRS 34.810(1)(b). Harte did not attempt to demonstrate good cause or actual prejudice. We therefore conclude the district court reached the right result and Harte is not entitled to relief on this claim.[3]

Finally, Harte contends the district court erred by dismissing his cumulative-error claim because he was entitled to an evidentiary hearing. Even were claims of cumulative error available in postconviction proceedings, *see McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009), Harte's claim was bare, and we conclude the district court did not err by dismissing this claim.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

[3]Harte's request of the district court at oral argument to construe his claim as an ineffective-assistance-of-counsel claim did not put the issue properly before the district court. *See Barnhart v. State*, 122 Nev. 301, 303-04, 130 P.3d 650, 651-52 (2006).

cc: Hon. Connie J. Steinheimer, District Judge
Oldenburg Law Office
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk