

No. 83024

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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JESSE D. NOBLE, JR.,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

On Appeal from the Eighth Judicial
District Court of the State of Nevada
Case No. C-18-336940-1

RESPONDENT'S ANSWERING BRIEF

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JURISDICTIONAL STATEMENT

This Nevada Supreme Court has jurisdiction under Nev. Const. art. 6, § 4(1) and NRS 1.030. Petitioner, Jesse D. Noble, Jr. (“Noble” or “Appellant”), filed an untimely motion for new trial on November 18, 2019. AA0038. The Eight Judicial District Court of Nevada (“District Court”) treated the motion as a petition for writ of habeas corpus. Petitioner filed a supplemental petition on August 11, 2020. AA0045. On May 17, 2021, the District Court correctly denied Noble’s writ of habeas corpus petition. AA0090-91. On June 1, 2021, Noble filed his Notice of Appeal. AA0095.

STATEMENT OF ISSUES

First, the District Court’s decision to deny Noble’s post-conviction petition for writ of habeas corpus without granting an evidentiary hearing was correct because Noble failed to plead with specificity facts that, if true, would entitle him to relief.

Second, the record supports the District Court’s decision that Noble received competent and effective assistance of counsel.

STATEMENT OF THE CASE

This is an appeal from a decision and order of the District Court denying Appellant’s post-conviction petition for writ of habeas corpus. Noble was under a sentence of imprisonment for an unrelated crime. AA0066.

The State of Nevada charged Noble with “Battery By A Prisoner” (a category B felony) in violation of NRS 200.481(2)(f). AA0022. Noble pleaded not guilty and proceeded to a jury trial. After two days of testimony and argument, the jury found Noble guilty. AA0037a. The District Court sentenced Noble to 28-72 months in the Nevada Department of Corrections (“NDOC”), to run consecutive to his original sentence. The District Court entered the judgment of conviction on April 11, 2019. AA0043.

Five months after entry of the judgment, Noble filed a *pro per* notice of appeal. AA0067. The Nevada Supreme Court dismissed the notice as untimely. AA0067. About six weeks later, on November 18, 2019, Noble filed an untimely motion for a new trial with the District Court premised on ineffective assistance of his trial counsel, Kenneth Frizzell (“trial counsel”). AA0067. Concurrently, Noble filed a motion for appointment of counsel and an evidentiary hearing. AA0067. The District Court partially granted Noble’s motion and appointed Joseph Z. Gersten as post-conviction counsel. AA0067. After several extensions, Mr. Gersten filed the supplemental petition for writ of habeas corpus. AA0045.

In the supplement, Noble alleged trial counsel failed to: (1) investigate, interview, and introduce testimony from certain witnesses; (2) impeach the testimony from the victim, Officer Waylon Brown; and (3) introduce a video. AA0052-57. On May 17, 2021, the District Court properly denied the petition for

writ of habeas corpus without an evidentiary hearing. Specifically, the court found:

[(1)] Noble failed to plead with specificity facts that, if true, would entitle him to relief; (2) Noble failed to allege how his attorney was deficient in cross examining the witnesses called at trial. That merely stating that the witnesses were not impeached, without specific allegations of how they could have been impeached, is not enough to show by a preponderance of the evidence that Noble is entitled to relief and thus warrant an evidentiary hearing; (3) Noble failed to show a reasonable probability of a different outcome had the victim, Officer Brown, been cross examined over which hand he was punched with because the victim consistently testified that Noble battered him; and (4) Noble failed to show that his counsel was deficient for not introducing a video that does not show Noble in the video and counsel's strategic choices are entitled to deference.

AA0090-91. Noble timely filed his notice of appeal. AA0095. This brief now follows.

STATEMENT OF FACTS

On December 21, 2017, while Noble was serving a sentence at the High Desert State Prison, an altercation between two other inmates of the quad took place. RA00150-151. Noble was not part of the main altercation but was in the quad area with other inmates when correctional officers sought to control the scene. RA00152. Prison protocol required that in the case of an altercation and at the command of a correctional officer, all uninvolved inmates were to lay flat on their stomachs with their arms above their heads. RA00152-153. This allowed officers to quickly sort out who was not part of the altercation and for inmates to show they were not a threat to overall security. *Id.* Additionally, this protocol gave officers more time to protect

themselves if an inmate decided to attack an officer or harm other inmates. RA00153.

Noble refused comply when ordered to lay on his stomach. RA00154. Instead, he continued to lay on his side and repeatedly ignored orders to lay on his stomach. RA00154-155. Officer Brown ordered him five or six times to get on his stomach; Noble ultimately replied, “Why don’t you fuckin’ make me.” RA00167. Noble struck Officer Brown twice in the face when Officer Brown reached down to grab Noble’s arm to put him on his stomach and put him in wrist restraints. RA00155, 168-170. The battery gave Officer Brown a bloody mouth and caused him to briefly black out. RA00155-156. Investigators documented Officer Brown’s injuries with photographs, and several officers who witnessed the attack submitted written reports which supported Brown’s claims against Noble. RA00156-157, 181.

A jury found Noble guilty of “Battery By A Prisoner” (a category B felony). RA00246. The District Court sentenced him to 28-72 months in the NDOC, to run consecutive to his existing sentence. AA0043.

SUMMARY OF THE ARGUMENT

First, the District Court properly exercised its discretion to deny Noble’s petition for writ of habeas corpus without an evidentiary hearing. Noble failed to plead with specificity facts that, if true, would entitle him to relief as his claims were vague and conclusory.

Second, the District Court properly found that Noble failed to meet his burden to show that his trial counsel was ineffective. Specifically, Noble failed to show how trial counsel fell below the objective standards of reasonableness and how trial counsel's decisions would have changed the outcome of his trial.

Finally, even if the District Court erred in denying an evidentiary hearing, Noble's claims about his trial counsel were meritless.

STANDARD OF REVIEW

The Court reviews *de novo* the application of law in the denial of a petition for writ of habeas corpus. *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012).

ARGUMENT

I. The District Court Acted Properly and Within Its Discretion in Denying Noble's Post-Conviction Petition for Writ of Habeas Corpus Without Granting an Evidentiary Hearing Because Noble Failed to Plead with Specificity Facts That, If True, Would Entitle Him to Relief.

The District Court properly rejected Noble's request for an evidentiary hearing because he failed to present specific facts or findings in support of this claims.

A district court has discretion to determine the necessity of an evidentiary hearing. NRS 34.770(1). The Nevada Supreme Court reviews for abuse of discretion a district court's denial of a habeas petition without the benefit of an evidentiary

hearing. *Rubio v. State*, 124 Nev. 1032, 1047, 194 P.3d 519, 1234 (2001). No evidentiary hearing is necessary if the district court can resolve a petition without expanding the record. *Mann v. State*, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002); *Marshall v. State*, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994).

A defendant is entitled to an evidentiary hearing only if he supports his petition with specific factual allegations which, if true, would entitle him to relief, unless the factual allegations are repelled by the record. *Marshall*, 110 Nev. at 1331, 885 P.2d at 605; *Berry v. State*, 131 Nev. 957, 969, 363 P.3d 1148, 1156 (2015); *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225 (“[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record”). “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.” *Nobles v. Warden, Nevada Dep't of Prisons*, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990).

The District Court acted properly and within its discretion in denying Noble an evidentiary hearing because Noble’s claims were vague and conclusory. As discussed in more detail below, *supra* Section II, Noble completely failed to allege with any degree of specificity what evidence would have been uncovered that would have conflicted or contradicted the State’s case.

II. The Record Supports the District Court’s Decision that Noble Received Competent and Effective Assistance of Trial Counsel.

Nevada applies the standard from *Strickland*¹ for determinations of the effectiveness of counsel. *Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984). Under *Strickland*, to assert ineffective assistance of counsel, the defendant must prove denial of “reasonably effective assistance” of counsel by satisfying a two-pronged test. *Strickland*, 466 U.S. at 686-87; *State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). The defendant must show first that his counsel’s representation fell below an objective standard of reasonableness, and second, that but for counsel’s errors, there is a reasonable probability that the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687-88, 694.

The court begins with the presumption of effectiveness and then must determine whether the defendant has shown by a preponderance of the evidence that counsel was ineffective. *Means v. State*, 120 Nev. 1001, 1004, 103 P.3d 25, 35 (2004). The role of a court in considering alleged ineffective assistance of counsel is “not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance.” *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing *Cooper v. Fitzharris*, 551 F.2d 1162, 1166 (9th Cir. 1977)).

In a petition for post-conviction relief, the petitioner must support their claims with specific factual allegations which, if true, would entitle the petitioner to relief.

¹ *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

“Bare” or “naked” allegations are not sufficient, nor are those belied and repelled by the record. *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

“Surmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). The question is whether an attorney’s representations amounted to incompetence under prevailing professional norms, “not whether it deviated from best practices or most common custom.” *Harrington v. Richter*, 562 U.S. 86, 105 (2011). Further, “[e]ffective counsel does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of competence demanded of attorneys in criminal cases.’” *Jackson v. Warden, Nevada State Prison*, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

In considering whether trial counsel was effective, the court must determine whether counsel made a “sufficient inquiry into the information...pertinent to his client’s case.” *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) (citing *Strickland*, 466 U.S. at 690-91). Then, the court will consider whether counsel made “a reasonable strategy decision on how to proceed with his client’s case.” *Doleman*, 112 Nev. at 848, 921 P.2d at 280 (citing *Strickland*, 466 U.S. at 690–91, 104 S.Ct. at 2066). Counsel’s strategic decisions are “tactical” decisions and are “virtually unchallengeable absent extraordinary circumstances.” *Doleman*, 112 Nev. at 848,

921 P.2d at 281; *see also Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); *Strickland*, 466 U.S. at 691.

The district court's analysis should not "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." *Donovan*, 94 Nev. at 675, 584 P.2d at 711 (citing *Cooper*, 551 F.2d at 1166). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. Indeed, counsel is not ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

A court need not consider both prongs of the *Strickland* test if a petitioner fails to make a sufficient showing on either prong. *Rippo v. State*, 122 Nev. 411, 423 P.3d 1084, 1098 (2018). Even if a defendant can show that his counsel's representation fell below an objective standard of reasonableness, he must still establish a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *McNelson v. State*, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The "defendant must show 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). “[O]verwhelming evidence of guilt is relevant to the question of whether a client had ineffective counsel.” *Ford v. State*, 105 Nev. 850, 852, 784 P.2d 951, 952 (1989).

A. Trial Counsel’s Decision Not to Call Four Additional Witnesses During Trial Was a Reasonable Strategic Decision and Did Not Prejudice the Appellant.

Noble failed to state with any degree of specificity that trial counsel was deficient or what conflicting or contradictory evidence counsel failed to discover from four specific state witnesses that would have altered the outcome of the trial. The District Court correctly concluded that “merely stating that the witnesses were not impeached, without specific allegation of how they could have been impeached, is not enough to show by preponderance of the evidence that Noble is entitled to relief and thus warrant and evidentiary hearing.” AA0090-91.

Appellant argues that his trial counsel was ineffective because he failed to investigate, interview, or introduce evidence of four witnesses – Correctional Officers Dario Paccone, Joseph Dugan, Kerry Hunter, and Stephen Newman – whose testimony would either conflict with or contradict the State’s narrative. AA0054. However, he does not specify that counsel did not in fact investigate these officers or what contradictory or conflicting evidence trial counsel failed to obtain by not calling the four officers during trial. Merely claiming that further

investigation would reveal potentially conflicting or contradictory evidence without any specifics is vague and conclusory. This Court should reject the claim.

Trial counsel effectively cross-examined Officer Brown and Correctional Officer Henry Grant, Jr. (“Officer Grant”) during trial. RA00149, 174. Trial counsel also effectively examined two defense witnesses, inmates Anthony “Darryl” Teagues and Nathaniel Gaines, to try to discredit Officers Brown and Grant. RA00190-199, 207-209, 210-216. Yet the jury still found Noble guilty. RA00246.

The four additional officers in question were all witnesses identified by the State. RA00056. Noble fails to demonstrate their proposed testimony was inconsistent with Officers Brown and Grant. Therefore, any proposed testimony would be cumulative, unnecessary, and potentially more harmful than beneficial to Noble’s defense.

It is unreasonable to expect trial counsel to call four additional state witnesses during the defense case-in-chief in the vain hope of impeaching one or all of them. Even if the four witnesses completely contradicted Officer Brown and Officer Grant’s testimonies, which is highly unlikely and not demonstrated from the record, Noble fails to demonstrate such evidence would undermine that the State met its burden to prove the elements of the charge with the testimonies of Officer Brown, Officer Grant, and the photos showing Officer Brown’s injury.

Trial counsel's decision to forego calling four additional state witnesses was a tactical one that this Court should not challenge. The law does not encourage courts to second guess trial counsel's reasoned choice or require trial counsel to make every conceivable motion or make futile arguments just to protect himself against allegations of inadequacy. *Donovan*, 94 Nev. at 675, 584 P.2d at 711 (citing *Cooper*, 551 F.2d at 1166). Noble failed to overcome the very high burden to show that trial counsel's decision to not call the four additional state witnesses during trial was erroneous or fell beyond the minimum standards of reasonable counsel representation.

Finally, he fails to demonstrate prejudice as he fails to show any testimony from the four witnesses would have changed the outcome of the trial.

Noble's claims regarding the four witnesses fails on the merits.

B. Trial Counsel's Decision Not to Further Cross-Examine Officer Brown Was a Reasonable Strategic Decision and Did Not Prejudice the Appellant.

Noble failed to state with any degree of specificity how trial counsel was deficient or what conflicting or contradictory evidence counsel failed to discover from further cross-examining Officer Brown that would have altered the outcome of the trial. Here again, the District Court correctly concluded that "Noble failed to show a reasonable probability of a different outcome had the victim been cross

examined over which hand he was punched with because the victim consistently testified that Noble battered him.” AA0090-91.

Noble claims that trial counsel “failed to introduce conflicting evidence from his victim and the State’s key witness, Officer Brown.” AA0054-55. Specifically, Noble argues that Officer Brown “changed his story regarding which hand he grabbed during the incident, and the testimony that he blacked out and when he awoke the incident was over, contradicts his institutional statement,” and that “the introduction of these contradictory statements would have led to a reasonable probability of a different outcome, showing both good cause and actual prejudice.” AA0055.

Here, trial counsel properly, competently, and effectively cross-examined Officer Brown during trial. Trial counsel effectively cross-examined Officer Brown at trial based in part on the officer’s testimony at the preliminary hearing. RA00015-17, 157-172. During the preliminary hearing, trial counsel explored the line of questioning relating to which of Noble’s hands he grabbed. RA00024-25. Officer Brown answered that he was not sure. RA00025.

At trial, counsel already knew that Officer Brown could not say which hand was used to pummel him. Instead, trial counsel cross-examined Officer Brown on the number of times he was hit which resulted in the photograph of his swollen lip. RA00170-171. Officer Brown did not know which hand Noble used during the

battery. Whether it was the right or left would not have impacted the jury's determinations.

Trial counsel also effectively cross-examined Officer Brown regarding whether he blacked out or not. During the preliminary hearing, Officer Brown testified that he blacked out after the second strike. RA00012. During cross-examination, trial counsel specifically asked Officer Brown whether he blacked out after the second strike and Brown answered in the affirmative. RA00026.

At trial, counsel already knew that Officer Brown would answer that he blacked out after Noble punched him a second time. Instead, during trial, counsel strategically chose to focus on asking Officer Brown whether Noble accidentally hit him with a back hand when attempting to get out of Brown's grip. RA00170. Trial counsel strategically pursued this line of questioning to try to show the strike was not "deliberate" and therefore did not constitute a battery as defined by law. NRS 200.481(2)(f). Whether Officer Brown blacked out or not after Noble struck him would not have impacted the jury's determinations that Noble deliberately used unlawful physical force on Officer Brown. *Id.*

Noble would like this Court to believe that trial counsel erred by failing to specifically cross-examine Officer Brown about which hand he grabbed and whether he blacked out or not during the incident. Even more troubling, Noble would like this Court to believe that potentially revealing such minor idiosyncrasies would have

changed the entire outcome of the trial. The fact is that Officer Brown consistently testified that Noble struck him in the face multiple times, which was sufficient to satisfy the elements of the crime. RA00011-12, 155.

During trial, both during direct examination and cross-examination, Officer Brown, again, consistently testified that Noble refused to lay on his stomach, ignored Officer Brown's commands to stay on his side, and then struck Officer Brown multiple times in the face when Officer Brown tried to restrain him. RA00154-155, RA000168-69.

Furthermore, during trial, Officer Grant also testified in support of Officer Brown's testimony. RA00179. Grant testified that he had to restrain Noble after he saw Officer Brown stumbling and Noble trying to stand up. RA00179-80. Grant had turned his attention over to Officer Brown and Noble when he heard over the radio that a "staff assault" was taking place. RA00179. Officer Grant confirmed that Noble was the only inmate within striking distance of Officer Brown. *Id.* And he testified that Officer Brown's face was red and swollen and his "eye was a little bit closed" after the battery took place. RA00180.

Trial counsel's chosen line of questioning during the trial was a reasonable strategic decision that this Court should not challenge. Noble failed to overcome the very high burden to show that trial counsel's decision to not further cross-examine

Officer Brown was erroneous or fell beyond the minimum standards of reasonable counsel representation.

Even if this Court deems that trial counsel's decision not to further cross-examine Officer Brown was not a strategic one, Noble still fails to allege how the decision resulted in prejudice.

Noble's claims regarding the cross-examination of Officer Brown fail on the merits.

C. Trial Counsel's Decision Not to Seek to Introduce a Video That Did Not Exist Was a Reasonable Strategic Decision and Did Not Prejudice the Appellant.

The District Court correctly found that "Noble failed to show that his counsel was deficient for not introducing a video that does not show Noble in the video and counsel's strategic choices are entitled to deference." AA091. Noble asks this Court to set aside his conviction and sentence because trial counsel "failed to introduce the video of the alleged incident which show no instances of petitioner involved in any aspect of the alleged disturbance." AA0056-57. Appellant believes "the introduction of the video...would have led to a reasonable probability of a different outcome." AA0057.

At the outset, the claim is belied by the record. At the preliminary hearing, trial counsel asked if there were security cameras in the area of the battery but was told that none existed. RA00016.

During the trial, trial counsel referenced the lack of cameras in his opening statement to give the jury more freedom to fill in the gaps about what happened on the night of the incident. RA00145. Yet the jury still found Noble guilty. RA00246. Thus, trial counsel made a strategic and tactical decision not to further inquire about such video during trial and this Court should not challenge his decision.

The law does not encourage the Court to second guess trial counsel's reasoned choice, and it does not require trial counsel to make futile arguments just to protect himself against allegations of inadequacy. *Donovan*, 94 Nev. at 675, 584 P.2d at 711 (citing *Cooper*, 551 F.2d at 1166). Noble fails to allege how trial counsel's decision to not further inquire about a video was constitutionally deficient. And he fails to demonstrate trial counsel erred in relation to a non-existent video.

Noble also fails to demonstrate prejudice given the overwhelming evidence of guilt addressed above, *supra*.

The State respectfully asks this Court to affirm the District Court's decision because Noble's claims, even if true, would not entitle him to relief and are belied by the record. The District Court's decision to deny an evidentiary hearing is entitled to deference. *Hargrove*, 100 Nev. at 503, 686 P.2d at 225; *Nobles*, 106 Nev. at 68, 787 P.2d at 391.

CONCLUSION

For these reasons, Respondent respectfully requests that this Court affirm the decision of the district court denying the petition for writ of habeas corpus.

RESPECTFULLY SUBMITTED this 7th day of March, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, 14 pt. Times New Roman type style.

I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 7th day March, 2022.

AARON D. FORD
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By: /s/ Mariana Kihuen
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9 on March 7, 2022.

Participants in this case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the Court's electronic filing system.

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