

IN THE SUPREME COURT OF THE STATE OF NEVADA

PHILLIP HARRY HUGHES A/K/A  
PHILLIP H. HUGHES A/K/A PHILIP  
HUGHES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48712

**FILED**

SEP 29 2009

TRACIE A. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On November 15, 2002, the district court convicted appellant, pursuant to a jury verdict, of four counts of sexual assault of a minor under 14 years of age and two counts of lewdness with a child under the age of 14. The district court sentenced appellant to serve terms in the Nevada State Prison totaling life in prison with the possibility of parole after 20 years. This court affirmed the judgment of conviction on direct appeal. Hughes v. State, Docket No. 41320 (Order of Affirmance, December 22, 2004). The remittitur issued on January 18, 2005.

On November 28, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Counsel for appellant filed a supplement on February 21, 2006. The State opposed the petition and the supplement. Pursuant to 34.770, the district court declined to conduct an evidentiary hearing. On January 12, 2007, the district court denied the petition. This appeal follows.

Appellant raised several claims of ineffective assistance of counsel in his petition below. On appeal, he argues the district court erred in denying two of his claims without conducting an evidentiary hearing. He also argues that the district court erred when it determined that two of his claims were waived pursuant to NRS 34.810 as claims that could have been raised on direct appeal. In addition, appellant argues that the district court used the improper standard of proof when considering the petition. For the reasons discussed below, we conclude that no relief is warranted.

#### Ineffective Assistance of Counsel

On appeal, appellant argues that the district court erred in denying two of his ineffective assistance of counsel claims without conducting an evidentiary hearing. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and there is a reasonable probability that in the absence of counsel's errors, the results of the proceedings would have been different. See Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test set forth in Strickland). The court need not consider both prongs if the petitioner makes an insufficient showing on either prong. Strickland, 466 U.S. at 697. To warrant an evidentiary hearing, a petitioner must raise claims that are 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).

First, appellant argues that his trial counsel was ineffective for failing to investigate and notify him of the time and date of the grand jury proceedings so that he could testify at those proceedings. Appellant fails to demonstrate that he was prejudiced. Appellant does not identify what evidence or testimony he would have introduced before the grand jury that would have had a reasonable probability of altering the outcome of the grand jury proceedings. Id. Further, appellant cannot demonstrate prejudice because he was ultimately convicted by a jury. Therefore, we conclude that the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, appellant argues that his trial counsel was ineffective for failing to argue and establish vindictive prosecution because the district attorney's office added additional charges to punish him for exercising his right to a jury trial. Appellant was originally charged by way of an information with one count of sexual assault of a minor under 14 years of age and two counts of lewdness with a child under the age of 14, to which appellant pleaded not guilty. Later, the State informed the district court that, after reviewing discovery, additional charges would be added. The evidence was presented to the grand jury. The grand jury indicted appellant on ten counts of sexual assault of a minor under the age of 14 and two counts of lewdness with a child under the age of 14. The district court dismissed four of the sexual assault counts following the filing of a pre-trial petition for a writ of habeas corpus. Appellant was then tried on six counts of sexual assault of a minor under the age of 14 and two counts of lewdness with a child under the age of 14. Appellant argues that the additional charges were added solely to punish him for

exercising his right to a jury trial on those counts alleged in the original information.

Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (citing North Carolina v. Pearce, 395 U.S. 711, 738 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794 (1989)). Evidence indicating a realistic or reasonable likelihood of vindictiveness may give rise to a presumption of vindictiveness on the government's part. United States v. Goodwin, 457 U.S. 368, 373 (1982). However, "[i]n the course of preparing a case for trial, a prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance." Id. at 381.

Appellant fails to demonstrate any facts which would indicate vindictiveness on the part of the State. Here, the State sought the additional charges because it reviewed evidence it obtained through discovery and that review provided the basis for the additional charges. The additional information provided a proper basis for further prosecution. Id. Thus, he fails to demonstrate his trial counsel was deficient for failing to argue vindictive prosecution. Further, appellant fails to demonstrate that there was a reasonable probability that the outcome of the proceedings would have been different had his trial counsel argued the additional charges were sought to punish him for exercising his right to trial. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

### Other Claims Raised in Petition Below

To the extent that appellant argues that the district court erred in denying his petition without conducting an evidentiary hearing concerning the additional claims raised in his petition below, appellant provides no specific argument for why an evidentiary hearing should have been conducted over the remaining claims. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225; see also Mazzan v. Warden, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000) (stating that “[c]ontentions unsupported by specific argument or authority should be summarily rejected on appeal”). Therefore, we conclude that appellant fails to demonstrate that the district court erred by denying appellant’s petition without conducting an evidentiary hearing.

### Alleged Improperly Waived Claims

Next, appellant argues that the district court erred in denying his claims that his trial counsel was ineffective for failing to inform him of the grand jury proceedings and for failing to argue vindictive prosecution as being waived pursuant to NRS 34.810(1)(b)(2), as claims that could have been raised on direct appeal. Appellant argues that, as ineffective assistance of counsel claims would not have been proper on direct appeal, those claims should not have been denied pursuant to NRS 34.810. Appellant fails to demonstrate that the district court erred. In its findings of fact and conclusions of law, the district court stated that appellant’s trial and appellate counsel were effective, but that his substantive claims could have been raised on direct appeal and were therefore waived. Thus, appellant’s claims of ineffective assistance of counsel were not waived and were considered by the district court on the merits. The district court then properly determined that the underlying substantive claims were waived

pursuant to NRS 34.810(1)(b)(2). Therefore, we conclude that appellant fails to demonstrate that the district court erred.

### Standard of Proof

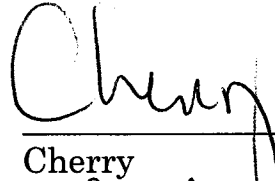
Next, appellant argues that the district court erred by using an overruled standard of proof. The district court's findings of fact and conclusions of law set forth the "strong and convincing proof" standard of ineffective assistance of counsel. Homick v. State, 112 Nev. 304, 310, 913 P.2d 1285 (1996) (quoting Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991), overruled by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004)); Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981), overruled by Means, 120 Nev. 1001, 103 P.3d 25. However, the correct standard of proof is that a petitioner "must establish the factual allegations which form the basis for his claim of ineffective assistance by a preponderance of the evidence." Means, 120 Nev. at 1013, 103 P.3d at 33. The petitioner must then, under Strickland, demonstrate prejudice by showing a reasonable probability of a different outcome despite counsel's alleged error. 466 U.S. at 694. The use of the incorrect standard may be reviewed under a harmless error analysis. Means, 120 Nev. at 1014, 103 P.3d at 34.

We conclude that the district court erred by using an overruled standard of proof, but that any error was harmless because appellant fails to demonstrate that any of his claims would have had merit had they been considered under the Means standard. See Bradley v. State, 109 Nev. 1090, 1093, 864 P.2d 1272, 1274 (1993) (citing Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)). As discussed previously, appellant fails to demonstrate that he was prejudiced by any errors of counsel. Therefore, we conclude that appellant fails to demonstrate that he is entitled to relief.

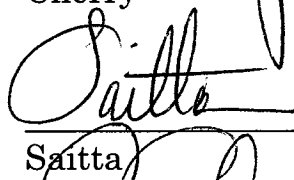
Conclusion

Accordingly, having considered appellant's contentions and concluded that they are without merit, we

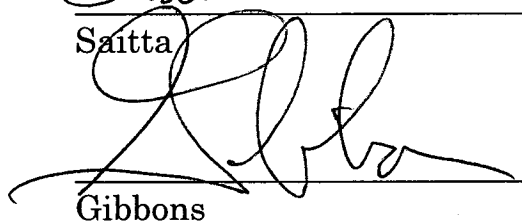
ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.

Cherry

  
\_\_\_\_\_, J.

Saitta

  
\_\_\_\_\_, J.

Gibbons

cc: Eighth Judicial District Court Dept. 6, District Judge  
Law Office of Patricia M. Erickson  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk