

IN THE SUPREME COURT OF THE STATE OF NEVADA

NICHOLAS FELIX,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49613

**FILED**

FEB 03 2009

TRACE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Nicholas Felix's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

On February 9, 2006, the district court convicted appellant, pursuant to a guilty plea, of first-degree murder. The district court sentenced appellant to serve a term of life in the Nevada State Prison without the possibility of parole. No direct appeal was taken.

On January 25, 2007, appellant filed a proper person petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary

hearing. On May 11, 2007, the district court denied appellant's petition. This appeal follows.<sup>1</sup>

First, appellant argues that the district court erred in denying his petition without allowing appellant to challenge the State's proposed findings of fact and conclusions of law, pursuant to Byford v. State. 123 Nev. 67, 156 P.3d 691 (2007). Appellant asserts that under Byford, pursuant to EDCR 7.21 and NCJC Canon 3B(7), if the district court requests that a party prepare the proposed findings of fact and conclusions of law, the other party must be notified of the request and given an opportunity to respond. Id. at 69, 156 P.3d at 692. Appellant argues that the district court violated Byford because it did not give appellant the opportunity to review and respond to the State's proposed draft. In the instant case, to the extent the district court may not have strictly followed the mandates of EDCR Rule 7.21 and NCJC Canon 3B(7), we conclude that any error was harmless and appellant failed to demonstrate prejudice. See NRS 178.598 (stating that any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded). Appellant failed to identify any challenge to the factual findings of the district court. As such, appellant failed demonstrate that any failure by the district court to strictly follow EDCR Rule 7.21 and NCJC Canon 3B(7) adversely affected the outcome of the proceedings or his ability to seek full appellate review. Further, Byford is distinguishable from the instant case.

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<sup>1</sup>Appellant is represented by counsel in this appeal.

In Byford, the State's draft of the proposed order was premature because the district court had not conducted a hearing and had not made a ruling on a capital murder defendant's claims following a remand from the Supreme Court to reconsider those claims. 123 Nev. at 69, 156 P.3d at 692. Therefore, we conclude that appellant is not entitled to relief on this claim.

Additionally, appellant argues that the district court conducted an improper ex parte evidentiary hearing on his post-conviction claims by holding a hearing without appellant's presence. A criminal defendant does not have an unlimited right to be present at every proceeding. See Gallego v. State, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001). A "defendant must show that he was prejudiced by the absence." Kirksey v. State, 112 Nev. 980, 1000, 923 P.2d 1102, 1115 (1996). A review of the record reveals that no evidence or arguments were presented at the status hearing; rather, the status hearing was limited to the district court stating that the petition was denied. Cf. Gebers v. State, 118 Nev. 500, 50 P.3d 1092 (2002) (concluding that defendant's rights were violated when he was not present at hearing where testimony and evidence were presented). Appellant fails to demonstrate that the outcome of the proceedings would have been different had he been present. Therefore, we conclude that the district court did not conduct an improper ex parte evidentiary hearing.

Next, appellant argues that the district court erred by using an overruled standard by which appellant was required to prove his claims. 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)); Lentz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981), overruled by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004). 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 1012-13, 103 P.3d at 33 (2004). The petitioner must then, under Strickland v. State, demonstrate prejudice by showing a reasonable probability of a different outcome despite counsel’s alleged error. 466 U.S. 668, 694 (1984). 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 failed 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)). In his brief, appellant did not discuss any of the claims of ineffective assistance of counsel that were raised in his petition before the district court in any detail. Only two claims were mentioned at all, and only one sentence devoted to each claim. Those two claims were mentioned in the discussion of the overall claim of error due to the use of the “strong and convincing” proof standard.

Appellant claimed that his trial counsel was ineffective due to the intrusion of counsel representing the Secretary of Foreign Affairs for Mexico and due to improper advice concerning the consequences of his plea. Appellant did not list any facts regarding these claims or how the district court erred in deciding these claims. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). We further conclude that appellant was not entitled to an evidentiary hearing because he failed to raise claims that were supported by specific factual allegations that were not belied by the record and, if true, would have entitled him to relief. Id.

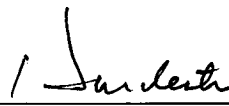
Next, appellant argues that the district court erred by failing to appoint counsel to assist him with the post-conviction proceedings in the district court. Appellant argues that the district court should have appointed counsel to ensure fairness in the proceedings. Pursuant to NRS 34.750, the district court may appoint counsel to aid indigent petitioners. The court may consider: the severity of the consequences, whether the issues presented are difficult, whether the petitioner is unable to comprehend the proceedings, or whether counsel is necessary to proceed with discovery. See NRS 34.750(1). Here, the district court concluded that petitioner did not meet the requirements for appointment of counsel to aid him with his petition and appellant fails to demonstrate that the district court abused its discretion. Therefore, we conclude that the district court did not err in denying appellant's motion for appointment of counsel.

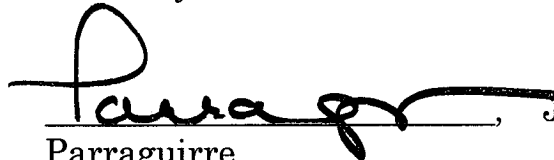
Finally, appellant contends that he is entitled to relief due to cumulative error. However, any error that occurred resulted in minimal


prejudice. Even when these errors are considered cumulatively, we conclude that they do not entitle appellant to relief. See Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002).

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

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Hardesty

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

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

cc: Hon. Michelle Leavitt, District Judge  
Donald J. Green  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk