

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY HARKINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53501

FILED

JUN 09 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Appellant argues that the district court erred in denying his claims of ineffective assistance of counsel. To prove ineffective assistance of 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 there is a reasonable probability that, 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). We give deference to the district court's factual findings regarding ineffective assistance of counsel, but review the court's

application of the law to those facts de novo. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant argues that his trial counsel was ineffective for failing to seek a change of venue as the case received pretrial publicity because the victim was the ex-husband of a Sparks justice of the peace. Appellant fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel testified at the evidentiary hearing that there was no difficulty seating an impartial jury. Further, appellant failed to demonstrate a reasonable likelihood that a fair and impartial jury could not have been seated in Washoe County. NRS 174.455; Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). Given the strength of the evidence produced at trial, appellant fails to demonstrate a reasonable probability that the outcome of trial would have been different had his counsel sought a change of venue. Therefore, the district court did not err in denying this claim.

Second, appellant argues that his trial counsel was ineffective for failing to investigate witnesses who could have testified that the victim always carried a knife. Appellant failed to demonstrate that he was prejudiced. Other than the witness who testified at trial that the victim often carried a knife, appellant fails to identify any other witnesses that trial counsel should have investigated. Accordingly, appellant fails to demonstrate a reasonable probability that there would have been a different outcome at trial had counsel performed further investigation in

this area. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Therefore, the district court did not err in denying this claim.¹

Third, appellant argues that his trial counsel was ineffective for failing to conduct an investigation to find the sharp object used by the victim to stab appellant and for failing to argue the State failed to collect exculpatory evidence. Appellant fails to demonstrate that he was prejudiced. Appellant fails to demonstrate that an investigation would have uncovered the stabbing implement and appellant fails to demonstrate a reasonable probability that such an investigation would have changed the outcome of trial. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004); Wiggins v. Smith, 539 U.S. 510, 534 (2003). Further, given the strength of the case against him, appellant fails to demonstrate a reasonable probability that the result of the proceedings would have been different if the sharp object would have been available. Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001). Therefore, the district court did not err in denying this claim.

Next, appellant argues that the State improperly failed to collect exculpatory evidence. Appellant failed to demonstrate good cause for failing to raise this claim in his direct appeal, and therefore, we

¹To the extent that appellant argues the district court erred in denying his claim that his trial counsel was ineffective for failing to investigate additional prior acts of violence committed by the victim, appellant fails to provide cogent argument as to how the district court erred in denying this claim. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

conclude that the district court did not err in denying this claim. See NRS 34.810(1)(b)(2).

Having considered appellant's contentions and concluding that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Brent T. Adams, District Judge
Mary Lou Wilson
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk