

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN MICHAEL FARNUM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53753

FILED

MAR 17 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

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; Stefany Miley, Judge.

On appeal, appellant raises several 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). A petitioner is only entitled to an

evidentiary hearing on claims supported by specific facts not belied by the record, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

First, appellant challenges the district court's denial of his claim that trial counsel was ineffective for giving appellant the drug Xanax during trial. The district court held an evidentiary hearing on this issue and determined that trial counsel did not give appellant Xanax during the trial. Further, the district court concluded that had appellant been given Xanax, appellant failed to demonstrate that trial counsel's decision to give appellant Xanax prejudiced him. We conclude that the district court's findings were based on substantial evidence and were not clearly wrong. See Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994) (district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal). Therefore, the district court did not err in denying this claim.

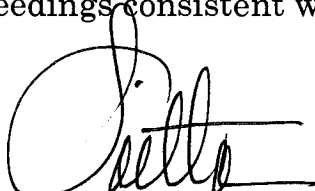
Next, appellant argues that the district court erred in denying, without an evidentiary hearing, his claim that trial counsel was ineffective for failing to call an expert at trial. Specifically, appellant claims that trial counsel retained an expert but failed to present the expert at trial. Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant failed to allege what this expert would have testified about or how the failure to call this witness prejudiced him. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Therefore, the district court did not err in denying this claim without an evidentiary hearing.

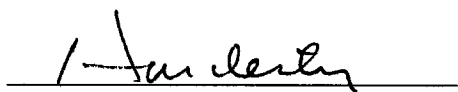
Next, appellant argues that the district court erred in denying, without an evidentiary hearing, his claim that trial counsel was ineffective for failing to object during the State's opening statement when the prosecutor stated that appellant told the victim that his seminal fluid was


medicine. Appellant claims that this statement was never made by him to the victim. Appellant failed to demonstrate he was prejudiced because he failed to demonstrate a reasonable probability of a different outcome at trial had trial counsel objected. The victim at trial denied that appellant made this statement to her. Therefore, the district court did not err in denying this claim without an evidentiary hearing.

Finally, appellant argues that the district court erred in denying two of his claims without holding an evidentiary hearing. Appellant claims that trial counsel was ineffective for failing to present a defense at trial and for failing to investigate. In his petition below and on appeal, appellant provided specific facts that, if true, may entitle him to relief. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Therefore, the district court was required to hold an evidentiary hearing on these issues. See id. We therefore conclude that the judgment of the district court should be reversed and remanded to the district court to hold an evidentiary hearing on these two issues. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Stefany Miley, District Judge
Michael H. Schwarz
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk