


IN THE SUPREME COURT OF THE STATE OF NEVADA

DAMIEN RIVERO,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K.
MCDANIEL,
Respondent.

No. 55236

FILED

NOV 08 2010

TRACE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Damien Rivero's timely post-conviction petition for a writ of habeas corpus. Seventh Judicial District Court, White Pine County; Dan L. Papez, Judge.

Rivero contends that the district court erred by denying his claims that counsel was ineffective for failing to (1) object to a venireperson's prejudicial reference to his prior bad acts and raise this issue on appeal, (2) seek a change of venue based on the preconceived prejudices of veniremembers who were connected to the Ely State Prison, (3) investigate and seek a mental evaluation to establish his state of mind at the time of the offense, and (4) investigate and present evidence regarding the alleged victim.¹

¹Rivero's claim that the district court erred by allowing bad act evidence to be revealed in the presence of the venire is procedurally barred and was properly denied by the district court. See NRS 34.810(1)(b)(2). Rivero's claim that counsel was ineffective for failing to introduce evidence of the victim's criminal history into evidence was not presented to the court below and we will not consider it here. See *Davis v. State*, 107 Nev.

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When reviewing the district court's resolution of ineffective-assistance claims, we give deference to the court's factual findings if they are supported by substantial evidence and not clearly erroneous 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).

The district court found that Rivero's claims lacked evidentiary support and counsel was not deficient and Rivero did not demonstrate prejudice because (1) the venireperson's statement that "[Rivero] has caused some problems" was made in response to a question posed by the court, it did not amount to bad acts evidence, and no evidence was presented that it tainted the venire or prejudiced the jury; (2) a jury was seated, all of the jurors assured the district court that they could be fair and impartial, and there was no evidence that pretrial publicity warranted a change of venue; (3) Rivero was mentally stable and there was no reason to believe that a mental evaluation would benefit the defense; and (4) counsel called any witnesses that had value to testify in Rivero's defense, and Rivero failed to identify any additional evidence that he requested counsel to present during the trial. See Strickland v. Washington, 466 U.S. 668, 687 (1984) (establishing two-part test for ineffective assistance of counsel); Kirksey v. State, 112 Nev. 980, 987-88, 998, 923 P.2d 1102, 1107, 1113-14 (1996) (applying Strickland); see also Means, 120 Nev. at 1012, 103 P.3d at 33 (petitioner must prove the facts

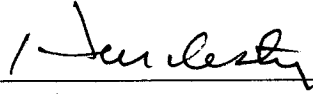
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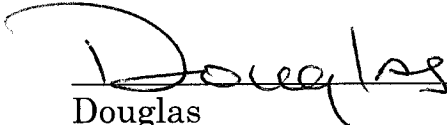
600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).


underlying his claims of ineffective assistance of counsel by a preponderance of the evidence).

Our review of the record reveals that the district court's factual findings are supported by substantial evidence, the findings are not clearly erroneous, and Rivero has not demonstrated that the district court erred as a matter of law. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Dan L. Papez, District Judge
White Pine County Clerk
Christopher R. Oram
Attorney General/Ely
Woodburn & Wedge