

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO AMPER ORPIADA,  
Appellant,  
vs.  
E.K. MCDANIEL, WARDEN,  
Respondent.

No. 56112

**FILED**

DEC 10 2010

TRACEE 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 Antonio Amper Orpiada's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Orpiada contends that the district court erred by denying his ineffective-assistance-of-counsel claims. He claimed that counsel was ineffective for failing to investigate the underlying offenses and mitigating circumstances and preventing him from testifying on his own behalf. 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 denied Orpiada's ineffective-assistance claims after finding that Orpiada did not present any evidence at the evidentiary hearing, other than his own testimony, to demonstrate that counsel's investigation was inadequate; Orpiada chose not to testify at trial, so no additional evidence would have been presented at trial; and the trial transcript clearly showed that Orpiada knew he had a right to testify

and knowingly, intelligently, and voluntarily waived that right. 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, 923 P.2d 1102, 1106 (1996) (adopting test in Strickland).

The trial transcript does not clearly support the finding that Orpiada knowingly, intelligently, and voluntarily waived his right to testify. However, Orpiada had an opportunity to prove both ineffective-assistance claims during the evidentiary hearing. Orpiada failed to prove that he was prejudiced by counsel's lack of investigation and he admitted that he conferred with counsel about his right to testify, counsel advised him not to testify, and he chose not to testify. We conclude that Orpiada failed to meet his burden to prove ineffective assistance of counsel, see Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004), and the district court did not err in denying these claims.

Orpiada also contends that the district court erred by denying his double jeopardy and redundancy claim. However, because this claim was not presented as an ineffective-assistance claim and could have been raised on direct appeal, it was procedurally barred absent a showing of good cause and actual prejudice. See NRS 34.810(1)(b)(2), (3). Orpiada did not allege good cause and actual prejudice in his petition and the district court did not make a finding of good cause and actual prejudice. We conclude that the district court should have dismissed this claim as procedurally barred and Orpiada is not entitled to relief. See State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) ("Application of statutory procedural default rules to post-conviction habeas petitions is mandatory.").

Having considered Orpiada's contentions and concluded that he is not entitled to relief, 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  
Attorney General/Carson City  
Story Law Group  
Washoe County District Attorney  
Washoe District Court Clerk