

IN THE SUPREME COURT OF THE STATE OF NEVADA

ARIE ROBERT REDEKER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 56796

**FILED**

MAR 07 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *H. Malone*  
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. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On appeal from the denial of his February 16, 2010, petition, appellant argues that the district court erred in denying his claims of ineffective assistance of trial counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate (a) that counsel's performance was deficient in that it fell below an objective standard of reasonableness and (b) 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 counsel was ineffective for not filing a motion for new trial as soon as he discovered juror misconduct. Specifically, appellant claims that a juror's post-trial blog showed that the juror did not require the State to prove its case beyond a reasonable doubt and that the juror bullied or otherwise caused another juror to change her vote from voluntary manslaughter to second-degree murder. Appellant fails to demonstrate deficiency or prejudice. As trial counsel indicated at the evidentiary hearing, the blog did not necessarily indicate that the juror was using the wrong standard but rather that once the State put on its case and met its burden of proof, the defense would need to rebut that evidence to avoid a conviction. Further, trial counsel testified that a juror did send a note to the trial judge regarding bullying during the deliberation process but that the note specifically referenced a juror other than the blogger. Thus even assuming without deciding that appellant's proffered evidence were admissible, see NRS 50.065(2), he failed to demonstrate a reasonable probability of success had counsel filed the motion. We therefore conclude that the district court did not err in denying this claim.

Second, appellant argues that counsel was ineffective for not submitting credible evidence of appellant's mental illnesses to the jury. Appellant fails to demonstrate deficiency or prejudice. The district court's finding that this was a strategic decision was supported by substantial evidence in the form of trial counsel's testimony as to the dangers and marginal benefits of producing the evidence during the guilt phase as opposed to saving it for a penalty phase had appellant been found guilty of first-degree murder. Further, although granted an evidentiary hearing, appellant failed to present the "credible evidence" that he believed counsel should have submitted to the jury. We therefore conclude that the district court did not err in denying this claim.

Third, appellant argues that counsel was ineffective for not challenging the admissibility of appellant's confession and the validity of his consent to search in a pretrial petition for a writ of mandamus. Appellant fails to demonstrate deficiency or prejudice. Because challenges to a district court's ruling on a motion to suppress evidence are generally challenged on appeal following trial and conviction, not in a pretrial petition for extraordinary relief, see Hardin v. Griffin, 98 Nev. 302, 304, 646 P.2d 1216, 1217 (1982), appellant had an adequate remedy at law, rendering it unlikely that this court would have considered his claim in an original petition before trial, see NRS 34.170. Further, as the State correctly points out and appellant fails to address, appellate counsel raised the suppression issue on direct appeal, and this court held that the evidence was properly admitted. Redeker v. State, Docket No. 48121 (Order of Affirmance, November 17, 2008). Because appellant fails to demonstrate a reasonable probability of success had counsel raised the issue in a petition for a writ of mandamus, we conclude that the district court did not err in denying this claim.

Appellant also argues that the district court erred in finding that appellant's Sixth Amendment rights were not violated when he was appointed counsel who was not qualified pursuant to SCR 250(2) despite the State's stated intention to seek the death penalty. Appellant's claim could have been raised in his direct appeal and was therefore procedurally barred absent a demonstration of good cause and actual prejudice.<sup>1</sup> NRS 34.810(1)(b). Appellant argues that the ineffective assistance of trial counsel provided good cause as counsel had a duty to inform the courts

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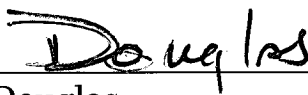
<sup>1</sup>Appellant correctly notes that the State failed to raise this objection below, but the application of procedural bars are mandatory. State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).


that he was not qualified and that the justice court could not qualify him pursuant to SCR 250(2)(b).

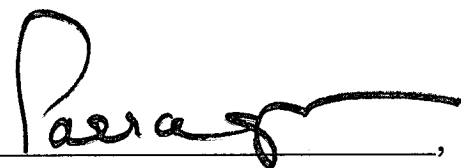
Appellant's good-cause claim fails. Appellant fails to demonstrate that trial counsel was deficient because, as appellant acknowledges, counsel did inform both the justice court and the district court that he was not death-qualified. Appellant fails to demonstrate that he was prejudiced because counsel became death-qualified prior to appellant's trial, and appellant was acquitted of first-degree murder and thus ultimately did not face the death penalty. Because appellant fails to demonstrate good cause to excuse his procedural defect, we conclude that the district court did not err in denying this claim.<sup>2</sup>

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Gibbons

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

cc: Hon. Donald M. Mosley, District Judge  
Law Offices of Cynthia Dustin, LLC  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>2</sup>Although application of the statutory default rules is mandatory, the district court denied the claim on its merits. We nevertheless affirm the district court's decision for the reasons stated above. See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding that a correct result will not be reversed simply because it is based on the wrong reason).