

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN S. DAVIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59253

FILED

APR 11 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *T. Malone*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Kevin Davis's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge. Davis argues that the district court erred by denying his claims of ineffective assistance of trial counsel and by declining to grant him a new sentencing hearing.

In reviewing ineffective-assistance claims, we give deference to the district court's factual findings if 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). Davis has the burden of proving by a preponderance of the evidence that counsel's performance was deficient and resulted in prejudice. See Means v. State, 120 Nev. 1001, 1011-12, 103 P.3d 25, 31-33 (2004) (explaining the test for ineffective assistance of counsel from Strickland v. Washington, 466 U.S. 668, 687-88 (1984)).

First, Davis claims that trial counsel was ineffective at sentencing for failing to correct misinformation about his criminal history. Specifically, he contends that the charging document for a prior felony DUI incorrectly cited the statute for a DUI involving substantial bodily

harm or death. Because his DUI conviction did not involve injury or death and counsel failed to point this out to the district court, he asserts that he was sentenced based on a materially untrue fact. We conclude that the district court did not err in denying this claim. At sentencing, there was no mention by the State or the court that Davis's prior DUI conviction involved substantial bodily injury or death, nor is there any indication that the court received misinformation about that DUI.¹ Rather, the district court made it clear that Davis's sentence was based on his entire criminal history, which involved numerous felonies and DUI-related offenses, as well as the instant robbery offense. Thus, Davis failed to demonstrate that the district court relied on a materially untrue fact in sentencing him. See Lader, 121 Nev. at 686, 120 P.3d at 1166; Means, 120 Nev. at 1011-12, 103 P.3d at 31-33.

Second, Davis claims that trial counsel was ineffective for failing to file a motion to modify his sentence because the district court relied upon a materially untrue fact. However, because Davis failed to demonstrate that the district court relied on incorrect information regarding his criminal record that worked to his extreme detriment, he could not show that a motion to modify his sentence would have been successful. See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). Therefore, he failed to demonstrate that counsel's performance was deficient or that he was prejudiced. See Donovan v. State, 94 Nev.

¹Davis contends that the State's argument at sentencing about his "lethal" conduct misled the court as to the nature of his prior DUI. However, Davis takes the State's comment out of context, as the State's argument was made in reference to the lengthy extent of Davis's criminal history, and not as a description of his most recent DUI conviction.

671, 675, 584 P.2d 708, 711 (1978) (holding that counsel cannot be deemed ineffective for failing to file futile motions).

Finally, Davis argues that the district court erred by declining to grant him a new sentencing hearing. While Davis phrases his argument as a violation of due process by the district court, the premise of his claim is that the facts underlying his ineffective-assistance claims warrant a new sentencing hearing. However, as discussed above, the district court did not err in denying the ineffective-assistance claims, and Davis did not demonstrate that he was entitled to a new sentencing hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. Michael Villani, District Judge
Dayvid J. Figler
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk