

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN DANIEL HIGUERA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59514

FILED

JAN 16 2013

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

ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jerome T. Tao, Judge.

Appellant Steven Higuera argues that the district court erred in denying his claims of ineffective assistance of 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 in 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. We give deference to the district court's factual findings 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, Higuera argues that counsel was ineffective for failing to locate Arnold Olmo. Higuera submitted that Olmo would have testified that Higuera had Olmo's permission to store Olmo's belongings while Olmo was incarcerated, supporting Higuera's claim that he mistakenly believed he was assisting Olmo when he took the property and therefore did not have the intent to commit larceny. The district court denied this claim without conducting an evidentiary hearing because Higuera could not prove that Olmo would testify that he gave Higuera permission to store his belongings and therefore Higuera failed to demonstrate prejudice. However, because Higuera presented facts that would entitle him to relief if true, the district court should have held an evidentiary hearing to determine whether counsel was deficient in her attempts to locate Olmo and whether that deficiency caused Higuera prejudice. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (noting that a petitioner is entitled to an evidentiary hearing if he presents claims that, if true, would entitle him to relief and are not belied by the record). Therefore, we remand this matter to the district court to conduct an evidentiary hearing on this claim.

Second, Higuera argues that counsel was ineffective for failing to subpoena a phone call recording between himself and Olmo. Higuera claimed that in this recording Olmo stated he would testify at trial concerning his relationship with Higuera and would provide information regarding a person that he suspected of burglarizing his home. Higuera made only a bare, unsubstantiated claim that such a recording existed, and regardless, Higuera only asserted that the tape could have guided counsel's strategy and did not argue that it would in any way change the result at trial. See id. at 502, 686 P.2d at 225 (noting that bare, naked

claims, unsupported by specific factual allegations need not be considered). Accordingly, the district court did not err in denying this claim without conducting an evidentiary hearing.


Third, Higuera argues that counsel was ineffective for failing to locate other witnesses who could have testified that he had implicit permission to store Olmo's belongings. Higuera failed to demonstrate deficiency or prejudice. Higuera made only bare, unsubstantiated claims that such witnesses existed and their testimony might have been helpful. Id. at 502, 686 P.2d at 225. In addition, counsel presented a witness at trial who testified that she believed Higuera had permission to store Olmo's belongings and therefore it is unlikely that additional testimony, other than Olmo's, would have had any impact. Accordingly, the district court did not err in denying this claim without conducting an evidentiary hearing.

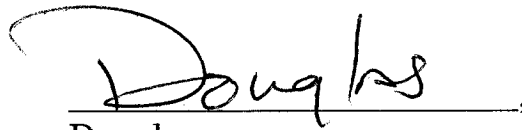
Fourth, Higuera argues that counsel was ineffective for failing to challenge several of the prior convictions underlying his habitual offender status. Having considered each prior conviction, we conclude that Higuera failed to demonstrate deficiency or prejudice because even assuming that several of the felonies were improperly considered the requisite number of felonies remained to sentence him as a habitual offender. Although the felonies were remote and non-violent, the district court was within its discretion to consider them, Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992), and it is clear from its statements at sentencing that Higuera's sentence would not have been different if the district court had not considered the challenged convictions. Accordingly,

the district court did not err in denying this claim without conducting an evidentiary hearing.¹

Having considered Higuera's contentions and concluded that one merits relief, 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.
Gibbons


_____, J.
Douglas


_____, J.
Saitta

cc: Hon. Jerome T. Tao, District Judge
McLetchie Law
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

¹Higuera also argues that the district court erred in denying his petition because counsel's ineffectiveness resulted in Higuera turning down a plea agreement. Because Higuera did not present this claim below, we decline to consider it in the first instance now. Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).