

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOEL BURKETT,
Appellant,
vs.
E.K. MCDANIEL, WARDEN,
Respondent.

No. 64925

FILED

OCT 15 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Joel Burkett's post-conviction petition for a writ of habeas corpus. Seventh Judicial District Court, White Pine County; Gary Fairman, Judge.

Burkett contends that the district court erred by denying his ineffective-assistance-of-counsel claims. In order to demonstrate ineffective assistance of counsel, Burkett has the burden of proving 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 *Strickland* test for ineffective assistance of counsel). We give deference to the district court's factual findings regarding ineffective assistance of counsel if they are supported by substantial evidence and not clearly wrong 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 court need not address both components of the inquiry if the petitioner

makes an insufficient showing on either one.” *Avery v. State*, 122 Nev. 278, 285, 129 P.3d 664, 669 (2006).

First, Burkett contended that trial counsel was ineffective for failing to investigate his claim that he could not have committed the offense of indecent exposure because he had Hepatitis C which prevented him from getting an erection. Because Burkett failed to present sufficient evidence to substantiate this claim, he did not demonstrate that any deficiency in counsel’s performance resulted in prejudice.

Second, Burkett contended that trial counsel was ineffective for failing to investigate and present a witness who he contends would have testified that the State’s witness had made prior false allegations of sexual harassment. Because Burkett failed to present any evidence substantiating this claim, he did not demonstrate that any deficiency in counsel’s performance resulted in prejudice.

Third, Burkett contended that trial counsel was ineffective because counsel’s theory of defense, that a prison cell is not “open” within the meaning of the indecent exposure statute, has been held invalid by this court. However, Burkett failed to cite any case law supporting this contention. Thus, he failed to demonstrate that counsel’s performance was deficient or that, but for counsel’s theory of defense, the outcome of the proceedings would have been different.

Fourth, Burkett contended that trial counsel was ineffective for failing to cross-examine the victim about the act of masturbation that

she witnessed and the characteristics of Burkett's erect penis. We are not convinced that counsel's performance fell below an objective standard of reasonableness for failing to make such an inquiry. Moreover, Burkett has not demonstrated that there is a reasonable probability that such an inquiry would have resulted in a different outcome at trial.

Fifth, Burkett contended that trial counsel was ineffective for failing to seek a continuance after the district court prohibited a defense witness from testifying. Burkett fails to explain why such a request would have been granted and does not demonstrate that there is a reasonable probability that a continuance would have caused the district court to reverse its decision on the defense witness. Thus, Burkett did not demonstrate that counsel was deficient or that counsel's failure to seek a continuance resulted in prejudice.

Sixth, Burkett contended that trial counsel was ineffective for failing to seek an order from the district court allowing her to meet privately with Burkett during the trial. Even assuming that Burkett felt intimidated by the presence of the prison guards during his meetings with counsel on the day of trial and trial counsel fell below an objective standard of reasonableness by failing to seek an order allowing her to meet privately with Burkett, he has not convinced this court that a private meeting would have changed his decision not to testify or otherwise affected the outcome of the trial. Therefore, Burkett failed to demonstrate that counsel's failure resulted in prejudice.

Seventh, Burkett contends that trial counsel was ineffective because she failed to meet the ADKT 411 standards for defense performance. Even if counsel failed to satisfy these standards and that failure amounted to a deficient performance, Burkett failed to demonstrate resulting prejudice.

Having considered Burkett's contentions and concluded that the district court did not err by denying his petition, we¹

ORDER the judgment of the district court AFFIRMED.

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

Saitta, J.
Saitta

cc: Hon. Gary Fairman, District Judge
Sears Law Firm, Ltd.
Attorney General/Carson City
Attorney General/Ely
White Pine County Clerk

¹The fast track response fails to comply with NRAP 32(a)(4)-(5) because it is not double-spaced, does not contain page numbers, and the footnote is not in the same size font as the body of the brief. NRAP 3C(h)(1). The footnotes in the fast track statement and reply are also not in the same size font as the body of the briefs. Counsel for both parties are cautioned that the failure to comply with the briefing requirements in the future may result in the imposition of sanctions. See NRAP 3C(n).