

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTHONY TODD MARTIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67276

FILED

JUL 14 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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. First Judicial District Court, Carson City; James E. Wilson, Judge.

Appellant Anthony Todd Martin argues the district court erred in denying the claims of ineffective assistance of counsel he raised in his March 5, 2013, petition. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and 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*). To demonstrate prejudice regarding the decision to enter a guilty plea, a petitioner must demonstrate a reasonable probability, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). 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 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).

First, Martin argues his counsel was ineffective for failing to conduct pretrial investigation.¹ Martin asserts counsel possibly could have uncovered favorable evidence and could have pursued a pretrial petition for a writ of habeas corpus with that evidence. Martin fails to demonstrate either deficiency or prejudice for this claim. At the evidentiary hearing, Martin's counsel testified that he conducted pretrial investigation and the district court found counsel to be credible. Substantial evidence supports that finding. Martin also fails to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on going to trial had counsel conducted pretrial investigation because he does not identify any additional evidence counsel could have discovered. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (a petitioner claiming counsel did not conduct an adequate investigation must specify what a more thorough investigation would have uncovered); *see also Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (explaining that bare and naked claims are insufficient

¹We note Noel Waters represented Martin until shortly after entry of Martin's guilty plea. Martin then retained Benjamin Durham and Frank Cofer to represent him at the sentencing hearing.

to demonstrate that a petitioner is entitled to relief). Therefore, the district court did not err in denying this claim.

Second, Martin argues counsel was ineffective for coercing him into pleading guilty by failing to investigate. Martin fails to demonstrate either deficiency or prejudice for this claim. Martin acknowledged in the plea agreement and at the plea canvass that he did not act under duress or coercion. In addition, Martin does not specify what further investigation would have revealed. *See Molina v. State*, 120 Nev. at 192, 87 P.3d at 538. Accordingly, Martin fails to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on going to trial had counsel conducted further investigation. Therefore, the district court did not err in denying this claim.

Third, Martin argues his counsel were ineffective at the sentencing hearing by failing to argue that this case and a companion case should have separate sentencing hearings. Martin asserts that consideration of both cases at the same sentencing hearing resulted in the district court imposing consecutive rather than concurrent sentences. Martin fails to demonstrate either deficiency or prejudice for this claim. The cases became combined through a package plea deal and Martin does not identify upon what legal bases a reasonably diligent attorney should have attempted to sever the cases following Martin's acceptance of the package plea offer. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Given the nature of Martin's package plea deal, Martin fails to demonstrate a reasonable probability of a different outcome had counsel attempted to seek different sentencing hearings for each case. Therefore the district court did not err in denying this claim.

Fourth, Martin argues his counsel were ineffective at the sentencing hearing by failing to review the presentence investigation report (PSI), discuss the case in depth with Martin, or know the underlying facts of the crime. Martin also argues that counsel had no experience with the sentencing judge. Martin fails to demonstrate either deficiency or prejudice for this claim. At the evidentiary hearing, Martin's sentencing counsel both testified they reviewed the PSI, discussed the case with Martin, and knew the underlying facts of the crime. The district court found counsel to be credible and substantial evidence supports that finding. Counsel also testified that the arguments at the sentencing hearing were formed through discussions with Martin, and they chose to seek probation and drug treatment. Tactical decisions such as this one "are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which Martin does not demonstrate. Finally, Martin fails to demonstrate a reasonable probability of a different outcome at the sentencing hearing had counsel been further prepared or raised different arguments. Therefore, the district court did not err in denying this claim.

Fifth, Martin argues his counsel were ineffective for failing to file a direct appeal. Martin fails to demonstrate he was entitled to relief for this claim. Martin's sentencing counsel each testified they did not recall Martin asking them to file a direct appeal and that if he had asked them to pursue one, they would have done so. The district court concluded counsel were credible and that Martin failed to demonstrate counsel had a duty to file a notice of appeal. Our review of the record reveals the district court's factual findings are supported by substantial evidence. *See Toston v. State*, 127 Nev. ___, ___, 267 P.3d 795, 801 (2011) (explaining that the

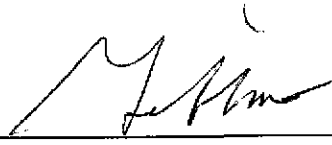
defendant has the burden to inform counsel that he wishes to pursue a direct appeal). Therefore the district court did not err in denying this claim.

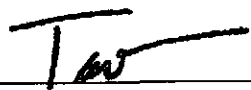
Finally, Martin argues the district court erred by using an overruled standard of proof. The district court's order set forth the "strong and convincing proof" standard of ineffective assistance of counsel. *Homick v. State*, 112 Nev. 304, 310, 913 P.2d 1285 (1996) (quoting *Davis v. State*, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991), overruled by *Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004)). The district court's order also referenced the "farce and sham" test. See *Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (recognizing that the reasonably effective assistance standard for ineffective assistance of counsel claims supplanted Nevada's traditional farce and sham test). However, the correct standard of proof is that a petitioner "must establish the factual allegations which form the basis for his claim of ineffective assistance by a preponderance of the evidence." *Means*, 120 Nev. at 1013, 103 P.3d at 33. The petitioner must then, under *Strickland*, demonstrate prejudice by showing a reasonable probability of a different outcome despite counsel's alleged error. 466 U.S. at 694. The use of an incorrect standard is reviewed under a harmless error analysis. *Means*, 120 Nev. at 1014, 103 P.3d at 34.

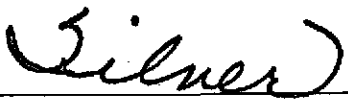
We conclude the district court erred by using an overruled standard of proof, but any error was harmless because Martin fails to demonstrate that any of his claims would have had merit had they been considered under the proper standard. See *Bradley v. State*, 109 Nev. 1090, 1093, 864 P.2d 1272, 1274 (1993) (citing *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)). As discussed previously, Martin fails to demonstrate either deficiency or prejudice for any of his claims of

ineffective assistance of counsel. Therefore, we conclude Martin fails to demonstrate he is entitled to relief. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. James E. Wilson, District Judge
Erik R. Johnson
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk