

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LEMAR ANTONIO GANT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67885

FILED

NOV 19 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 postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Appellant Lemar Antonio Gant argues the district court erred in denying the claims of ineffective assistance of counsel he raised in his March 21, 2014, 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*). 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, Gant argues his trial counsel was ineffective for failing to retain a DNA expert witness. Gant fails to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he decided not to retain a defense DNA expert because he believed the defense could demonstrate Gant's DNA was on the firearm due to transfer from Gant's bandana. 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 Gant does not demonstrate. Gant fails to demonstrate a reasonable probability of a different outcome at trial had counsel sought a defense DNA expert because he does not demonstrate that further expert testimony regarding DNA would have been favorable to his defense. Therefore, the district court did not err in denying this claim.

Second, Gant argues his trial counsel was ineffective for failing to properly investigate a defense witness, who was revealed during trial to have testified untruthfully. Gant fails to demonstrate his counsel's performance was deficient or resulting prejudice. "[D]efense counsel has a duty 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993) (quoting *Strickland*, 466 U.S. at 691). A petitioner may not properly "accuse his counsel of ineffectiveness when it is clear that [the petitioner] himself was responsible for any prejudice which resulted." See *Leonard v. State*, 114 Nev. 639, 657, 958 P.2d 1220, 1233 (1998), modified on other grounds by *Collman v. State*, 116 Nev. 687, 7 P.3d 426 (2000).

At the evidentiary hearing, counsel testified Gant's girlfriend informed him of a potential defense witness, Matthew Merry. Merry then informed counsel he had accepted a ride from Gant on the day in question, that unknown to Gant he had placed the firearm in the vehicle, and had used Gant's bandana when concealing the firearm. Counsel testified he informed Gant of the substance of Merry's potential testimony and Gant had never informed him Merry's version of events was untruthful. During trial, it was revealed Merry had actually been in the Henderson Detention Center during the incident, and therefore, could not have been in Gant's vehicle on that day. Counsel acknowledged at the evidentiary hearing he could have performed further actions to ascertain the truthfulness of Merry's potential testimony, but Gant had given him no reason to believe Merry would testify untruthfully. The district court concluded Gant knew Merry's testimony was false, but did not disclose this fact to counsel. Given Gant's own knowledge of whether Merry's potential testimony was truthful, we conclude Gant did not meet his burden to demonstrate counsel acted unreasonably.¹ *See id.*

¹Gant also asserts the district court misapplied the *Strickland* standard for this claim because the court considered Gant's conduct when evaluating the performance of Gant's trial counsel. However, defense counsel's "particular decision not to investigate must be directly assessed for reasonableness in all the circumstances." *Strickland*, 466 U.S. at 691. As the district court determined Gant knew Merry's testimony was false and failed to inform his counsel of that knowledge, the district court properly considered Gant's conduct when evaluating Gant's trial counsel's performance. Accordingly, Gant fails to demonstrate the district court misapplied the standard for ineffective assistance of counsel for this claim.


In addition, Gant fails to demonstrate a reasonable probability of a different outcome had counsel performed further investigation regarding Merry because there was strong evidence of his guilt presented at trial, given DNA consistent with Gant's was discovered on the firearm and the firearm was hidden in the vehicle driven by Gant. Therefore, the district court did not err in denying this claim.

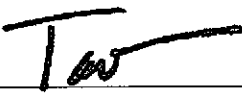
Third, Gant argues his trial counsel was ineffective for improperly influencing Gant to decline to testify in his own defense. Gant asserts he wished to testify that a police officer had planted the firearm in the vehicle, but he was forced to decline to testify because his testimony would have conflicted with Merry's testimony. Gant fails to demonstrate counsel's performance was deficient or resulting prejudice. The trial court informed Gant he had the right to testify and the decision whether to testify was his alone. Gant acknowledged he had discussed testifying with counsel and he understood he had to decide whether to testify. In addition, Gant had a lengthy criminal history and he would have been subject to questioning regarding those convictions. *See* NRS 50.095. Given Gant's statements to the trial court and his criminal history, he fails to demonstrate counsel improperly influenced him to decline to testify or there was a reasonable probability of a different outcome had counsel performed different actions with respect to Gant's potential testimony. Therefore, the district court did not err in denying this claim.


Fourth, Gant argues the cumulative effect of ineffective assistance of counsel warrants vacating his judgment of conviction. Gant fails to demonstrate any errors, even if considered cumulatively, amount to ineffective assistance of counsel sufficient to warrant vacating the

judgment of conviction. Therefore, Gant fails to demonstrate the district court erred in denying this claim.

Having concluded Gant is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Carolyn Ellsworth, District Judge
Coyer Law Office
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk