

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROTZILYN MERCHELLE MITCHELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67667

FILED

JAN 21 2016

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. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Appellant Rotzilyn Mitchell claims the district court erred by denying her claims of ineffective assistance of counsel raised in her August 26, 2014, petition without holding an evidentiary hearing. 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). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations not belied by the record and, if true, would entitle her to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Mitchell argues counsel was ineffective for failing to argue against imposition of the habitual criminal enhancement. This claim is belied by the record. Counsel argued against the imposition of the habitual criminal enhancement by arguing Mitchell's convictions were old and nonviolent. He also argued although Mitchell had been found to be a habitual felon in Alabama, that was twelve years prior and she was given probation. Further, he made arguments regarding Mitchell's drug use and the fact she had been crime free for many years. Therefore, the district court did not err in denying this claim without holding an evidentiary hearing.

Second, Mitchell argues counsel was ineffective for failing to cite case law in support of his argument that Mitchell's convictions were remote, trivial, or nonviolent. Mitchell fails to demonstrate counsel was deficient or resulting prejudice. As stated above, counsel made the arguments outlined in the cases cited by Mitchell in her petition and her opening brief. Further, Mitchell fails to demonstrate a reasonable probability of a different outcome had counsel raised further arguments related to this issue as the habitual criminal statute makes no special allowance for non-violent crimes or for remoteness of the prior convictions; these are merely considerations within the discretion of the district court. *See Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992).


Therefore, the district court did not err in denying this claim without holding an evidentiary hearing.

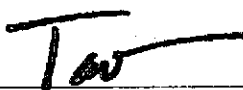
Third, Mitchell argues counsel was ineffective for failing to assert two of her prior felonies, a 1987 Illinois conviction for theft and a 1987 Illinois conviction for violation of bail bond, should not have counted as two separate prior convictions because the convictions were related. Mitchell fails to demonstrate counsel was deficient or resulting prejudice. The two challenged convictions were not the result of the same act, transaction, or occurrence and may be used as two separate convictions for purposes of habitual criminal adjudication. *See Rezin v. State*, 95 Nev. 461, 462, 596 P.2d 226, 227 (1979). Even were counsel successful in raising this claim at sentencing, Mitchell cannot demonstrate a reasonable probability of a different outcome because she still would have been eligible for adjudication as a habitual criminal even if the district court had counted these convictions as only one for adjudication purposes. *See* NRS 207.010(1)(b). Therefore, the district court did not err in denying this claim without holding an evidentiary hearing.


Next, Mitchell claims appellate counsel was ineffective for failing to challenge her adjudication as a habitual criminal on appeal. Mitchell fails to demonstrate counsel was deficient or resulting prejudice because she fails to demonstrate this claim would have had a reasonable probability of success on appeal. *See Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Mitchell had sufficient prior felonies to be eligible for the habitual criminal enhancement and the district court stated the habitual criminal enhancement was appropriate due to Mitchell's criminal history and her prior adjudication as a habitual felon.

Therefore, the district court did not err in denying this claim without holding an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. William D. Kephart, District Judge
Gentile, Cristalli, Miller, Armeni & Savarese, PLLC
Dickinson Wright PLLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

¹We conclude the district court did not abuse its discretion by not considering the transcript from the evidentiary hearing held in Mitchell's other case. We note that after holding an evidentiary hearing in that case, the district court denied claims similar to those raised here. That denial was affirmed by this court in *Mitchell v. State*, Docket No. 65246 (Order of Affirmance, January 21, 2015).