

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

REBECCA JEAN FLANAGAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67611

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 for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Appellant Rebecca Flanagan claims the district court erred by denying her claims of ineffective assistance of counsel raised in her petition filed on October 19, 2011, and supplemental petition filed on January 21, 2014. To prove ineffective assistance of counsel, a petitioner must demonstrate 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 district

court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Flanagan claims counsel was ineffective for failing to present an expert at sentencing who would have testified she was easily susceptible to manipulation by men. Flanagan fails to demonstrate she was prejudiced because she fails to demonstrate a reasonable probability of a different outcome had counsel presented an expert. The primary concern for the district court at sentencing was Flanagan's extensive criminal history. Flanagan had six prior felony convictions and Flanagan fails to demonstrate her "susceptibility to manipulation" would have changed the district court's sentencing decision. Therefore, the district court did not err in denying this claim.

Second, Flanagan claims counsel was ineffective for failing to present mitigation evidence regarding her prior drug use and physical and emotional abuse. Flanagan fails to demonstrate counsel was deficient or resulting prejudice because she fails to support this claim with specific facts that, if true, would entitle her to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Third, Flanagan claims counsel was ineffective for failing to argue she was less culpable than her codefendant. Flanagan fails to demonstrate counsel was deficient or resulting prejudice. Counsel argued at sentencing that Flanagan was not involved in the burglaries. Flanagan fails to demonstrate a reasonable probability of a different outcome at sentencing had counsel made further arguments regarding her culpability because Flanagan pleaded guilty to these charges and there was some evidence tying her to the crimes. Further, as stated above, the district

court based its sentence on the fact Flanagan had been previously convicted of six felonies. “[S]entencing is an individualized process; therefore, no rule of law requires a court to sentence codefendants to identical terms.” *Nobles v. Warden*, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990). Therefore, the district court did not err in denying this claim.


Fourth, Flanagan claims counsel was ineffective for withdrawing her direct appeal from her judgment of conviction without her consent. Flanagan fails to demonstrate counsel was deficient. The district court held an evidentiary hearing on this issue and concluded Flanagan consented to the withdrawal and substantial evidence supports the decision of the district court. Counsel testified he visited Flanagan in prison after her appeal in a similar but separate case had been denied. *See Flanagan v. State*, Docket No. 57047 (Order of Affirmance, April 6, 2011). Counsel informed her the direct appeal in the instant case would be denied for the same reasons. The district court concluded counsel was credible, he discussed the consequences of withdrawing the plea with Flanagan, and counsel had already prepared the appeal, so there was no reason for counsel to withdraw the appeal without her consent. Therefore, we conclude the district court did not err in denying this claim.


Flanagan also claims counsel was ineffective for telling her withdrawing her appeal might show the parole board she took responsibility for her actions, and therefore, would be helpful at her future parole hearings. Flanagan claims this was erroneous advice because NRS 213.10885 does not allow the parole board to consider whether she appealed the judgment of conviction. The district court concluded, because this claim was raised after the evidentiary hearing, it was outside the scope of the petition, and declined to consider it.

The district court has the discretion to allow a petitioner to assert claims not previously raised in her petition, but the district court is under no obligation to consider issues raised by a petitioner for the first time at the evidentiary hearing. *Barnhart v. State*, 122 Nev. 301, 303-04, 130 P.3d 650, 652 (2006). We conclude the district court did not abuse its discretion by declining to consider this claim. Because this claim was not properly before the district court below, we decline to consider it on appeal. *Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means*, 120 Nev. at 1012-13, 103 P.3d at 33.

Finally, Flanagan claims the State made prejudicial statements at her and her codefendant's sentencing hearings. This claim is outside the scope of claims permissible to be raised in a postconviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. See NRS 34.810(1)(a). Therefore, the district court did not err in denying this claim.

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Jessie Elizabeth Walsh, District Judge
Lester M. Paredes
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk