

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JACK JOSEPH BATTLE, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 68709

**FILED**

**FEB 17 2016**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus that was filed on October 28, 2013, and was supplemented on February 24, 2015. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

*Ineffective assistance of counsel*

Appellant Jack Battle, Jr., claims the district court erred by rejecting his claims of ineffective assistance of counsel. To prove ineffective assistance of trial 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, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (adopting the *Strickland* test). Similarly, to prove ineffective assistance of appellate counsel, a petitioner must demonstrate counsel was deficient for failing to raise an issue for review and the omitted issue had a reasonable probability of success on appeal. *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114. Both components of the inquiry—

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deficiency and prejudice—must be shown. *Strickland*, 466 U.S. at 697. We give deference to the 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, Battle claimed trial counsel was ineffective for failing to have Battle's competency evaluated. The district court considered the pleadings, transcripts, and documents on file and made the following findings: Battle's competency claim was a bare allegation which was insufficient to prove counsel's ineffectiveness. The only evidence he presented of his alleged incompetence were statements he pulled from the record and presented out of context. Battle's direct-examination was coherent and his few nonresponsive answers appear to have been given for strategic reasons. Battle's cross-examination testimony was combative, manipulative, and difficult, but this behavior did not provide a basis for determining he was legally incompetent to stand trial. Furthermore, Battle made no showing that a competency evaluation would have revealed he was incompetent to stand trial or would have provided evidence helpful in mitigating his sentence.

Second, Battle claimed trial counsel was ineffective for failing to consult with his trial counsel in another case and review the testimony Wendy Martinez gave during a *Petrocelli*<sup>1</sup> hearing in that case to prepare for Martinez's cross-examination in this case. The district court found Battle failed to allege specific facts as to what value Martinez's *Petrocelli* hearing testimony may have had and how it would have impacted the

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<sup>1</sup>*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

outcome of the trial. Counsel's cross-examination of Martinez without using her *Petrocelli* testimony was so effective that the State dropped the deadly weapon enhancement. And counsel would have been remiss in cross-examining Martinez about her *Petrocelli* hearing testimony because the examination would have opened the door to the admission of damaging evidence. Accordingly, Battle failed to demonstrate prejudice in this regard.

Third, Battle claimed trial counsel was ineffective for failing to inform him of the limited scope of the State's impeachment questions after his testimony opened the door to admission of evidence about his other case. The district court found Battle was removed from the courtroom during the hearing on the impeachment evidence because he refused to stop interrupting the hearing despite numerous warnings. Even if counsel had requested time to discuss the impeachment questions with Battle, the district court would not have granted the request because Battle had been repeatedly admonished to answer only the questions asked, not to interrupt, and he would not be granted a mistrial. And Battle cannot demonstrate prejudice because his testimony regarding the knife was stricken, the jury had previously received a limiting instruction, and the deadly weapon enhancement had already been dropped.

Fourth, Battle claimed appellate counsel was ineffective for failing to file a petition for rehearing after the Nevada Supreme Court affirmed his judgment of conviction. The district court found Battle failed to explain what facts the Nevada Supreme Court mistakenly relied upon or what law the Nevada Supreme Court misapprehend. Instead, Battle merely summarized the contents of his argument on appeal and the Nevada Supreme Court's decision regarding his argument. Accordingly,

Battle failed to establish counsel's performance was deficient or prejudice arising from counsel's performance.

The record demonstrates the district court's factual findings are supported by substantial evidence and are not clearly wrong, and we conclude Battle failed to demonstrate he was prejudiced by counsel's representation. *See Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (petitioner bears the burden of proving ineffective assistance).

#### *Cumulative error*

Battle claims the district court erred in denying his habeas petition because the cumulative effect of counsel's errors warranted relief. However, even assuming multiple deficiencies in counsel's performance may be cumulated to find prejudice under the *Strickland* test, *see McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009), the district court did not find any such deficiencies, so there was nothing to cumulate.

#### *Evidentiary hearing*

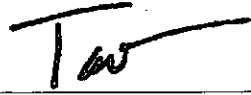
Battle claims the district court erred by rejecting his request for an evidentiary hearing on his claim that trial counsel was ineffective for failing to prepare for trial, and he asserts he should have been permitted to gather facts regarding appellate counsel's decision not to pursue a motion for reconsideration. A petitioner is only entitled to an evidentiary hearing if he has asserted specific factual allegations that are not belied or repelled by the record and, if true, would entitle him to relief. *Nika v. State*, 124 Nev. 1272, 1300-01, 198 P.3d 839, 858 (2008). "We review the district court's determination that a petitioner is not entitled to an evidentiary hearing for abuse of discretion." *Stanley v. Schriro*, 598 F.3d 612, 617 (9th Cir. 2010). Because Battle's claims were insufficiently

pleaded and/or belied by the record, we conclude the district court did not abuse its discretion in this regard.

For the foregoing reasons, we conclude the district court did not err by denying Battle's habeas petition without an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED:

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Michelle Leavitt, District Judge  
Law Office of Betsy Allen  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk