

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GREGORY HOUTZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69561

FILED

JUN 22 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *J. Hendrick*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Appellant Gregory Houtz argues the district court erred in denying his claims of ineffective assistance of counsel raised in his January 10, 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).

Houtz first argues his trial counsel was ineffective for failing to object during the sentencing hearing when the State commented on his failure to express remorse. Houtz asserts he maintained his innocence and therefore, consideration of his failure to express remorse was not permissible pursuant to *Brake v. State*, 113 Nev. 579, 584-85, 939 P.2d 1029, 1033 (1997). Houtz fails to demonstrate he was prejudiced by the State's comments. The sentencing court specifically stated it imposed the sentence due to Houtz's "extraordinarily violent criminal history." Given the sentencing court's statement, Houtz fails to demonstrate a reasonable probability of a different outcome during the sentencing hearing had counsel objected to the State's comments. Therefore, the district court did not err in denying this claim.

Second, Houtz appears to assert trial counsel was ineffective for failing to object during the sentencing hearing when the State asserted Houtz was intoxicated during the burglary. Houtz fails to demonstrate counsel's performance was deficient or resulting prejudice. During trial, the victim testified Houtz acted as if he had been drinking. Houtz fails to demonstrate it was objectively unreasonable for his counsel to have declined to object when the State referenced this testimony during the sentencing hearing. As the sentencing court specifically stated it imposed sentence due to Houtz's violent criminal history, Houtz fails to demonstrate a reasonable probability of a different outcome at the sentencing hearing had counsel objected to the State's comments regarding his intoxication. Therefore, the district court did not err in denying this claim.

Next, Houtz argues the district court erred in denying his claims of ineffective assistance of appellate counsel. To prove ineffective assistance of appellate 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 the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).


First, Houtz argues his appellate counsel was ineffective for failing to argue on direct appeal the State improperly commented on his failure to express remorse. Houtz fails to demonstrate he was prejudiced. As explained previously, the sentencing court did not rely upon Houtz's failure to express remorse when imposing sentence; it expressly relied upon his violent criminal history. Accordingly, Houtz fails to demonstrate this issue had a reasonable likelihood of success on appeal. Therefore, the district court did not err in denying this claim.


Second, Houtz argues his appellate counsel was ineffective for failing to argue on direct appeal that the sentencing court erred by declining to grant a continuance to permit Houtz to obtain additional information regarding his mental health issues and treatment. On an appeal involving a postconviction petition for a writ of habeas corpus, this court generally declines to consider issues which were not raised in the district court in the first instance. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). A review of the record before this court


reveals Houtz did not raise this claim in his petition and supplement before the district court. Because Houtz does not demonstrate cause for his failure to raise this claim before the district court, we decline to consider it in this appeal.

Finally, Houtz argues the district court erred in denying the remainder of his claims without considering them at an evidentiary hearing. To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific allegations that are not belied by the record, and if true, would entitle him to relief. *Rubio v. State*, 124 Nev. 1032, 1046 & n.53, 194 P.3d 1224, 1233-34 & n.53 (2008). The district court concluded Houtz's additional claims did not meet that standard and the record before this court reveals the district court's conclusions in this regard were proper. Therefore, the district court properly denied these claims without considering them at the evidentiary hearing.

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Janet J. Berry, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk