

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES EDWARD MCDONALD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69943

FILED

JUL 27 2016

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

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

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; Michelle Leavitt, Judge.

Appellant Charles Edward McDonald argues the district court erred in denying his claims of ineffective assistance of counsel raised in his February 6, 2013, petition. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his 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, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry must be shown, *Strickland v. Washington*, 466 U.S. 668, 697 (1984), 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 that are supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, McDonald argues his counsel was ineffective for failing to investigate his mental health or request a competency evaluation. In support of his claim, McDonald submitted evaluations undertaken during a later criminal case where McDonald was determined to be incompetent for a period of time and an evaluation undertaken during the postconviction proceedings for this matter. The district court concluded this claim was belied by the record, as McDonald's statements and actions during the trial and sentencing hearing demonstrated McDonald had the ability to consult with his attorney with a reasonable degree of rational understanding and that he had a rational and factual understanding of the proceedings against him. See *Melchor-Gloria v. State*, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983) (citing *Dusky v. United States*, 362 U.S. 402 (1960)). Because the record demonstrated McDonald was competent during his trial and sentencing hearing, the district court concluded he did not demonstrate his counsel's performance was deficient or resulting prejudice.

We conclude the district court erred in denying this claim without conducting an evidentiary hearing. McDonald supported this claim with specific factual allegations in the form of the competency


evaluation undertaken during the postconviction proceedings, in which a psychiatrist concluded McDonald was incompetent during the trial. Moreover, the record is silent regarding the investigation and actions taken by McDonald's counsel regarding McDonald's mental health. Accordingly, this claim is not belied by the record, and if true, would entitle McDonald to relief. See *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Therefore, an evidentiary hearing is necessary to ascertain whether counsel undertook any actions regarding McDonald's mental health, what decisions counsel made, if any, regarding the pursuit of a competency evaluation, and to evaluate the merits of McDonald's assertion he was incompetent during his trial and sentencing hearing.

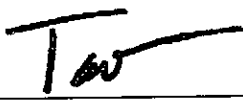
Second, McDonald argues his counsel was ineffective for advising McDonald to reject a plea offer and proceed to trial without showing McDonald the video footage of the crime scene. McDonald asserts counsel advised him the jury would not be able to identify him as the perpetrator and that is why he decided to reject the plea offer. McDonald states he would have accepted a plea offer from the State had he viewed the video footage ahead of trial. McDonald failed to demonstrate his counsel's performance was deficient or resulting prejudice.


McDonald did not allege counsel misadvised him regarding the law pertaining to his charges, cf. *Lafler v. Cooper*, 566 U.S. ___, ___, 132 S. Ct. 1376, 1384 (2012) (explaining that counsel's performance was objectively unreasonable due to informing the petitioner of an incorrect legal rule). Moreover, during the preliminary examination the victim could only describe the physical characteristics of the perpetrator of the crime and did not identify McDonald as the person who committed the crime, and accordingly, McDonald fails to demonstrate that counsel's

advice regarding use of an identity defense at trial was the performance of an objectively unreasonable counsel. In addition, McDonald did not demonstrate a reasonable probability there was a plea offer from the State he would have accepted absent ineffective assistance of counsel, the State would not have withdrawn it in light of intervening circumstances, and the district court would have accepted such an offer. *See id.* at ___, 132 S. Ct. at 1385. Therefore, we conclude the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Michelle Leavitt, District Judge
Oronoz & Ericsson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk