

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

REYNOLD CHERY-SIMMONS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 69942

FILED

JUL 27 2016

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY: *[Signature]*  
CHIEF 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; Nancy L. Allf, Judge.

Appellant Reynold Chery-Simmons claims the district court erred by denying his claims of ineffective assistance of counsel raised in his petition filed on October 16, 2013, and in his supplemental petition filed on April 30, 2015, without holding an evidentiary hearing.<sup>1</sup>

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*,

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<sup>1</sup>Chery-Simmons filed his petition on October 16, 2013, more than one year after remittitur issued on direct appeal on February 6, 2012. Therefore, the petition was untimely filed. See NRS 34.726(1). The district court found good cause existed to hear the petition on the merits because Chery-Simmons filed his petition within a reasonable time after learning his direct appeal had been denied. We conclude the district court did not err in finding good cause to overcome the procedural bar.

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 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, Chery-Simmons claims counsel was ineffective for failing to file a motion to sever the counts. Chery-Simmons claims the counts constituted separate robberies and they should not have been joined because there was no common scheme or plan to the robberies and because evidence would not have been cross-admissible in the trials if they had not been joined.

Chery-Simmons fails to demonstrate counsel was deficient or resulting prejudice. The offenses were properly joined because they were part of the same scheme or plan and evidence of each of the offenses was cross-admissible to prove the other offenses. *See Weber v. State*, 121 Nev. 554, 573, 119 P.3d 107, 120 (2005); *see also Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (stating counsel is not deficient for failing to file futile motions).

Chery-Simmons admitted he committed the robberies to get money to provide gas for his stepmother's car. Each of the robberies was

committed late at night, in the same neighborhood, with the same or similar group of people, with a gun, and using the same vehicle. In each of the robberies, Chery-Simmons and at least one other person approached someone alone on the street, showed the gun, and demanded a purse or wallet. Further, evidence of each of the robberies would have been cross-admissible in each of the trials for the offenses to establish Chery-Simmons' motive, plan, or identity. See NRS 48.045(2). Chery-Simmons also fails to demonstrate a reasonable probability of a different outcome at trial had the motion been granted because Chery-Simmons confessed to committing each of the four robberies and there was evidence tying him to each of the robberies. Therefore, the district court did not err in denying this claim without holding an evidentiary hearing.

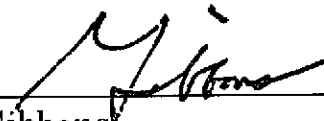
Second Chery-Simmons claims appellate counsel was ineffective for failing to raise the severance issue on appeal. Because we concluded trial counsel was not deficient for failing to file the motion and filing such a motion would not have had a reasonable probability of changing the outcome at trial, we conclude Chery-Simmons 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). Therefore the district court did not err in denying this claim without holding an evidentiary hearing.

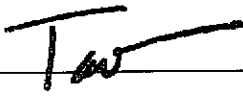
Finally, Chery-Simmons claims trial counsel was ineffective for advising him to go to trial rather than take a plea offer. Specifically, Chery-Simmons claims he wanted to accept the State's second offer to plead to one count of conspiracy and one count of robbery with a deadly weapon. Counsel talked him out of pleading because he had a viable

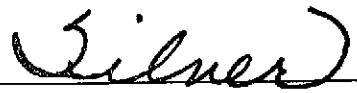
defense based on misidentification. Chery-Simmons claims this was bad advice because Chery-Simmons had confessed to the crimes.

The district court found, "it is evident from the record that Defendant was insistent upon receiving probation, that the State never provided Defendant with an offer stipulating to probation, and that this was the cause of failed negotiations." Chery-Simmons does not specifically challenge this finding and we conclude the district court's factual findings are supported by substantial evidence and are not clearly erroneous. Therefore, the district court did not err by denying this claim without holding an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

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