

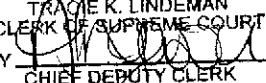
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GARY LEE HOSEY, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 69833

**FILED**

JUL 27 2016

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
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; Jennifer P. Togliatti, Judge.

Appellant Gary Lee Hosey, Jr., argues the district court erred in denying his claims of ineffective assistance of counsel raised in his October 27, 2014, 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). 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, Hosey argues his counsel were ineffective for failing to investigate the proximate cause of the accident or hire experts to analyze the road conditions. Hosey argues counsel may have discovered the accident was caused by a damaged drainage ditch, and not due to Hosey's intoxication. Hosey fails to demonstrate his attorneys' performances were deficient or resulting prejudice.

Hosey did not demonstrate counsel could have uncovered favorable evidence through reasonably diligent investigation. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (a petitioner claiming counsel did not conduct an adequate investigation must "address[] the quality of evidence that [counsel] would have developed with additional preparation"). Hosey merely speculated counsel could have uncovered favorable information and did not demonstrate that investigation or the hiring of experts would have revealed favorable evidence regarding the traffic accident. As Hosey failed to support his claim with specific, factual allegations regarding the cause of the accident or the condition of the roadway, he failed to demonstrate he is entitled to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d 222 at 225.

Moreover, the Nevada Supreme Court has explained that "a criminal defendant can only be exculpated where, due to a superseding cause, he was in no way the proximate cause of the result." *Etcheverry v. State*, 107 Nev. 782, 785, 821 P.2d 350, 351 (1991) (internal quotation marks omitted). "[A]n intervening cause must be a superseding cause, or the sole cause of the injury in order to completely excuse the prior act." *Id.*

(emphasis omitted). The record before this court shows Hosey was under the influence of alcohol and/or marijuana at the time of the accident and that he was driving substantially over the speed limit and committed other traffic violations when the accident occurred. Under these circumstances, Hosey fails to demonstrate reasonably diligent counsel would have attempted to show the condition of the roadway was the sole cause of the accident. He also fails to demonstrate a reasonable probability of a different outcome had counsel investigated the roadway or hired experts in an effort to show Hosey was not criminally liable for the accident. Therefore, we conclude the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, Hosey argues his counsel were ineffective for failing to seek a change of venue due to pretrial publicity. Hosey fails to demonstrate his attorneys' performances were deficient or resulting prejudice.

Hosey failed to demonstrate a fair and impartial trial could not have been had in Clark County. *See* NRS 174.455; *see also Hernandez v. State*, 124 Nev. 978, 992, 194 P.3d 1235, 1245 (2008) (explaining the petitioner failed to "establish that he was unable to secure an impartial jury or that the publicity was so intense that even an impartial jury would be swayed by the considerable pressure of public opinion." (quotation marks omitted)), *overruled on other grounds by Armenta-Carpio v. State*, 129 Nev. \_\_\_, \_\_\_, 306 P.3d 395, 399 (2013). Further, a review of the record before this court reveals there was substantial evidence of Hosey's guilt, and accordingly, Hosey failed to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted

on going to trial had counsel sought a change of venue. Therefore, we conclude the district court did not err in denying this claim without considering it at an evidentiary hearing.

Third, Hosey argues his counsel were ineffective for agreeing to consecutive sentences during plea negotiations and for failing to argue against multiple charges in this matter. Hosey argues the charges arose out of a single incident and, despite multiple victims, he should not have been forced to serve multiple consecutive sentences for a single incident. Hosey fails to demonstrate his attorneys' performances were deficient or resulting prejudice.


"[T]he usual rule, long established in Nevada, [is] that a course of conduct resulting in harm to multiple victims gives rise to multiple charges of the offense." *Galvan v. State*, 98 Nev. 550, 655 P.2d 155, 157 (1982). As Hosey was properly convicted and sentenced for multiple charges due to multiple victims, he failed to demonstrate an objectively reasonable attorney would have raised this argument or a reasonable probability of a different outcome had counsel raised this argument.<sup>1</sup> Therefore, we conclude the district court did not err in denying this claim without conducting an evidentiary hearing.

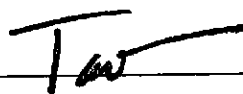
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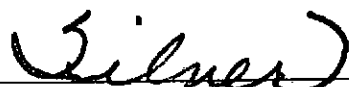
<sup>1</sup>Hosey argues the rule that multiple victims gives rise to multiple charges, as explained in *Galvan*, should be reevaluated. We disagree. Moreover, the Nevada Supreme Court's decisions are binding on this court and we cannot reevaluate that court's decisions.

Fourth, Hosey argues the cumulative errors of counsel amount to ineffective assistance of counsel and should warrant vacating the judgment of conviction. Hosey failed to demonstrate any errors were committed by his counsel, and accordingly, there were no errors to cumulate. Therefore, we conclude the district court did not err in denying this claim without conducting an evidentiary hearing and we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Jennifer P. Togliatti, District Judge  
Terrence M. Jackson  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk