

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MONTY LEE BURCH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 68622

**FILED**

OCT 19 2016

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
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; Kathleen E. Delaney, Judge.

Appellant Monty Lee Burch argues the district court erred in denying his claims of ineffective assistance of trial counsel raised in his November 9, 2011, 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).

First, Burch argues his trial counsel was ineffective for disclosing to the State a report from a defense DNA expert. Burch asserts the DNA report was not favorable, counsel did not intend to call the expert as a witness at trial, and under those circumstances, counsel should not have disclosed such information. Burch fails to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he had noticed the DNA expert as a witness and felt he had an ethical duty to disclose her report, even though he ultimately decided not to call her as a witness at trial. The district court concluded that counsel properly disclosed the DNA report as required by NRS 174.234(2) and Burch fails to demonstrate the district court erred in so concluding. The district court further found that the defense DNA expert's report reiterated the conclusions of the State's DNA expert and substantial evidence supports that conclusion. As the defense DNA report matched the conclusions of the State's DNA expert and the defense DNA report was not introduced at trial, Burch fails to demonstrate a reasonable probability of a different outcome at trial had counsel declined to disclose the defense expert's DNA report. Therefore, we conclude the district court did not err in denying this claim.

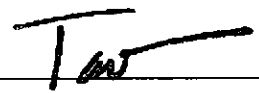
Second, Burch argues his trial counsel was ineffective for failing to properly explain the quality of the evidence against him or the plea offers from the State. Burch fails to demonstrate his trial counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified the public defender's office initially represented Burch and he was later appointed Burch's counsel due to a conflict. Counsel testified he could not recall if the State's plea offer had occurred when he or the public defender's office represented Burch, but remembered Burch was not interested in accepting the plea offer. Counsel

also testified his general practice in these types of cases, and particularly in cases with the type of physical evidence faced by Burch, is to explain to the defendant it is in his best interests to accept the State's offer. The district court concluded counsel was credible. Burch fails to demonstrate the district court abused its discretion in this regard.

Given the district court's findings, Burch fails to demonstrate his counsel's performance was objectively unreasonable. In addition, Burch 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 *Lafler v. Cooper*, 566 U.S. \_\_\_, \_\_\_, 132 S. Ct. 1376, 1385 (2012); *Missouri v. Frye*, 566 U.S. \_\_\_, \_\_\_, 132 S. Ct. 1399, 1409 (2012). Therefore, we conclude Burch fails to demonstrate the district court erred in denying this claim.

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

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

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

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

cc: Hon. Kathleen E. Delaney, District Judge  
Oronoz, Ericsson & Gaffney, LLC  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk