

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JORGE LUIS PONCE,
Appellant,
vs.
WARDEN, LOVELOCK C.C.,
Respondent.

No. 70817

FILED

MAR 23 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Jorge Ponce appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus.¹ Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Ponce claims the district court erred by denying his claim counsel was ineffective for failing to call witnesses on his behalf at trial. To prove ineffective assistance of counsel, a petitioner must demonstrate 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, 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

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

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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).


The district court concluded Ponce failed to demonstrate he was prejudiced by counsel's failure to call witnesses. Ponce claimed the witnesses would have testified they were around both the victim and Ponce and they had no knowledge the victim was being abused or treated in an improper manner. Some of the witnesses would have also testified the victim's family engaged in threatening conduct. The district court found that while counsel may have been deficient in not calling these witnesses, Ponce could not demonstrate a reasonable probability of a different outcome at trial had the witnesses been called. Ponce confessed to inappropriately touching the victim and to performing oral sex on the victim "no more than 30" times. Further, the victim testified extensively about Ponce's repeated sexual assaults over three years. Substantial evidence supports the decision of the district court, and we conclude the district court did not err by denying this claim.

Ponce also claimed the district court erred by denying his claims the district court abused its discretion by allowing an expert witness to testify about grooming and his sentence constituted cruel and unusual punishment. As to his first claim regarding the expert witness, this claim was previously raised and rejected on direct appeal. *See Ponce v. State*, Docket No. 64965 (Order of Affirmance, October 15, 2014). Therefore, this claim was barred by the doctrine of law of the case and cannot be avoided by a more detailed and focused argument. *See Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). As to his cruel

and unusual punishment claim, this claim could have been raised on direct appeal from his judgment of conviction and was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.810(b). Ponce failed to allege good cause and prejudice to overcome the procedural bar. Therefore, the district court did not err in denying these claims. Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. David A. Hardy, District Judge
Jorge Luis Ponce
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

²We also conclude the district court did not err by declining to hold an evidentiary hearing, see *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (to warrant an evidentiary hearing, a petitioner must allege specific facts that, if true, entitle him to relief), or by declining to appoint postconviction counsel, see NRS 34.750(1).