IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ABRAWIEN COLLINS PERCY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68743

ORDER OF AFFIRMANCE

Appellant Abrawien Percy appeals from a district court order denying his April 6, 2015, postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

Percy claims the district court erred by denying his claims he received ineffective-assistance-of-counsel. 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 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).

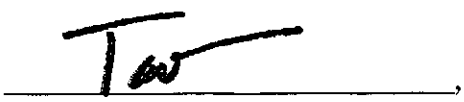
First, Percy claimed counsel was ineffective for failing to interview Percy's mother and sister and have them testify regarding a phone call. Specifically, Percy claimed his mother would have testified her disappointment expressed in the phone call was in relation to a jaywalking incident and her disappointment was not related to the instant charges. Percy failed to demonstrate he was prejudiced by counsel's failure to call his mother at trial to testify about the phone call. Whether Percy's mother was disappointed in him for conduct in the instant case or whether she was disappointed in him for jaywalking would not have had a reasonable probability of altering the outcome of this case. The evidence in this case was overwhelming. The victim identified Percy as being someone who looked like the person who sexually assaulted her. Further, Percy's fingerprints were found on a can of coke in the victim's kitchen, and a jacket and a lug wrench matching the description given by the victim were found in Percy's bedroom. Percy's DNA matched the DNA found on the jacket. Accordingly, the district court did not err in denying this claim, without holding 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).

Second, Percy claimed counsel was ineffective for failing to have Percy's mother and sister testify to challenge the search warrant. Percy claims on appeal the witnesses could have been used to challenge the introduction of certain items recovered from the search. This claim was not raised below in the district court and we decline to consider it for

the first time on appeal.[1] *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) *overruled on other grounds by Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver



_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Kerry Louise Earley, District Judge
Oronoz, Ericsson & Gaffney, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[1]Below, Percy claimed counsel should have used the witnesses to challenge the constitutionality of the search as a whole and they could have "testified regarding their personal knowledge and experiences during the police's actions in carrying out the search warrant."