

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DERRICK ANTHONY ARMSTRONG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69898

FILED

MAY 17 2017

ELIZABETH A. FLOWEN
CLERK OF SUPREME COURT
BY *M. Wilcox*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Derrick Anthony Armstrong appeals 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.

Armstrong argues the district court erred in denying his claims of ineffective assistance of counsel raised in his January 22, 2013, petition and supplements. 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, Armstrong argued his counsel was ineffective for failing to call him to testify at the suppression hearing. Armstrong asserted his testimony would have demonstrated Heather Hildenbrand did not have the authority to permit the officers to search the apartment. Armstrong failed to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, Armstrong's counsel testified he advised Armstrong not to testify because he believed the district court would not have found him to be credible due to his prior convictions involving drugs and because Armstrong had not been truthful with police officers the night of his arrest. Tactical decisions such as this one "are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which the district court concluded Armstrong did not demonstrate. Substantial evidence supports the district court's conclusion in this regard. Armstrong failed to demonstrate a reasonable probability of a different outcome at the suppression hearing had counsel advised him to testify. Therefore, we conclude the district court did not err in denying this claim.¹

¹In his reply brief, Armstrong argues the State failed to respond to an assertion in his opening brief that the police moved items throughout the apartment in an effort to fabricate Hildenbrand's authority over that residence. In his opening brief and before the district court, Armstrong raised this issue within the context of a claim of ineffective assistance of counsel for the failure to call Armstrong to testify at the suppression hearing. We conclude the State appropriately responded to Hildenbrand's ineffective assistance of counsel claim. Armstrong did not raise an independent claim that the police attempted to fabricate Hildenbrand's authority during the district court proceedings, and to the extent he attempts to do so on appeal, we decline to consider such a claim in the first instance. See *McNelson v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

Second, Armstrong argued his counsel was ineffective for failing to question the police officers at the suppression hearing regarding Armstrong's statements at the time of his arrest. Armstrong failed to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, a police officer testified Armstrong initially stated he did not know Hildenbrand when officers arrived at the apartment complex in response to a report of a domestic disturbance. Armstrong's counsel testified he was aware of this information and concluded it was not beneficial information for the defense. Under these circumstances, Armstrong failed to demonstrate it was objectively unreasonable for counsel to decline to pose questions regarding this information. As the testimony at the evidentiary hearing established Armstrong initially stated he did not know Hildenbrand, when he actually had a romantic relationship with her, Armstrong did not demonstrate a reasonable probability of a different outcome had counsel questioned the police officers at the suppression hearing regarding this information. Therefore, we conclude the district court did not err in denying this claim.²

Third, Armstrong argued his counsel was ineffective for failing to present jail-phone calls he had with Hildenbrand to impeach her testimony at the suppression hearing. Armstrong argued the nature of the calls would have demonstrated Hildenbrand did not actually reside at

²In his reply brief, Armstrong argues the State failed to adequately respond to this claim, and therefore conceded the district court erred in denying this claim. However, we conclude the State's response to this claim in its answering brief is adequate for this court to appropriately review this claim.

the apartment and police officers threatened to charge her with drug offenses if she did not consent to a search of the apartment. Armstrong failed to demonstrate counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he spent a significant amount of time reviewing the call recordings in preparation for trial and concluded they were not helpful because they contained numerous prejudicial statements. Counsel was not sure why he did not introduce them at the suppression hearing, but testified Armstrong had decided not to pursue a defense which may have implicated Hildenbrand in criminal offenses. Given that limitation and the nature of the calls, Armstrong did not demonstrate counsel acted in an objectively unreasonable manner in failing to impeach Hildenbrand's testimony at the suppression hearing with the call recordings.

In addition, the Nevada Supreme Court already concluded the facts regarding entry of the apartment demonstrated the police officers had a reasonable belief Hildenbrand had the apparent authority to consent to a search of the apartment, *Armstrong v. State*, Docket No. 57741 (Order of Affirmance, September 13, 2012), and the testimony at the postconviction evidentiary hearing further supported this conclusion. That testimony included the police officers' discussion with fellow residents and employees of the apartment complex, which supported Hildenbrand's statements that she resided in Armstrong's apartment. Under these circumstances, the police officers reasonably believed Hildenbrand had the authority to consent to the entry and search of the apartment, *see Illinois v. Rodriguez*, 497 U.S. 177, 188-89 (1990), and Armstrong failed to demonstrate a reasonable probability of a different outcome had counsel attempted to impeach Hildebrand's testimony

concerning her residence at the apartment. Therefore, we conclude the district court did not err in denying this claim.


Fourth, Armstrong argued his counsel was ineffective for failing to properly question witnesses at the suppression hearing in order to establish the sequence of events leading to the search of Armstrong's apartment. Armstrong failed to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he did not cross-examine witnesses at the suppression hearing regarding the sequence of events leading to the apartment search because the sequence had already been established at the trial.³ Tactical decisions such as this one "are virtually unchallengeable absent extraordinary circumstances," *Ford*, 105 Nev. at 853, 784 P.2d at 953, which the district court concluded Armstrong did not demonstrate. Substantial evidence supports the district court's conclusion in this regard. Armstrong failed to demonstrate a reasonable probability of a different outcome at the suppression hearing had counsel raised additional questions regarding this type of information. Therefore, we conclude the district court did not err in denying this claim.

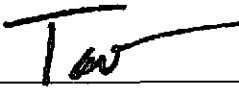
Fifth, Armstrong argued the cumulative errors of counsel amount to ineffective assistance of counsel and should warrant vacating the judgment of conviction. Armstrong failed to demonstrate any errors were committed by his counsel, and accordingly, there were no errors to


³The trial in this matter occurred prior to the suppression hearing following the Nevada Supreme Court's decision on the first direct appeal. *Armstrong v. State*, Docket No. 50616 (Order of Reversal and Remand, July 31, 2009).

cumulate. Therefore, we conclude the district court did not err in denying this claim.

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Kathleen E. Delaney, District Judge
Jean J. Schwartzner
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk