

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DONALD ALVA OLIVER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 71513

**FILED**

SEP 13 2017

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Donald Alva Oliver appeals from a district court order denying the postconviction petition for a writ of habeas corpus he filed on September 18, 2015. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Oliver claims the district court erred by denying his petition because he was deprived of effective assistance of counsel. To establish ineffective assistance of trial counsel, a petitioner must demonstrate counsel's performance was deficient because it fell below an objective standard of reasonableness, and resulting prejudice in 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 (1984). The petitioner must demonstrate both components of the ineffective-assistance inquiry—deficiency and prejudice. *Id.* at 697. We give deference to the district court's factual findings if they are supported by substantial evidence and are not clearly wrong 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, Oliver claimed defense counsel was ineffective for failing to confront a witness against him. Oliver argued counsel should have cross-examined victim Belinda Kappert when she was given the opportunity to do so as a remedy for the State's failure to provide discovery of a second photographic lineup. And Oliver asserted if counsel had cross-examined Kappert then she could have impeached Kappert's testimony regarding her inability to identify the coconspirator in the second photographic lineup.

The district court made the following findings. It was significant Kappert identified Oliver in the first photographic lineup with "100 percent" confidence before she was asked to identify the coconspirator in the second photographic lineup. It was unclear how defense counsel's decision not to question Kappert about her identification of the coconspirator constituted deficient performance because Kappert's answers would have bolstered Kappert's identification of Oliver. There was no possibility of prejudice and Oliver made no showing of how this impeachment would have changed the outcome of the trial.

The record supports the district court's factual findings, and we conclude Oliver failed to demonstrate defense counsel was ineffective by deciding not to recall Kappert for additional cross-examination. *See Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (petitioner bears the burden of proving ineffective assistance by a preponderance of the evidence); *Rhyne v. State*, 118 Nev. 1, 8 & n.3, 38 P.3d 163, 167 & n.3 (2002) (decisions regarding whether to call a particular witness are tactical decisions); *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989)

("Tactical decisions are virtually unchallengeable absent extraordinary circumstances.").

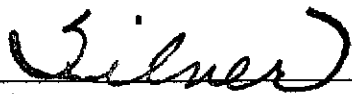
Second, Oliver claimed defense counsel was ineffective for failing to investigate and compel the presence of witnesses who were present when he pawned victim George Williams' ring. Oliver maintained he asked defense counsel on several occasions to subpoena the person who drove him to the pawnshop and the person who asked him to pawn the ring so they could testify on his behalf. And Oliver argued, "[t]hese two individuals would have supported [his] defense that he pawned the ring solely because one of the individuals, the owner of the ring, had no identification."


The district court made the following findings. It was unlikely these witnesses would have come to court. But, even if they had, their credibility as the ones who obtained the ring illegally would be pitted against the credibility of the victim whose ring was taken. "This dynamic would conflict with defense counsel's strategy, which emphasized the objective fact that [Oliver] was 'the wrong guy' based on his handedness." Because the pawnshop video depicted Oliver taking and keeping the money after pawning the ring, the argument Oliver pawned the ring for someone else was unlikely to be persuasive. Defense counsel made a professional decision not to call these unreliable witnesses and Oliver failed to provide any facts that would support a finding of prejudice.

The record supports the district court's factual findings, and we conclude Oliver failed to demonstrate he was prejudiced by defense counsel's failure to investigate and subpoena his possible defense witnesses.

*See Means*, 120 Nev. at 1012, 103 P.3d at 33; *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

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

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

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

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

cc: Hon. Douglas Smith, District Judge  
Matthew D. Carling  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk