

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TERRY ANTHONY BALL,  
Appellant,  
vs.  
ISIDRO BACA, WARDEN, NORTHERN  
NEVADA CORRECTIONAL CENTER,  
Respondent.

No. 72331

FILED

NOV 14 2017

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

*ORDER OF AFFIRMANCE*

Terry Anthony Ball appeals from a district court order dismissing the postconviction petition for a writ of habeas corpus he filed on December 17, 2015.<sup>1</sup> Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

In his petition, Ball claimed he received ineffective assistance of trial and appellate 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 petitioner would not have pleaded guilty and would have insisted on going to trial. *Kirksey v. State*, 112 Nev. 980, 997-88, 923 P.2d 1102, 1107 (1996).

Similarly, to establish ineffective assistance of appellate counsel, a petitioner must demonstrate counsel's performance was

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

deficient because it fell below an objective standard of reasonableness, and resulting prejudice in that the omitted issue had a reasonable probability of success on appeal. *Id.* at 998, 923 P.2d at 1114.

The petitioner must demonstrate both components of the ineffective-assistance inquiry—deficiency and prejudice. *Strickland*, 466 U.S. at 697. 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).

Ball claimed trial counsel were ineffective for (1) failing to investigate whether he used toy guns to commit his robberies,<sup>2</sup> (2) failing to object to the deadly-weapon argument the State made during the preliminary hearing, and (3) allowing him to enter guilty pleas to charges that included the use of a deadly weapon. Ball further claimed appellate counsel was ineffective for failing to raise the issue of whether toy guns can support the imposition of a deadly weapon enhancement.

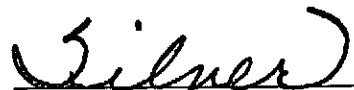
The district court found even if counsel had investigated whether the toy guns were actually real guns, or raised the issue on appeal, Ball would not have been entitled to relief. Ball used the guns to provoke a deadly reaction from the robbery victims. And the Nevada Supreme Court has consistently held that an inoperable firearm, which would necessarily include a toy gun in this case, is considered a deadly weapon for purposes of the sentence enhancement because its use may provoke a deadly reaction from the victim or from the bystanders.


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<sup>2</sup>Ball did not argue he used a toy gun on direct appeal and there is nothing in the record before this court that indicates Ball used a toy gun. Further, Ball pleaded guilty to using a deadly weapon.

The record supports the district court's findings and we conclude it did not err by dismissing Ball's postconviction habeas petition. *See Barnhart v. State*, 122 Nev. 301, 304-05, 130 P.3d 650, 652 (2006) ("Whether [a] gun was actually loaded and capable of firing bullets in a deadly fashion is of no consequence in determining whether it is a deadly weapon . . . even an inoperative firearm is considered a deadly weapon for purposes of the sentence enhancement because its use may provoke a deadly reaction from bystanders." (internal quotation marks omitted)). Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>3</sup>

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

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

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

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<sup>3</sup>To the extent Ball also claimed the district court abused its discretion by imposing the deadly weapons enhancement, his claim fell outside the narrow scope of claims permissible in a habeas petition challenging a judgment of conviction based on a guilty plea. *See* NRS 34.810(1)(a).

cc: Hon. Scott N. Freeman, District Judge  
Terry Anthony Ball  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk