

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TERON DEALONTA FRANKLIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72579

FILED

FEB 14 2018

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

ORDER OF AFFIRMANCE

Teron Dealonta Franklin appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on January 14, 2015, and a supplemental petition filed on October 9, 2015. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Franklin contends the district court erred by denying several of his claims that trial counsel was ineffective. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *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.

For purposes of the deficiency prong, counsel is strongly presumed to have provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *Id.* at 690. And for both prongs, the petitioner bears the burden of demonstrating 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—including credibility determinations—that are supported by substantial evidence and 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); *Little v. Warden*, 117 Nev. 845, 854, 34 P.3d 540, 546 (2001).

First, Franklin argued counsel failed to communicate the State's final guilty plea offer until after it had already expired. The district court found Franklin was not credible and, accordingly, Franklin failed to demonstrate by a preponderance of the evidence that counsel failed to communicate the offer or he would have accepted it. *See Missouri v. Frye*, 566 U.S. 134, 145, 147 (2012) (holding counsel is deficient when she fails to timely communicate a favorable guilty plea offer and petitioner is prejudiced when he demonstrates a reasonable probability he would have accepted the offer, it would have been entered without the State rescinding it or the trial court rejecting it, and it was more favorable than the trial outcome). The district court's findings are supported by the record and are not clearly wrong. We therefore conclude the district court did not err by denying this claim.

Second, Franklin argued counsel should have withdrawn because she was not physically healthy enough to represent him at trial. The district court found counsel questioned prospective jurors, made an opening statement, cross-examined witnesses, and made closing arguments. These findings of active participation at trial are supported by the record and are not clearly wrong, and they thus belie Franklin's claim. We therefore conclude the district court did not err by denying this claim. *Cf. Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Third, Franklin argued counsel was unprepared to go to trial. Specifically, he noted counsel first met with him just over a week before the start of trial and she did not yet have his complete file, and he argued she should have sought a continuance to allow for a proper investigation. The district court found counsel engaged in detailed cross-examination of witnesses and argued the relevant facts and law in closing arguments, both of which demonstrated her preparation for trial. These findings are supported by the record and are not clearly wrong. Further, Franklin failed to demonstrate what further information could have been gleaned from a continuance or how it would have affected the outcome at trial. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). We therefore conclude the district court did not err by denying this claim.

Fourth, Franklin argued counsel did not understand the factual or legal basis of his case and told him a felony conviction—and thus habitual criminal treatment—was impossible. The district court found Franklin was not credible and counsel's actions at trial, summarized above, demonstrated her understanding of the case. These findings are supported by the record and are not clearly wrong. We therefore conclude the district court did not err by denying this claim.

Fifth, Franklin argued counsel suffered from an actual conflict of interest. A petitioner who demonstrates an actual conflict has adversely affected counsel's performance has satisfied *Strickland's* deficiency prong, and we presume prejudice. *See Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980); *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992). “[A] conflict exists when an attorney is placed in a situation conducive to divided loyalties.” *Clark*, 108 Nev. at 329, 831 P.2d at 1376 (quoting *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991)).

Franklin claimed counsel's conflict stemmed from her prosecution of him in two 2002 cases when she was a deputy district attorney. Franklin failed to demonstrate divided loyalties. First, we note the record does not demonstrate counsel was aware she had been assigned to Franklin's prior cases. Both of the 2002 cases were dismissed two weeks after the criminal complaint was filed due to witness unavailability, and in both cases, Franklin was prosecuted under a pseudonym. And Franklin did not demonstrate how counsel could feel a loyalty to a case of which she was unaware. Second, Franklin did not demonstrate the alleged conflict had any bearing on counsel's performance, adverse or otherwise. Finally, Franklin neither alleged nor demonstrated the 2002 cases and the instant case were substantially related or involved the revelation of privileged communications. *See Maiden v. Bunnell*, 35 F.3d 477, 480 (9th Cir. 1994) ("In cases of successive representation, conflicts of interests may arise if the cases are substantially related or if the attorney reveals privileged communications of the former client or otherwise divides his loyalties." (internal quotation marks omitted)). We therefore conclude the district court did not err by denying this claim.

Franklin next argues the district court improperly dismissed several ineffective-assistance-of-counsel claims as abandoned simply because he did not address them at the evidentiary hearing. Franklin did not abandon his claims, but neither is he entitled to relief. Franklin failed to demonstrate the underlying facts by a preponderance of the evidence because he failed to present evidence in support of these claims. Further, he failed to allege facts that would warrant relief for his insufficient-evidence claim. He argued counsel should have claimed insufficient evidence at the preliminary hearing as to how the victim's arm came to be

broken.¹ But so long as slight or marginal evidence supported a finding that the victim broke her arm as a result of Franklin's domestic violence,² there was sufficient evidence of the elements of battery constituting domestic violence resulting in substantial bodily harm to support the charges. See NRS 33.018; NRS 200.481(2)(b); *Sheriff v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980). Any other details of how the break occurred did not implicate sufficiency of the evidence supporting the charges. We therefore conclude the district court did not err by denying these claims. See *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

Finally, Franklin contends the district court erred in denying one of his claims that appellate counsel was ineffective. To demonstrate ineffective assistance of appellate counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697.

Franklin argued appellate counsel should have claimed trial counsel was ineffective for failing to convey the State's final plea offer because the issue was "conclusively established." Franklin failed to demonstrate appellate counsel was objectively unreasonable, because the claim required an expansion of the record. See *discussion, supra* at 2; see


¹Franklin was represented by different counsel at his preliminary hearing.

²Franklin's appendices do not contain a transcript of the preliminary hearing. However, they do contain a police report of the incident indicating the victim suffered a broken bone.

also *Pellegrini v. State*, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001) (“[W]e have generally declined to address claims of ineffective assistance of counsel on direct appeal unless there has already been an evidentiary hearing or where an evidentiary hearing would be unnecessary.” (footnote omitted)). Contrary to Franklin’s contention, the district court did not conclude “there is no right to effective assistance of appellate counsel whatsoever.” We therefore conclude the district court did not err by denying this claim.

Having concluded Franklin’s claims lack merit, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Lynne K. Simons, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk