

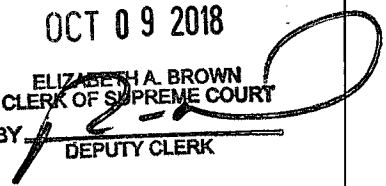
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EVAN EUGENE MOORE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73064

FILED

OCT 09 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Evan Eugene Moore appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on June 4, 2010. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Moore argues the district court erred by denying his ineffective-assistance-of-counsel claims. 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, Moore claimed counsel was ineffective for failing to visit him while he was in jail awaiting trial or otherwise communicating with him prior to trial. He claimed counsel only visited him once in jail while awaiting trial and, therefore, he was unable to talk to her about his alibi witness. At the evidentiary hearing, Moore was adamant counsel only visited him once but admitted her investigator visited over 15 times. Counsel testified she could not remember how many times she visited Moore prior to trial but she would never go to trial on a murder case without meeting with a client several times. Further, Moore entered records from the jail showing counsel visited with him at least twice.

The district court found Moore failed to demonstrate counsel was deficient. Specifically, the district court found Moore's testimony incredible and found counsel credible. Substantial evidence supports the district court's decision, and we conclude the district court did not err by denying this claim.

Second, Moore claimed counsel was ineffective for failing to discuss his right to testify with him. Counsel testified that while she could not specifically remember talking with Moore about his right to testify, she was confident she had informed Moore about his right to testify as that was her custom and practice as a defense attorney. Again, the district court found Moore's testimony incredible and found counsel credible. Substantial evidence supports the district court's decision, and we conclude the district court did not err by denying this claim.

Finally, Moore claimed counsel was ineffective at trial because she never brought up a discrepancy with the hotel desk clerk during trial

and did not argue Moore was right handed while the shooter in this case shot with his left hand. These claims were not raised in Moore's petition filed below. If there was a supplemental petition filed after counsel was appointed, Moore failed to provide this court with a copy of that supplemental petition. See NRAP 30(b)(2)(A), (b)(3); *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."). Further, it does not appear the district court allowed Moore to expand the evidentiary hearing beyond the limited issues set forth by the district court. See *Barnhart v. State*, 122 Nev. 301, 303-04, 130 P.3d 650, 651-52 (2006). Therefore, we decline to consider these claims on appeal. See *McNelson v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

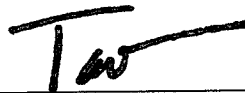
We conclude the district court did not err by denying the petition, and we

ORDER the judgment of the district court AFFIRMED.



Silver

C.J.



Tao

J.



Gibbons

J.

cc: Hon. Scott N. Freeman, District Judge
Edward T. Reed
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk