

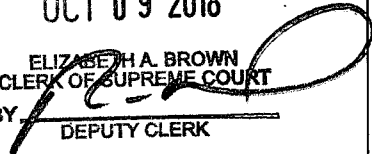
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RUDY M. BARRAZA,
Appellant,
vs.
DWIGHT NEVEN, WARDEN, HIGH
DESERT STATE PRISON,
Respondent.

No. 73543

FILED

OCT 09 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Rudy M. Barraza appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on October 8, 2012, and supplemental petition filed on June 22, 2015. Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.

Barraza contends the district court erred by denying ineffective-assistance-of-trial-counsel claims without first conducting an evidentiary hearing. 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. To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that, if true and

not repelled by the record, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Barraza first argued counsel was ineffective for failing to conduct an adequate pretrial investigation, including investigating whether Barraza was actually the driver of the vehicle, there was any video from other responding law enforcement vehicles, and there were any dispatch logs and/or reports indicating multiple suspects could have been the driver. Barraza failed to demonstrate prejudice because he failed to specify what a more thorough investigation would have revealed. *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 without first conducting an evidentiary hearing.

Barraza next argued counsel was ineffective for failing to use expert witnesses at trial. Barraza claimed counsel could have used an expert to obtain fingerprint and/or DNA evidence from the vehicle to identify alternative suspects and to investigate the lighting conditions at the time the driver exited the vehicle. Barraza failed to demonstrate deficiency or prejudice. The sheriff's office incident report indicated the pursuing deputy did not lose sight of the fleeing vehicle for more than five seconds; he saw the driver stop, exit the vehicle, and flee into a nearby thicket; and he never observed anyone else in or near the vehicle. The report also indicated Barraza was found in that thicket. In light of this information, counsel was not objectively unreasonable for not investigating alternative suspects. Moreover, Barraza failed to specify what a more thorough investigation would have revealed or how it would have affected the outcome at trial. *See id.* We therefore conclude the district court did

not err by denying this claim without first conducting an evidentiary hearing.

Barraza next argued counsel was ineffective for failing to adequately prepare for sentencing. Counsel had argued the State could not amend the habitual-criminal count in the information after a jury verdict was returned, and Barraza claimed counsel failed to brief the issue as ordered by the district court. Barraza failed to demonstrate deficiency or prejudice. At the time of Barraza's 2010 trial and 2011 sentencing, NRS 207.016(2) provided, "A [habitual criminal] count . . . may be separately filed after conviction of the primary offense" so long as sentencing is at least 15 days after the filing. 2007 Nev. Stat., ch. 327, § 56, at 1441. Thus, any brief arguing the State could not amend a habitual-criminal count would have been futile. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing. See *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

Finally, Barraza argued counsel was ineffective for advising him to reject an earlier plea offer based on counsel's erroneous belief that the State would not be able to amend the habitual-criminal count to seek a sentence pursuant to the large habitual criminal statute. To establish prejudice where a defendant rejects a plea offer based on counsel's objectively unreasonable advice, a defendant must demonstrate a reasonable probability that he would have accepted the plea offer, the prosecutor would not have withdrawn it, the district court would have accepted it, and the resulting conviction and/or sentence would have been less severe than what the defendant received. *Lafler v. Cooper*, 566 U.S. 156, 164 (2012). Barraza failed to allege, let alone demonstrate, specific

facts meeting all the requirements of *Lafler*. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

Silver

Silver

C.J.

Tao

Tao

J.

Gibbons

Gibbons

J.

cc: Hon. Kimberly A. Wanker, District Judge
David H. Neely, III
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk