

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DANIEL TODD ROSENBERG,
Appellant,
vs.
THE STATE OF NEVADA; AND
HAROLD WICKMAN, WARDEN,
NEVADA DEPARTMENT OF
CORRECTIONS,
Respondents.

No. 73831-COA

FILED

DEC 19 2018

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

ORDER OF AFFIRMANCE

Daniel Todd Rosenberg appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Rosenberg argues the district court erred by dismissing the claim of ineffective assistance of counsel raised in his July 11, 2016, petition and later-filed supplement without conducting an evidentiary hearing. 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. To warrant an evidentiary hearing, a petitioner must raise claims supported by specific allegations not belied by the record, that if true, would entitle him to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Rosenberg argued his counsel was ineffective for failing to seek disqualification of the trial-level judge. Rosenberg contended that the judge was biased against him due to Rosenberg's separate criminal case involving restaurants the judge frequented and that were co-owned by the son of a prominent attorney. Rosenberg also asserted the judge demonstrated he was biased by improperly stating during the plea canvass that Rosenberg should receive a life sentence in this matter. Rosenberg failed to demonstrate his counsel's performance was deficient or resulting prejudice.

"The test for whether a judge's impartiality might reasonably be questioned is objective and presents a question of law such that this court will exercise its independent judgment of the undisputed facts." *Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (2011) (internal citations, quotation marks and punctuation omitted); *see also Rippo v. Baker*, 580 U.S. ___, ___, 137 S. Ct. 905, 907 (2017) ("Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (internal quotation marks omitted)). The Nevada Supreme Court has previously held that the "remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence," *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998), and that "[a] judge is presumed to be impartial, and the party asserting the challenge carries the burden of establishing sufficient factual grounds warranting disqualification. Disqualification must be based on facts, rather than mere speculation." *Rippo v. State*, 113 Nev. 1239, 1248, 946 P.2d 1017, 1023 (1997) (internal citations omitted).


Based on the record in this matter, we conclude Rosenberg's factual allegations were insufficient to support his claim of bias stemming from the restaurant-related case. Rosenberg's allegations concerning that case amounted to mere speculation that the judge may have harbored bias against Rosenberg. Mere speculation is insufficient to establish improper bias on the part of a judge. Because Rosenberg failed to sufficiently allege the trial-level judge's impartiality might reasonably be questioned, he did not demonstrate his counsel's performance fell below an objective standard of reasonableness by failing to seek disqualification of the trial-level judge.

In addition, Rosenberg failed to demonstrate the trial-level judge improperly stated Rosenberg deserved a life sentence during the plea canvass. When canvassing Rosenberg concerning entry of his guilty plea, the trial-level court questioned Rosenberg concerning his understanding of the potential penalties he faced under the habitual criminal enhancement. The court noted the parties had agreed to a sentence under the habitual criminal enhancement and stated "that means that the maximum sentence you should receive in that case is what, please? Is it life?" The court then clarified "Life without the possibility of parole in Nevada State Prison. Do you understand that?" Rosenberg responded that he understood and the district court again clarified "So are we clear now the maximum possible sentence you should receive in case CR13-1726 is life in Nevada State Prison without the possibility of parole" and Rosenberg responded "Clear." The record in this matter demonstrates the district court did not indicate it had closed its mind to evidence concerning the appropriate sentence, but rather properly explained the potential penalties Rosenberg faced by entry of his guilty plea.

Given the record concerning this issue, we conclude Rosenberg failed to demonstrate his counsel's performance fell below an objective standard of reasonableness. Rosenberg also failed to demonstrate a reasonable probability of a different outcome had counsel sought the disqualification of the trial-level judge. Therefore, we conclude the district court did not err by dismissing this claim without conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Lynne K. Simons, District Judge
Oldenburg Law Office
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk