IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ABRAHAM AUSTIN, JR., A/K/A ABRAHAM AUSTINS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74659-COA

FILED

JAN 17 2019

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

ORDER OF AFFIRMANCE

Abraham Austin, Jr. appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on July 19, 2017.[1] Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Austin claims 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).

[1]This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

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). To warrant an evidentiary hearing, a petitioner must allege specific facts that, if true, entitle him to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Austin claimed counsel was ineffective for failing to prepare a defense and for allowing codefendant's counsel to do several aspects of the trial on Austin's behalf. Specifically, Austin claimed his codefendant presented a defense where a drug deal had gone bad and Austin did not understand or agree with that defense.

Austin failed to demonstrate counsel was deficient or resulting prejudice. Austin was canvassed prior to his codefendant testifying. Austin indicated to the trial court his defense was a drug deal gone bad and he understood that his codefendant was going to testify to that. Therefore, this claim is belied by the record. Further, counsel informed the district court it was part of his strategy to have Austin's codefendant's counsel perform several aspects of the trial. "Tactical decisions are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which Austin did not demonstrate. Therefore, we conclude the district court did not err by denying this claim without first holding an evidentiary hearing.

Second, Austin claimed counsel was ineffective for failing to file a motion to sever his case from that of his codefendant. Specifically, he claimed his codefendant's testimony placed him at the scene of the crime, this evidence would not have been offered had his trial been severed, and there was no other evidence placing him at the scene of the crime.

Austin failed to demonstrate counsel was deficient or resulting prejudice. Austin failed to demonstrate a motion to sever would have been successful, *see* NRS 174.165; *Rowland v. State*, 118 Nev. 31, 44, 39 P.3d 114, 122 (2002), and counsel is not deficient for failing to file futile motions, *see Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Further, while the victim did not identify Austin as one of the participants in the crime, the victim's wife and daughter who were also present during the crime, positively identified Austin as a participant. Therefore, there was evidence outside of his codefendant's testimony placing him at the crime. Accordingly, we conclude the district court did not err by denying this claim without first holding an evidentiary hearing.

Third, Austin claimed counsel was ineffective for failing to convey an offer of simple robbery to him. He claimed the only offer ever communicated to him was for pleading to all charges without the weapon enhancements. Austin claimed he first heard about the simple robbery offer at a hearing on August 20, 2014, which was before trial commenced.

This claim is belied by the record. At the hearing held on August 20, 2014, the State informed the district court it had offered Austin the option to plead guilty to robbery with the right to argue for an appropriate sentence. The district court specifically canvassed Austin and Austin affirmed that offer had been conveyed to him and he had rejected it. Therefore, we conclude the district court did not err by denying this claim without first holding an evidentiary hearing.

Fourth, Austin claimed appellate counsel was ineffective for allowing the State to change its theory regarding the kidnapping on appeal. Specifically, he claimed the State argued at trial the kidnapping occurred when the defendants moved the victim from the living room to the garage.

Austin claimed the State on appeal argued the kidnapping happened when the defendants attacked the victim outside the home and forced him inside. Austin failed to demonstrate he was prejudiced by counsel's performance. *See Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (to demonstrate prejudice for an ineffective assistance of appellate counsel claim, a petitioner must show resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal). While it does appear the State argued on appeal the kidnapping happened at the door rather than when he was moved to the garage, the Nevada Supreme Court did not rely on this argument in finding the kidnapping was not incident to the robbery. *See Austin v. State*, Docket No. 67323 (Order of Affirmance, September 16, 2016). Therefore, we conclude the district court did not err by denying this claim without first holding an evidentiary hearing.

Having concluded Austin was not entitled to relief, we ORDER the judgment of the district court AFFIRMED.

_____, A.C.J.
Douglas

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Abraham Austin, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk