

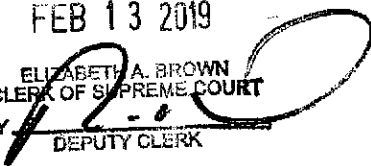
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ELVIS WELLS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74742-COA

FILED

FEB 13 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE AND REMANDING TO CORRECT
JUDGMENT OF CONVICTION*

Elvis Wells, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 28, 2017.¹ Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Wells first contends the district court erred by denying his claim that trial counsel was ineffective. To demonstrate ineffective assistance of 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. We give deference to the district court's factual

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

findings 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). 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).

First, Wells claimed counsel should have sought to postpone trial until the results of DNA testing were received because the results would have been exculpatory. Wells failed to demonstrate prejudice. The district court's conclusion that the results were not exculpatory is supported by substantial evidence in the record. At most, the largely inconclusive results suggested that Wells' codefendant, not Wells, was the gunman. However, as Wells was convicted of conspiracy in the crimes, there is no reasonable probability of a different outcome even had the jury reached that conclusion. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Wells claimed counsel should have questioned Wells' competency and sanity because counsel was aware of Wells' emotional state resulting from the illness and death of his father. Wells' bare claim failed to demonstrate deficiency or prejudice. Specifically, Wells did not claim that he lacked the sufficient ability to consult with the attorney with a reasonable degree of rational understanding or lacked a rational and factual understanding of the proceedings against him. See *Melchor-Gloria v. State*, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983) (setting out the standard for

competency). We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Wells also claimed, over the course of several grounds, that his rights to due process were violated during his trial. Such claims would have been appropriate to raise on direct appeal and are thus procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.810(1)(b). Wells failed to allege good cause to overcome the procedural bar. We therefore conclude the district court did not err by denying these claims without first conducting an evidentiary hearing.


Wells argued for the first time on appeal that appellate counsel was ineffective for failing to raise these claims. As these claims were not raised before the district court in the first instance, we decline to consider them on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). Insofar as Wells contends the district court should have allowed him to amend his petition, the record does not indicate that Wells sought to amend his petition, nor would the district court have necessarily been in error had it refused such a request. *See* NRS 34.750(5).


In reviewing Wells' claims, we noticed a typographical error in Wells' judgment of conviction. It reflects a sentence of 12 to 25 years in prison for count 1, which is at odds with the district court's oral pronouncement of sentence (10 to 25 years in prison) as well as the controlling sentencing statute. *See* NRS 207.010(1)(b)(3) (providing for a term of 10 to 25 years in prison). We therefore direct the district court to amend the judgment of conviction to reflect a sentence of 10 to 25 years in prison as to count 1. *See* NRS 176.565.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED AND REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.²


_____, A.C.J.
Douglas


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Tierra Danielle Jones, District Judge
Elvis Wells, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²We conclude the district court did not abuse its discretion by declining to appoint postconviction counsel. See NRS 34.750(1); *Renteria-Nova v. State*, 133 Nev. 75, 76, 391 P.3d 760, 760-61 (2017).