

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRYAN DRYDEN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 68020

FILED

FEB 23 2017

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Bryan Dryden appeals from an order of the district court denying his postconviction petition for a writ of habeas corpus filed on April 15, 2013. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Dryden argues the district court erred by denying his ineffective-assistance-of-counsel claims. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his 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, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry must be shown. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). We give deference to the 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, Dryden argued counsel was ineffective for failing to investigate potentially exculpatory DNA evidence. Specifically, Dryden argued counsel should have requested DNA testing of a person Dryden claimed was the actual person who killed the victim. There were several unknown DNA samples taken from the scene of the crime and Dryden believed they would match the other person's DNA. Dryden failed to demonstrate counsel was deficient or resulting prejudice.

After holding an evidentiary hearing, the district court found counsel's decision not to further attempt to obtain and test the DNA of the other man was a reasonable strategy decision in light of the lack of credible information corroborating Dryden's new theory and the fact she had already obtained a DNA sample from another individual Dryden insisted was the real killer, whose DNA did not match the samples found at the crime scene. Substantial evidence supports the decision of the district court because the decision not to pursue this investigation was tactical and reasonable. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) ("Where counsel and the client in a criminal case clearly understand the evidence and the permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources."); *Doleman v. State*, 112 Nev. 843, 847-48, 921 P.2d 278, 280-82 (1996) (tactical decisions are "virtually unchallengeable absent extraordinary circumstances"). Further, Dryden admitted to the police he had hit, stomped, and "knee dropped" the victim's head, and he only stopped hitting the victim when he realized the victim had stopped moving

and was dead.<sup>1</sup> Therefore, Dryden failed to demonstrate a reasonable probability he would not have pleaded guilty and would have insisted on going to trial had counsel done further DNA testing. Accordingly, we conclude the district court did not err in denying this claim.<sup>2</sup>

Second, Dryden claimed counsel was ineffective for failing to ensure Dryden listened to a recording of the truck driver's 911 call prior to entry of his plea. Dryden claimed the truck driver's 911 call supported his claim he was in a defensive position during the fight. The district court found the truck driver stated in the call and at the preliminary hearing that he saw two people fighting and another person standing off to the side. The truck driver stated the person to the side appeared to be Hispanic and could have been male or female. The district court concluded counsel was not deficient for failing to play this phone call for Dryden because there was nothing in the phone call worth pursuing.

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<sup>1</sup>To the extent Dryden claims counsel was ineffective for failing to file a motion to suppress his statement to the police, this claim was not raised below, and we decline to consider for the first time on appeal. See *Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) *overruled on other grounds by Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004).

<sup>2</sup>Dryden also claims the district court erred by denying his claim for genetic marker testing which he made pursuant to NRS 176.0918. Dryden raised this claim within his postconviction petition rather than filing a separate petition for genetic marker testing. We conclude the district court did not err in denying because it was outside the scope of claims that may be raised in a postconviction petition for a writ of habeas corpus challenging a judgment of conviction entered pursuant to a guilty plea. See NRS 34.810(1)(a). Further, we conclude Dryden did not follow the correct procedure for seeking DNA testing because he did not provide a declaration to support his petition. See NRS 176.0918(3).

Further, the district court concluded Dryden failed to demonstrate prejudice because the truck driver testified at the preliminary hearing, at which Dryden was present, and Dryden admitted to being involved in the fight. Substantial evidence supports the decision of the district court, and we conclude the district court did not err in denying this claim.<sup>3</sup>

Third, Dryden claimed counsel was ineffective for failing to have him evaluated for competency. He claimed he was having problems with his medications, was having anxiety attacks, believed a surveillance system was following him, and counsel knew about these issues and she did not refer him for competency. Dryden failed to demonstrate counsel was deficient. The district court found counsel was very familiar with the standards of competency because she handled almost all of the competency cases in the Clark County Public Defender's Office from 2009 to 2012. Counsel also had a social worker obtain a psychosocial evaluation, gathered his previous mental health records and his current medication records from the jail, and hired an expert to evaluate Dryden. The district court concluded counsel's decision was based upon reasonable professional judgment after a sufficient inquiry into the pertinent facts and circumstances. Substantial evidence supports the decision of the district court, and we conclude the district court did not err in denying this claim.

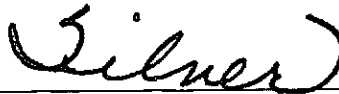
Finally, Dryden claims counsel was ineffective for coercing him into pleading guilty by lying to him about several things: the 911

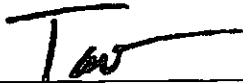
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<sup>3</sup>Dryden also argues counsel was ineffective for failing to obtain and use 911 recordings from a separate incident involving his girlfriend. He also claims these recordings demonstrate he was actually innocent. Because this claim was not raised below, we decline to consider on it appeal. *See Davis*, 107 Nev. at 606, 817 P.2d at 1173.

recordings not being available, the DNA of the other person being excluded, the fact counsel would provide him with monetary support while in prison, and his conviction being overturned on appeal because the State never "red flagged" the DNA samples in the system. In his petition below and his subsequent pleadings, Dryden specifically stated he was not arguing he was coerced into pleading guilty. Because these claims were not raised below, we decline to consider them for the first time on appeal. *See Davis*, 107 Nev. at 606, 817 P.2d at 1173. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Kathleen E. Delaney, District Judge  
Bryan Dryden  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk