

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DERRICK ALONZO SIMPSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 75898-COA

FILED

AUG 14 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Derrick Alonzo Simpson appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on December 28, 2016, and supplemental petitions filed on January 31, 2017, and October 16, 2017. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Simpson argues 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). 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, would entitle him to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Simpson claimed counsel was ineffective for failing to investigate and for failing to retain an expert. Specifically, he claimed counsel should have retained an expert to do DNA testing on the hoodie and to do fingerprint and DNA testing on the box cutter. Simpson failed to demonstrate prejudice. While there is a possibility DNA and fingerprint testing may have been helpful at trial, given the identification by the victim, Simpson being located in the area of the attack, and Simpson's proximity to the alleged weapon and hoodie, Simpson failed to demonstrate a reasonable probability of a different outcome at trial had the testing been done. Therefore, we conclude the district court did not err by denying this claim without first holding an evidentiary hearing.

Second, Simpson claimed counsel was ineffective for failing to meet and confer with him regarding his defense, which witnesses to call, and what investigation to do. Specifically, Simpson claimed he told counsel some information and counsel failed to follow up on this information. Simpson failed to demonstrate counsel was deficient or prejudice resulting from counsel's failure to follow up because Simpson failed to support this claim with specific facts that, if true, would entitle him to relief. Simpson failed to allege what information he told counsel, what witnesses counsel should have spoken to, and what further investigation counsel should have done based on the information Simpson provided to counsel. Therefore, we

conclude the district court did not err by denying this claim without an evidentiary hearing.

Third, Simpson claimed counsel was ineffective for failing to file a discovery motion or conduct a file review of the State's file. Simpson failed to demonstrate counsel was deficient or prejudice resulting in counsel's failure to file a motion or conduct a file review. Simpson failed to allege what counsel could have found had counsel filed the motion, or done a file review, or how this failure prejudiced him. Therefore, this claim was not supported by specific facts that, if true, entitled him to relief. Accordingly, we conclude the district court did not err by denying this claim without holding an evidentiary hearing.

Fourth, Simpson claimed counsel was ineffective for failing to file a motion for new trial based on conflicting evidence being presented at trial. Specifically, Simpson pointed out the discrepancy between the arrest report, an officer's testimony at the preliminary hearing, and an officer's testimony at trial about the where the box cutter was found, and also the discrepancy between the CAD report's description of the suspect and Simpson's height and weight.

Simpson failed to demonstrate counsel was deficient or prejudice resulting from counsel's failure to file a motion for new trial. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (holding counsel is not deficient for failing to file futile motions). The conflicts in testimony and the evidence presented at trial were not substantial and did not give rise to a reasonable probability the district court judge would have resolved the conflicting evidence differently than the jury and would have concluded the totality of the evidence failed to prove Simpson was guilty beyond a reasonable doubt. *See State v. Walker*, 109 Nev. 683, 685-86, 857

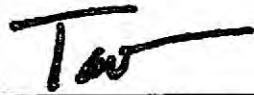
P.2d 1, 2 (1993). Therefore, we conclude the district court did not err by denying this claim without holding an evidentiary hearing.

Fifth, Simpson claimed counsel was ineffective for failing to call the arresting officer as a witness. Specifically, Simpson claimed counsel should have called this officer in order to demonstrate the officer's report differed from what other officers testified to at trial regarding where the box cutter was found. Simpson failed to demonstrate counsel was deficient or prejudice resulting from counsel's failure to call this officer at trial. Counsel was able to produce this testimony without calling this officer at trial. Therefore, we conclude the district court did not err by denying this claim without holding an evidentiary hearing.

Sixth, Simpson claimed cumulative error entitled him to relief. Even assuming that multiple deficiencies in counsel's performance may be cumulated to establish prejudice, *see McConnell v. State*, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009), Simpson failed to demonstrate multiple deficiencies in counsel's performance to cumulate. Therefore, we conclude the district court did not err by denying this claim without holding an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Kenneth C. Cory, District Judge
Gregory & Waldo, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk