

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EDWARD WARDELL BERRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71279

FILED

MAY 15 2017

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

ORDER OF AFFIRMANCE

Edward Wardell Berry appeals from an order of the district court denying the postconviction petition for a writ of habeas corpus he filed on June 22, 2016.¹ Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

First, Berry argues the district court erred by denying his claim counsel was ineffective for coercing him and misadvising him regarding his charges, and therefore, caused his plea to be unknowing and unintelligent. This claim was previously raised and rejected on appeal. *See Berry v. State*, Docket No. 69156 (Order of Affirmance, May 18, 2016). Therefore, this claim was barred by the doctrine of the law of the case and cannot be avoided by a more detailed and focused argument. *See Hall v. State*, 91 Nev. 314, 314-15, 535 P.2d 797, 798-99 (1975). Accordingly, the district court did not err by denying this claim.

Second, Berry argues the district court erred by denying his claim counsel was ineffective for failing to investigate his excessive bail

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

when there was no evidence of the underlying offense. To prove ineffective assistance of counsel, a petitioner must demonstrate that 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 that, 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).


Berry failed to demonstrate counsel was deficient. The district court concluded Berry's bail was set at \$50,000 not based on the strength of the evidence against him but because the State of California had a hold on Berry and Berry's prior criminal history included 6 felonies, four of which involved serious violence or threats. Therefore, the district court concluded counsel was not deficient for failing to investigate Berry's bail. Substantial evidence supports the decision of the district court, and we conclude the district court did not err by denying this claim.

Finally, Berry raises claims in his brief that were not raised below: counsel was ineffective for failing to file a motion to dismiss the charges, counsel was ineffective for failing to investigate, counsel was ineffective for failing to allow him to testify at the preliminary hearing,

counsel was ineffective for failing to hire an investigator, his plea was invalid because the plea canvass was insufficient, and his plea was invalid because no factual basis existed to support his conviction. Berry failed to raise these claims before the district court, and we decline to consider them in the first instance on appeal. See *McNelson v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Jennifer P. Togliatti, District Judge
Edward Wardell Berry
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk