

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THOMAS WILLIAM HARSH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 71043

**FILED**

JUN 14 2017

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

*ORDER OF AFFIRMANCE*

Thomas Harsh appeals from an order of the district court denying the postconviction petition for a writ of habeas corpus he filed on February 3, 2014, and his supplemental petitions filed on December 14, 2015, and March 7, 2016. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Harsh claims the district court erred by denying his claims of ineffective assistance of counsel. 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).

First, Harsh claims counsel was ineffective for failing to investigate and produce documents regarding the victim's bankruptcy and the fact she did not list the vehicle as an asset during the bankruptcy proceedings. Harsh claims the victim could have been impeached with this evidence and counsel could have argued she committed perjury by failing to list the vehicle in her bankruptcy documents and by testifying at trial her bankruptcy attorney told her not to list the vehicle as an asset.

The district court found counsel was not deficient for failing to investigate because the victim testified at trial she did not list the vehicle in her bankruptcy documents, the bankruptcy documents would not have been admissible under NRS 50.085(3), and counsel thoroughly cross-examined the victim about her ownership of the vehicle and the fact she did not re-title the vehicle until October, 10 months after receiving the vehicle from the previous owner. Further, the district court found Harsh failed to demonstrate a reasonable probability of a different outcome at trial because the jury was aware of the victim's dishonesty in her bankruptcy proceeding and received extensive testimony attacking her veracity. The district court also found this claim failed on the prejudice prong because the Nevada Supreme Court already concluded Harsh failed to demonstrate a reasonable probability of a different outcome at trial had this evidence been presented at trial. The district court found the prejudice claim was barred by the doctrine of law of the case and could not be avoided by a more detailed and precisely focused argument.

We agree with Harsh that neither the doctrine of law of the case nor res judicata barred this claim. However, we conclude Harsh

failed to demonstrate prejudice such that there was reasonable probability of a different outcome at trial had counsel investigated and produced documents from the victim's bankruptcy proceedings. Therefore, while the district court erred by finding the claim was barred by the doctrine of law of the case and res judicata, we nevertheless affirm the denial of this claim. See *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding a correct result will not be reversed simply because it is based on the wrong reason).

Second, Harsh claims counsel was ineffective for failing to argue the victim failed to retitle the vehicle within 10 days of the title being signed over to her and for failing to subpoena the custodian of records from the DMV in order to admit documents demonstrating someone other than the victim was the legal owner of the vehicle. The district court found counsel was not deficient and there was no resulting prejudice because the fact the vehicle was titled in someone else's name at the time the vehicle was stolen was not disputed at trial. Substantial evidence supports the decision of the district court and we conclude the district court did not err by denying this claim.

Third, Harsh claims the district court erred below by relying on *Palmer v. State*, 112 Nev. 763, 920 P.2d 112 (1996) to determine the victim was the owner of the vehicle. We conclude the district court did not err in this regard. While the facts were slightly different in *Palmer* than in the instant case, they were not so different as to preclude the district court from relying on *Palmer* in finding the victim was the owner of the vehicle. While there was no familial relationship between the owner and the victim in this case and the victim in this case did not pay for insurance on the vehicle, the victim in this case had exclusive control over the

vehicle during the applicable time period just as the victim did in *Palmer*. Further, under NRS 205.271, which the district court also relied on, to be an owner means “having the lawful use or control or the right to the use and control of a vehicle under a lease or otherwise for a period of 10 or more successive days.” In this case, the victim had control of the vehicle for a period of 10 or more successive days, and therefore, was the owner of the vehicle. Accordingly, the district court did not err.

Fourth, Harsh claims counsel was ineffective for failing to obtain the title that was presented at trial and had counsel obtained this title, he would have accepted negotiations, and not gone to trial. The district court found counsel did subpoena the DMV records, and therefore, counsel was not deficient. The district court also found Harsh’s claim he would have accepted the plea negotiations was a bare and naked claim and Harsh failed to explain how having the title in the victim’s name would have changed his decision with respect to the negotiations where the victim always had a possessory interest in the vehicle. Substantial evidence supports the decision of the district court, and we conclude the district court did not err by denying this claim.


Fifth, Harsh claims counsel was ineffective for failing to object to the use of expert testimony by a witness who was not noticed as an expert. Specifically, Harsh claims counsel should have objected to the testimony by a police officer regarding shaved keys. Harsh failed to demonstrate he was prejudiced because Harsh failed to demonstrate the State would not have been permitted to present the officer’s testimony. *See Sampson v. State*, 121 Nev. 820, 827, 122 P.3d 1255, 1259-60 (2005) (discussing the range of possible remedies for failure to make appropriate expert witness disclosures). Further, the district court found Harsh could


not demonstrate a reasonable probability of a different outcome at trial had the officer not testified about the shaved keys. The victim testified the vehicle was hers and it was stolen. Harsh was found in the vehicle, a Toyota, and the key being used for the vehicle was a Hyundai key. Further, Harsh told the officers the vehicle was not his and he "borrowed it from a guy" but he was unable to provide the person's name or contact information. Substantial evidence supports the decision of the district court, *see* NRS 205.273(1)(b), and we conclude the district court did not err by deny this claim.


Finally, Harsh claims the district court erred by denying his petition without holding an evidentiary hearing on his claims. We conclude the district court did not err by declining to hold an evidentiary hearing. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2 222, 225 (1984) (to warrant an evidentiary hearing, a petitioner must allege specific facts that, if true, would entitle him to relief).

Having considered Harsh's contentions on appeal and concluding he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Douglas Smith, District Judge  
Oronoz, Ericsson & Gaffney, LLC  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk