

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LAFAYETTE D. HOLMES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71134

FILED

JUN 14 2017

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

ORDER OF AFFIRMANCE

Lafayette Holmes appeals from an order of the district court denying the postconviction petition for a writ of habeas corpus he filed on May 18, 2016.¹ Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Senior Judge; Eighth Judicial District Court, Clark County; J. Charles Thompson, Senior Judge.

In his petition, Holmes claimed counsel was ineffective for failing to file a motion to sever the counts because the five counts were for three distinct incidents occurring on three different dates, the counts were unrelated, and the battery count was prejudicial to the other counts because it was violent.

¹This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).


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).


The district court found Holmes failed to demonstrate counsel was deficient or resulting prejudice. The court found counsel was not deficient for failing to file a futile motion. Further, the court found a motion to sever would not have been successful because the offenses charged were part of a common scheme or plan. The district court's findings are supported by substantial evidence. See NRS 173.115; *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (counsel is not deficient for failing to file futile motions). While the offenses occurred on separate dates and different locations and only some included violence, they were all part of a common scheme or plan to steal from kiosks on the

Las Vegas strip. Accordingly, we conclude the district court did not err by denying the petition, and we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Chief Judge, Eighth Judicial District Court
Hon. Joseph T. Bonaventure, Senior Judge
Hon. J. Charles Thompson, Senior Judge
Lafayette D. Holmes
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 counsel, *see* NRS 34.750(1), or by declining to hold an evidentiary hearing, *see Hargrove v. State*, 100 Nev. 498, 502-03; 686 P.2d 222, 225 (1984) (to warrant an evidentiary hearing, a petitioner must allege specific facts that, if true, entitle him to relief).