IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JASON EDWARD ELIASON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71168

FILED

JUN 14 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Jason Edward Eliason appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Eliason argues the district court erred in denying his claims of ineffective assistance of trial counsel he raised in his January 2, 2015, petition and supplement without conducting an evidentiary hearing. 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). To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations that are not belied by the record

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

First, Eliason argued his trial counsel were ineffective for failing to request a limiting instruction regarding testimony concerning Eliason's possession of a knife approximately ten days prior to the incident leading to the instant charges. Eliason failed to demonstrate his attorneys' performances were deficient or resulting prejudice. During the trial, Eliason's counsel informed the district court that they did not want the district court to give a limiting instruction regarding this information because they concluded such an instruction would be prejudicial to the defense. Tactical decisions such as this one "are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which Eliason did not demonstrate. Moreover, a review of the record reveals the victim testified Eliason threatened him with a knife during the incident in this matter, and considering the circumstances in this case, Eliason failed to demonstrate a reasonable probability of a different outcome had counsel requested a limiting instruction. Therefore, we conclude the district court did not err in denying this claim without conducting an evidentiary hearing.[1]

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[1]Eliason also argues the district court erred by denying this claim pursuant to the law of the case doctrine because this claim was not considered on direct appeal. On direct appeal, Eliason claimed the district court erred in admitting evidence he possessed a knife ten days prior to the instant offense and further asserted the district court should have provided the jury with a limiting instruction regarding the knife evidence even though his counsel did not want the district court to issue such an instruction. The Nevada Supreme Court concluded the knife evidence was properly admitted and "a limiting instruction was not required." *Eliason*

continued on next page . . .

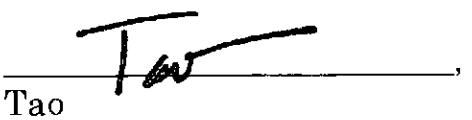
Second, Eliason argued his trial counsel were ineffective for refusing to allow him to testify. Eliason failed to demonstrate his attorneys' performances were deficient or resulting prejudice. The trial court informed Eliason he had the right to testify and he had to decide whether he wished to testify in this matter. Eliason acknowledged he had discussed testifying with counsel, he understood he had to decide whether to testify, and he decided to follow his attorneys' advice and not testify. In addition, Eliason had a lengthy criminal history and he would have been subject to cross-examination regarding a number of his prior convictions. *See* NRS 50.085(3); NRS 50.095. Given Eliason's statements to the district court and his criminal history, he failed to demonstrate counsel's advice was objectively unreasonable and counsel refused to allow him to testify, or there was a reasonable probability of a different outcome had counsel advised Eliason to testify. Therefore, we conclude the district court did not err in denying this claim without conducting an evidentiary hearing.

. . . *continued*

v. State, Docket No. 64782 (Order of Affirmance, July 22, 2014). The Nevada Supreme Court did not decide whether Eliason's attorneys' decisions with respect to a limiting instruction amounted to ineffective assistance of counsel, and therefore, the law of the case doctrine was not appropriately applied to this claim. *See Hsu v. Cty. of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 728 (2007) (explaining the law of the case doctrine "expresses the practice of courts generally to refuse to reopen what has been decided."); *see also Feazell v. State*, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995) (explaining that claims of ineffective assistance of counsel are generally not appropriate for review on direct appeal). Nevertheless, as the district court properly denied the petition, we affirm. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

Having concluded Eliason is not entitled to relief, we ORDER the judgment of the district court AFFIRMED.


Silver, C.J.


Tao, J.


Gibbons, J.

cc: Hon. Patrick Flanagan, Chief Judge
Second Judicial District Court, Department One
Oldenburg Law Office
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk