

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES ADRIAN FORD, A/K/A
DAVID BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69151

FILED

NOV 18 2016

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Charles Adrian Ford filed his petition on November 21, 2014, more than two years after issuance of the remittitur on direct appeal on October 10, 2012. *Ford v. State*, Docket No. 58907 (Order of Affirmance, September 12, 2012). Thus, Ford's petition was untimely filed. See NRS 34.726(1). Moreover, Ford's petition was successive because he had previously filed two postconviction petitions for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petitions.¹ See NRS 34.810(1)(b)(2); NRS 34.810(2). Ford's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS

¹Ford's previous petitions were filed in the district court on December 6, 2013, and March 27, 2014. Ford did not appeal from the denial of those petitions.

34.726(1); NRS 34.810(1)(b); NRS 34.810(3). “Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory.” *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).

The district court concluded Ford had good cause to excuse his delay because he should have been appointed postconviction counsel to aid him with his first petition.² However, the failure to appoint postconviction counsel cannot constitute good cause for this case. The appointment of postconviction counsel in this matter was not statutorily or constitutionally required. *See Brown v. McDaniel*, 130 Nev. 331 P.3d 867, 870 (2014); *Crumpp v. Warden*, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); *McKague v. Warden*, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996); *see also* NRS 34.750 (providing for the discretionary appointment of postconviction counsel in non-capital cases). Because the appointment of postconviction counsel was not required in this matter, the district court erred in concluding this issue constituted good cause for this untimely and successive petition. *See Brown*, 130 Nev. at ___, 331 P.3d at 873 (explaining the state postconviction statutes do not permit the failure to

²We note the district court did not issue a written order regarding its good cause finding, but rather stated its conclusions during a hearing. We also note Ford asserted he had good cause due to abandonment by his appellate counsel, but the district court properly did not grant relief for that good-cause claim. As Ford’s claim of abandonment by appellate counsel was itself procedurally barred because it was raised in an untimely manner and in a successive petition, it cannot constitute good cause for additional procedurally barred claims. *See Hathaway v. State*, 119 Nev. 248, 71 P.3d 503 (2003) (“[I]n order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally barred.”).

appoint postconviction counsel for an initial petition in a non-capital case to provide good cause for a later petition). Therefore, the district court erred in determining Ford had good cause to overcome the procedural bars.

However, we note the district court correctly concluded Ford did not demonstrate actual prejudice sufficient to overcome the procedural bars. *See State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 94-95 (2012) (explaining that a petitioner must demonstrate both cause for the delay and undue prejudice in order to overcome the procedural time bar under NRS 34.726). To determine if Ford can establish actual prejudice sufficient to overcome the procedural bars, we must consider his underlying claims to ascertain whether any of his alleged claims of error “worked to his actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions.” *Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993). For the reasons discussed below, we conclude Ford fails to establish actual prejudice and therefore, the district court properly denied the petition as procedurally barred.

Ford’s underlying claims involved ineffective assistance of his trial 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. To warrant an evidentiary hearing, a petitioner must raise claims that are supported by

specific allegations that are not belied by the record, and if true, would entitle him to relief. *Rubio v. State*, 124 Nev. 1032, 1046 & n.53, 194 P.3d 1224, 1233-34 & n.53 (2008) (noting a district court need not conduct an evidentiary hearing concerning claims that are procedurally barred when the petitioner cannot overcome the procedural bars).

First, Ford argued his trial counsel was ineffective for failing to conduct pretrial investigation regarding numerous potential witnesses, a number of which Ford is unable to name. Ford failed to demonstrate his trial counsel's performance was deficient or resulting prejudice. Ford merely speculated these witnesses would have provided favorable information and he did not demonstrate investigation into these witnesses would have revealed favorable testimony or evidence. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (a petitioner claiming counsel did not conduct an adequate investigation must specify what a more thorough investigation would have uncovered).

Moreover, a review of the record reveals significant evidence of Ford's guilt. The evidence and testimony demonstrated that shortly after the victim arrived in Las Vegas, Ford threatened to harm the victim or her children if she did not engage in acts of prostitution and provide him with her earnings. Ford directed the victim to work with a second prostitute who would monitor her, to call him repeatedly to report upon her activities, and then return to their motel room. Ford then repeatedly sexually assaulted the victim in a manner causing injuries, which were corroborated through a sexual assault examination. A short time following the sexual assaults, the victim was able to report these incidents to the authorities, she informed them where Ford could be located, and the police discovered him in that location. Upon a search of Ford's motel

room, the police discovered the victim's belongings, and in particular her laptop computer was located in Ford's duffel bag. Under these circumstances, Ford failed to demonstrate a reasonable probability of a different outcome at trial had counsel performed further investigation into potential witnesses.

Second, Ford argued his trial counsel was ineffective for failing to interview the victim prior to trial so as to be properly prepared to cross-examine her. Ford failed to demonstrate his counsel's performance was deficient or resulting prejudice. During trial, counsel cross-examined the victim at length and challenged her version of events. Under these circumstances, Ford failed to demonstrate counsel was unprepared or performed in an objectively unreasonable manner. Given the significant amount of evidence of Ford's guilt presented at trial, Ford failed to demonstrate a reasonable probability of a different outcome had counsel sought to interview the victim prior to trial.

Third, Ford argued his counsel was ineffective for failing to meet and confer with him regarding potential defenses, witnesses, or investigations. Ford failed to demonstrate trial counsel's performance was deficient or resulting prejudice. Ford asserted he informed counsel of potential witnesses and of investigations counsel could have undertaken, which demonstrates he had an opportunity to confer with counsel. Ford did not address the quality of any information he provided which counsel failed to investigate or explain how any of that information would have altered the outcome of his trial. *See Molina*, 120 Nev. at 192, 87 P.3d at 538. Accordingly, Ford failed to demonstrate a reasonable probability of a different outcome at trial had counsel spent more time discussing these issues with Ford.

Fourth, Ford argued his trial counsel was ineffective for failing to retain experts to review the sexual assault examination of the victim and for failing to adequately question the nurse who performed the sexual assault examination. Ford failed to demonstrate his counsel's performance was deficient or resulting prejudice. Ford did not demonstrate a defense-retained expert would have provided favorable evidence had counsel retained such an expert. *See id.* Moreover, a review of the record reveals counsel cross-examined the nurse at length regarding her findings and, considering the totality of the quality of the cross-examination, Ford failed to demonstrate counsel was not adequately prepared for the nurse's testimony. Given the significant evidence of Ford's guilt presented at trial, he failed to demonstrate a reasonable probability of a different outcome at trial had counsel retained defense experts or further prepared to cross-examine the nurse.

Fifth, Ford argued his trial counsel was ineffective for failing to object when the district court improperly instructed the jury regarding the pandering charge because the instruction failed to inform the jurors they must find Ford acted with specific intent in order to convict him of that charge. Ford could not demonstrate prejudice for this claim because the Nevada Supreme Court already considered the underlying claim and stated the evidence produced at trial "shows that Ford specifically intended to induce the victim to become or remain a prostitute and we are confident that the jury would have convicted him had a proper instruction been given." *Ford v. State*, Docket No. 58907 (Order of Affirmance, September 12, 2012).

Sixth, Ford argued his trial counsel was ineffective for failing to object when the State made inflammatory remarks during closing

arguments. Ford could not demonstrate either deficiency or prejudice because on direct appeal the Nevada Supreme Court already reviewed the challenged remarks and concluded the challenged remarks were not improper. *Ford v. State*, Docket No. 58907 (Order of Affirmance, September 12, 2012).

Seventh, Ford argued his trial counsel was ineffective for failing to properly advise him during the plea negotiations. Ford asserted his belief that a plea offer was extended, but counsel failed to convey that offer to Ford. Ford failed to demonstrate his counsel's performance was deficient or resulting prejudice for this claim. Ford provided no information regarding the alleged plea offer and provided no argument as to whether he would have accepted the offer instead of proceeding to trial. Accordingly, Ford did not demonstrate a reasonable probability there was a plea offer from the State he would have accepted absent ineffective assistance of counsel, the State would not have withdrawn it in light of intervening circumstances, and the district court would have accepted such an offer. *See Lafler v. Cooper*, 566 U.S. ___, ___, 132 S. Ct. 1376, 1385 (2012); *Missouri v. Frye*, 566 U.S. ___, ___, 132 S. Ct. 1399, 1409 (2012); *see also Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (explaining that a bare, unsupported claim is insufficient to demonstrate a petitioner is entitled to relief).

Eighth, Ford argued his trial counsel was ineffective for failing to object when counts on the verdict form were listed in a different order than on the amended information. Ford failed to demonstrate his counsel's performance was deficient or resulting prejudice. The verdict form properly listed the charged crimes as contained in the amended information, albeit in a different order. Under these circumstances, Ford

failed to demonstrate a reasonably diligent counsel would have objected to the order of the counts contained on the verdict form. Ford further failed to demonstrate a reasonable probability of a different outcome had counsel sought to correct the order of the counts as listed on the verdict form.

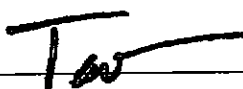
Ninth, Ford argued his trial counsel was ineffective for failing to object to inflammatory and irrelevant expert testimony regarding pimp-prostitute subculture. Ford failed to demonstrate his counsel's performance was deficient or resulting prejudice. The record reveals this expert testimony was admitted to explain Ford's actions and statements, as well as the victim's response to his actions, with respect to Ford's forcing the victim to engage in acts of prostitution. Thus, this expert testimony was properly admitted pursuant to NRS 50.275. *See Higgs v. State*, 126 Nev. 1, 17-18, 222 P.3d 648, 658-59 (2010) (explaining district court judges have wide discretion to admit expert testimony within the parameters of NRS 50.275).

In addition, the Nevada Supreme Court has previously permitted admission of expert testimony regarding the pimp-prostitute subculture, but cautioned there are limits to permissible uses of such testimony. *Ford v. State*, 127 Nev. 608, 625 n.9, 262 P.3d 1123, 1134 n.9 (2011). Considering the victim's testimony regarding Ford's threats, his directions regarding who she was permitted to talk with, Ford's use of sexual violence to control the victim, and the context of the expert testimony in this matter, Ford failed to demonstrate this testimony exceeded the permissible limit. Given the significant evidence of Ford's guilt presented at trial, Ford failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected to admission of this expert testimony.

Because Ford's claims would not have entitled him to relief, he failed to demonstrate actual prejudice sufficient to overcome the procedural bars. Therefore, we conclude the district court did not err by denying the petition without conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Valerie Adair, District Judge
Gregory & Waldo
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk