

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LEONARD CARL MCCASKILL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69051

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 dismissing a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Appellant Leonard Carl McCaskill argues the district court erred in dismissing his claims of ineffective assistance of trial counsel raised in his November 23, 2011, petition. 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 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, McCaskill argued his trial counsel was ineffective for failing to assert the jury instructions were improper because they effectively eliminated his theories of self-defense and mistake of fact. McCaskill failed to demonstrate his counsel's performance was deficient or resulting prejudice. The Nevada Supreme Court considered the underlying issues on direct appeal and stated the district court properly instructed the jury regarding transferred intent and self-defense, and because the jury was properly instructed on self-defense, a separate instruction regarding mistake of fact was not warranted. *McCaskill v. State*, Docket No. 55147 (Order of Affirmance, March 9, 2011). Given the Nevada Supreme Court's conclusion the jury was properly instructed with respect to these issues, McCaskill failed to demonstrate a reasonably diligent defense attorney would have objected to the jury instructions or sought different instructions and McCaskill failed to demonstrate a reasonable probability of a different outcome at trial had counsel done so. Therefore, the district court did not err in dismissing this claim without conducting an evidentiary hearing.

Second, McCaskill argued his trial counsel was ineffective for failing to investigate and present evidence regarding prior violent events committed by the victim towards McCaskill. McCaskill alleged he was aware of these violent events and it caused him to believe the victim was a dangerous threat. McCaskill failed to demonstrate his counsel's performance was deficient or resulting prejudice. McCaskill made a bare allegation there were prior uninvestigated violent events committed by the victim and he failed to support this allegation with specific facts, which was insufficient to demonstrate he is entitled to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. As McCaskill failed to support his claim,

he did not demonstrate counsel could have uncovered favorable evidence through reasonably diligent investigation. *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 “address[] the quality of evidence that [counsel] would have developed with additional preparation”).

Further, McCaskill did not allege and the record does not reveal he informed his counsel regarding events in which the victim acted violently towards him. If McCaskill, who would have been the primary source for such information, did not advise counsel regarding these events, counsel cannot have reasonably been expected to investigate them. *See Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994) (concluding counsel was not ineffective for failing to investigate statements when he was not informed of those statements ahead of trial); *see also Strickland*, 466 U.S. at 691 (explaining that a decision not to investigate must be assessed for reasonableness considering the circumstances in which the decision was made and “[c]ounsel’s actions are usually based, quite properly . . . on information supplied by the defendant.”).


Given the lack of specific facts to support this claim, McCaskill failed to meet his burden to demonstrate a reasonable probability of a different outcome had counsel investigated the victim’s alleged use of violence towards McCaskill. Therefore, the district court did not err in dismissing this claim without conducting an evidentiary hearing.

Next, McCaskill argues the district court erred in denying his postconviction motion to compel discovery and in refusing to permit him to inspect the district attorney’s case file for potential exculpatory evidence. The district court denied McCaskill’s motion pursuant to NRS 34.780(2), which states postconviction discovery may occur after an evidentiary

hearing has been set.¹ We note McCaskill does not identify specific evidence he hoped to receive through discovery or through inspection of the district attorney's case file, and he merely asserts there is a possibility he would discover favorable evidence. We conclude McCaskill fails to raise specific allegations that if true would have entitled him to relief. Accordingly, McCaskill fails to demonstrate he was entitled to an evidentiary hearing. *See Hargrove*, 100 Nev. 502-03, 686 P.2d at 225. As McCaskill was not entitled to an evidentiary hearing, the district court properly concluded he was not entitled to postconviction discovery or access to the district attorney's case file. *See* NRS 34.780(2).

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

¹McCaskill also appears to assert the application of the postconviction discovery procedures pursuant to NRS 34.780 violate his right to due process. McCaskill did not raise this claim before the district court and we decline to consider it in the first instance. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

cc: Hon. Elliott A. Sattler, District Judge
Stover & Jordan
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk