

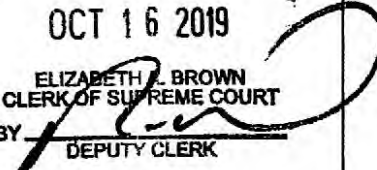
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TRACEY LEWIS BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78073-COA

FILED

OCT 16 2019

ELIZABETH L. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Tracey Lewis Brown appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on August 13, 2018. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Brown claims the district court erred by denying several of the ineffective-assistance-of-counsel claims raised in his petition. 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). 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

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novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). To warrant an evidentiary hearing, a petitioner must allege specific facts, not belied by the record, that if true, would entitle him to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Brown claimed counsel was ineffective for failing to file any motions regarding the fact that the officer's testimony at trial differed from testimony he gave during a federal suppression hearing. Specifically, Brown claimed the officer testified at the state grand jury proceeding and at trial that he stopped the car Brown was a passenger in for a felony traffic stop; but, at the federal suppression hearing, the officer testified that he stopped the car for failure to use headlights. Brown claimed these inconsistencies were perjury and the charges against him would have been dismissed had counsel filed the appropriate motions.

This claim lacks merit. The documents provided by Brown demonstrate the officer consistently testified he pulled the car over based on its failure to use headlights. Therefore, any motion filed by counsel would have been futile, and counsel is not deficient for failing to file futile motions. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Further, Brown failed to demonstrate a reasonable probability of a different outcome at trial had counsel filed any motions or used this information at trial. Accordingly, Brown failed to demonstrate counsel was deficient or resulting prejudice, and we conclude the district court did not err by denying this claim without holding an evidentiary hearing.

Second, Brown claimed counsel was ineffective for failing to file a motion to dismiss based on a *Brady*¹ violation because the State failed to

¹*Brady v. Maryland*, 373 U.S. 83 (1963).

provide him with all discovery prior to trial. Specifically, he claimed the State failed to provide him with the mail that was found in the apartment that was searched. “To prove a *Brady* violation, the accused must make three showings: (1) the evidence is favorable to the accused, either because it is exculpatory or impeaching; (2) the State withheld the evidence, either intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material.” *State v. Huebler*, 128 Nev. 192, 198, 275 P.3d 91, 95 (2012).

Brown failed to demonstrate the State withheld discovery. From the transcripts, it is clear counsel knew about the mail prior to trial. At trial, counsel argued the mail did not provide enough nexus to the apartment for the fruits of the search to be admissible at trial. Because Brown failed to demonstrate the evidence was withheld, any motion to dismiss based on that ground would have been futile. And counsel is not deficient for failing to file futile motions. *See Donovan*, 94 Nev. at 675, 584 P.2d at 711. Therefore, Brown failed to demonstrate counsel was deficient, and we conclude the district court did not err by denying this claim without holding an evidentiary hearing.

Third, Brown claimed counsel was ineffective for failing to allege “jury tampering” affected the outcome of his trial. This claim is belied by the record. Counsel argued for a mistrial for this reason. He also filed a motion for new trial that raised the jury issue. Finally, counsel raised this claim on appeal. On appeal, the Nevada Supreme Court found Brown did not demonstrate prejudice. *See Brown v. State*, Docket No. 69841 (Order of Affirmance, November 22, 2017). Accordingly, we conclude the district court did not err by denying this claim without holding an evidentiary hearing.

Fourth, Brown claimed counsel was ineffective for failing to file a motion to dismiss based on the fact that several of the victims were unable to identify him as the robber. Brown filed this claim in a supplemental petition on October 29, 2018. The district court declined to consider Brown's supplemental petition because Brown did not ask for permission to file a supplemental petition and did not demonstrate good cause for filing a supplement. We conclude the district court did not abuse its discretion by declining to consider the supplemental petition. *See* NRS 34.750(5) ("No further pleadings may be filed except as ordered by the court."). Because the district court did not consider this claim below, we declined to consider this claim for the first time on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

Fifth, Brown claimed the district court erred by denying his claim that counsel was ineffective because their relationship was "broken" and could not be repaired. Brown argued that counsel refused to provide him with discovery or file motions. Brown failed to demonstrate a reasonable probability of a different outcome at trial had counsel had a more meaningful relationship with Brown, provided Brown with discovery, or filed the motions requested by Brown. Accordingly, we conclude Brown failed to demonstrate prejudice, and we conclude the district court did not err by denying this claim without holding an evidentiary hearing.

Sixth, Brown claimed appellate counsel was ineffective for failing to argue on appeal that the officer's testimony at trial differed from testimony he gave during a federal suppression hearing. As stated above, this claim lacked merit because the officer was consistent in his testimony. Therefore, Brown failed to demonstrate this claim had a reasonable likelihood of success on appeal. *See Kirksey v. State*, 112 Nev. 980, 998, 923

P.2d 1102, 1114 (1996). Accordingly, we conclude the district court did not err by denying this claim without holding an evidentiary hearing.

Finally, Brown claimed the district court erred by denying his claim that the trial court erred by denying his motion to withdraw counsel. This claim could have been raised on direct appeal from Brown's judgment of conviction, and Brown failed to demonstrate cause and actual prejudice. Therefore, this claim was procedurally barred, *see* NRS 34.810(1)(b)(2), and we conclude the district court did not err by denying this claim without first holding an evidentiary hearing.

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Valerie Adair, District Judge
Tracey Lewis Brown
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk