

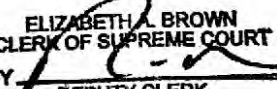
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEMANS BOWLES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 77398-COA

**FILED**

OCT 16 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Demans Bowles appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on August 22, 2018. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Bowles raised several claims of ineffective assistance of trial-level counsel. To demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); see *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, petitioner must raise claims supported by specific factual allegations that, if true and not belied by the record, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

19-42751

*Ineffective assistance of trial-level counsel*

First, Bowles claimed counsel failed to conduct any investigation in his case. A petitioner claiming that counsel should have conducted investigation must identify what the investigation would have revealed. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Bowles failed to identify what an investigation would have revealed. Further, Bowles failed to claim that, but for counsel's alleged failure, the outcome would have been different. To the extent Bowles claimed counsel forced him into signing the guilty plea without any investigation, his bare claim failed to indicate how counsel "forced" him. For these reasons, Bowles failed to demonstrate deficiency or prejudice. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Bowles claimed counsel forced him to waive his preliminary hearing by telling him he would get a lighter sentence if he did. Counsel's purported actions do not indicate force. Further, counsel's candid advice regarding the benefits of foregoing a preliminary hearing is not evidence of deficient performance. Bowles waived his preliminary hearing in anticipation of pleading guilty to reduced charges, including the State dropping a deadly weapon enhancement. Because a deadly weapon enhancement carries a mandatory consecutive sentence, *see* NRS 193.165(1), counsel's advice was not objectively unreasonable. And Bowles failed to claim that, but for counsel's alleged failure, the outcome would have been different. For these reasons, Bowles failed to demonstrate deficiency or prejudice. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Bowles claimed counsel should have had him tested to verify he was mentally fit to stand trial. Bowles' bare claim failed to

indicate why counsel should have had him tested or what the results would have been. *Cf. Molina*, 120 Nev. at 192, 87 P.3d at 538. For these reasons, Bowles failed to demonstrate deficiency or prejudice. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fourth, Bowles claimed counsel should have filed a motion for a change of venue after his motions to strike the State's notice of intent to seek punishment as a habitual criminal and to seek the recusal of the trial-level judge were denied. A motion to change venue cannot be granted by the district court until after voir dire examination of the jury. NRS 174.455(2). Because Bowles pleaded guilty, there was no jury to examine. Accordingly, a motion to change venue would have been futile, and counsel is not ineffective for failing to file a futile motion, *see Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

*Ineffective assistance of appellate counsel*

Bowles also raised several claims of ineffective assistance of appellate counsel. To demonstrate ineffective assistance of appellate counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that the omitted issue would have had a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to—and will be most effective when he does not—raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983), *as limited by Smith v. Robbins*, 528 U.S. 259, 288 (2000); *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. To

warrant an evidentiary hearing, claims must be supported by specific factual allegations that, if true and not repelled by the record, would entitle the petitioner to relief. *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225.

First, Bowles claimed counsel should have argued that the trial-level court erred by failing to hold an evidentiary hearing on his qualification for adjudication under the habitual criminal statute. The State presented evidence of Bowles' prior convictions at his sentencing hearing, and trial-level counsel conceded they were sufficient. Bowles' bare claim did not challenge the validity of the evidence presented or indicate what additional evidence could have been introduced in a formal evidentiary hearing. Further, Bowles failed to allege a reasonable probability of a different outcome on appeal had counsel raised such a claim. For these reasons, Bowles failed to demonstrate deficiency or prejudice. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Bowles claimed counsel should have appealed the denial of his motion to recuse the sentencing judge. Bowles' motion was based on the sentencing judge's *sua sponte* decision to continue the sentencing hearing after Bowles objected to the State's untimely notice of intent to seek habitual criminal treatment. However, no bias will be found based solely on a judge's performance of his official duties. See *Ainsworth v. Combined Ins. Co. of Am.*, 105 Nev. 237, 254-55, 774 P.2d 1003, 1015-16 (1989), *abrogated on other grounds by Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 705, 962 P.2d 596, 606 (1998). It would thus have been futile for counsel to challenge the denial of the motion to recuse on appeal and, accordingly, counsel was not ineffective. See *Ennis*, 122 Nev. at 706, 137

P.3d at 1103. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Bowles claimed counsel should have appealed the Nevada Supreme Court's denial of his petition for a writ of mandamus to the federal courts. Bowles' bare claim failed to state on what grounds he could have sought federal relief.<sup>1</sup> Further, Bowles failed to allege a reasonable probability of a different outcome on direct appeal in the Nevada appellate court had counsel pursued federal relief. For these reasons, Bowles failed to demonstrate deficiency or prejudice. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Bowles also claimed he was entitled to relief due to cumulative error. Even if multiple instances of deficient performance may be cumulated for purposes of demonstrating prejudice, *see McConnell v. State*, 125 Nev. 243, 259 & n.17, 212 P.3d 307, 318 & n.17 (2009), Bowles did not identify any instances of deficient performance to cumulate. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Finally, the district court denied Bowles' motion to appoint postconviction counsel. The district court found that Bowles' sole basis for requesting counsel was to help with an evidentiary hearing. This finding is supported by the record on appeal, and we note no evidentiary hearing was held in this matter. Further, the issues Bowles presented were not difficult, he appeared able to comprehend the proceedings, and it does not appear

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<sup>1</sup>Bowles' counsel were appointed to represent him in his state criminal proceedings and direct appeal. Nothing in the record before this court suggests counsel's representation would have extended to a federal suit.

counsel was necessary to proceed with any discovery. We therefore conclude the district court did not abuse its discretion by denying Bowles' motion for the appointment of postconviction counsel. See NRS 34.750(1); see generally *Renteria-Novoa v. State*, 133 Nev. 75, 391 P.3d 760 (2017).

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Chief Judge, Eighth Judicial District Court  
Demans Bowles  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk