

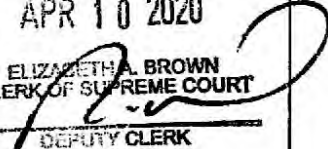
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ARTHUR JOSEPH BREWER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79071-COA

FILED

APR 10 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Arthur Joseph Brewer appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on October 19, 2018. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Brewer argues the district court erred by denying his claims that counsel was ineffective. 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 novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Brewer claimed counsel was ineffective for failing to visit with him and failing to give him his contact information. The district court found Brewer failed to allege he was prejudiced by counsel's actions because he failed to demonstrate how the outcome of the proceedings would have been different. The record supports the decision of the district court, and we conclude the district court did not err by denying this claim.

Brewer also claimed counsel was ineffective for failing to investigate or prepare for trial. Specifically, he claimed counsel should have used the testimony of two witnesses from the preliminary hearing. He claims the testimony would have demonstrated he had permission to use the vehicle. The district court found that one of the witnesses Brewer wanted counsel to use had invoked his Fifth Amendment right to remain silent and did not testify at trial. However, the information the witness would have provided was presented through Brewer's testimony and other references at trial. Therefore, the district court concluded counsel was not deficient for failing to use this witness' testimony from the preliminary hearing. The record supports the decision of the district court.

As to Brewer's claim regarding the other witness, he failed to demonstrate what testimony was presented at the preliminary hearing that was not presented at trial. Therefore, this claim was only a bare and unsupported claim and Brewer failed to demonstrate he was entitled to

relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Accordingly, we conclude the district court did not err by denying this claim.

Brewer next claims the district court erred by denying his claim that counsel refused to impeach a police officer at trial. This claim was raised for the first time in Brewer's response to the State's reply to his petition. Brewer did not seek permission to file a responsive pleading and the State was not given an opportunity to respond to this claim. Therefore, the district court had the discretion to not consider this claim. *See NRS 34.750(5)*; *see also Barnhart v. State*, 122 Nev. 301, 303, 130 P.3d 650, 651 (2006) ("Generally, the only issues that should be considered by the district court [] on a post-conviction habeas petition are those which have been pleaded in the petition or a supplemental petition and those to which the State has had an opportunity to respond."). Therefore, because this claim was not properly raised below, we decline to consider it for the first time on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

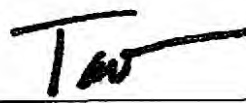
Next, Brewer claims counsel was ineffective for failing to file a motion regarding lost or destroyed evidence and the district court was biased against him. These claims were not raised in the petition below, and we decline to consider them for the first time on appeal. *See id.*


Finally, Brewer contends the district court erred by denying the petition without appointing postconviction counsel. The appointment of counsel in this matter was discretionary. *See NRS 34.750(1)*. When deciding whether to appoint counsel, the district court may consider factors including, whether the issues presented are difficult, whether the petitioner

is unable to comprehend the proceedings, or whether counsel is necessary to proceed with discovery. *Id.* Because the district court granted Brewer leave to proceed in forma pauperis and his petition was a first petition not subject to summary dismissal, NRS 34.745(1), (4), Brewer met the threshold requirements for the appointment of counsel. *See* NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 761 (2017). However, here, Brewer sought the appointment of counsel solely on the basis that he is indigent; he did not argue any other factor to support his request for counsel. And a review of the record reveals the issues in this matter were not difficult, Brewer was able to comprehend the proceedings, and discovery with the aid of counsel was not necessary. *See id.* Therefore, Brewer fails to demonstrate the district court abused its discretion by denying the petition without appointing postconviction counsel. *See Renteria-Novoa*, 133 Nev. at 76, 391 P.3dat 760-61. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Douglas W. Herndon, District Judge
Arthur Joseph Brewer
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk