

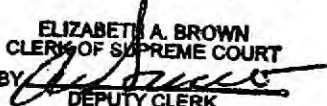
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT TIMOTHY ESTALL, II,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 79371-COA

FILED

AUG 10 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Robert Timothy Estall II appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on December 29, 2017, and a supplemental petition for a writ of habeas corpus filed on June 14, 2018. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Estall's petitions were untimely because they were filed more than one year after the remittitur on direct appeal was issued on October 11, 2016.<sup>1</sup> See NRS 34.726(1). Consequently, his petitions were procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *Id.* In an attempt to show good cause, Estall argued that his retained counsel failed to file a timely postconviction petition for a writ of habeas corpus despite her assurances that she would do so. The district court conducted several evidentiary hearings, it found cause for the delay but no undue prejudice, and it concluded the petitions were procedurally barred and denied them as such.

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<sup>1</sup>See *Estall v. State*, Docket No. 67174 (Order of Affirmance, September 16, 2016).

20-29254

Estall claims the district court erred by finding there was no undue prejudice. To show undo prejudice under NRS 34.726(1)(b), “a petitioner must show that errors in the proceedings underlying the judgment worked to the petitioner’s actual and substantial disadvantage.” *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012). As a practical matter, the district court must review the merits of the claims raised in the petition in order to determine whether a petitioner has demonstrated undue prejudice under this test.

Estall claimed in his petitions that he was deprived of effective assistance of counsel. To prevail on a claim of ineffective assistance of trial counsel, a petitioner must demonstrate counsel’s performance was deficient because it fell below an objective standard of reasonableness, and resulting prejudice in 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 (1984). The petitioner must demonstrate both components of the ineffective-assistance inquiry—deficiency and prejudice. *Id.* at 697. We give deference to the district court’s factual findings if supported by substantial evidence and not clearly wrong 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).

First, Estall claimed trial counsel was ineffective because counsel only spoke to him a few times and never discussed any case strategy or possible defenses to the charges. The district court made the following findings. Estall’s claim of inadequate communication was without merit. Counsel met with Estall at least four or five times while Estall was in custody. Counsel made a strategic decision to insist on proceeding to trial as soon as possible because the State appeared to have trouble locating

witnesses, and counsel communicated this strategy to Estall. Counsel spent at least a day with Estall going over his testimony. Counsel used an investigator in this case. And the investigator met with Estall and reviewed the evidence with him. Any lack of communication between counsel and Estall did not render counsel ineffective. The district court's findings are supported by the record and are not clearly wrong. We conclude the district court properly determined this ineffective-assistance-of-counsel claim did not establish the prejudice necessary to overcome the procedural bar. See *Morris v. Slappy*, 461 U.S. 1, 14 (1983).

Second, Estall claimed trial counsel was ineffective for failing to conduct an adequate investigation. The district court made the following findings. Estall's claim of an inadequate investigation was a bare allegation. Estall did not identify how a better investigation would have made a more favorable outcome of the trial probable. Counsel used an investigator in this case. And the investigator met with Estall and reviewed the evidence with him. The district court's findings are supported by the record and are not clearly wrong. We conclude the district court properly determined this ineffective-assistance-of-counsel claim did not establish the prejudice necessary to overcome the procedural bar. See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

Third, Estall claimed trial counsel was ineffective for failing to advise him of a plea offer. The district court made the following findings. Estall's claim that counsel failed to communicate the State's plea offer was belied by the record. During the pretrial conference held on August 20, 2014, Estall confirmed that counsel had discussed the State's new plea offer with him and acknowledged that he had rejected the offer. Even if the claim had not been belied by the record, Estall could not have shown prejudice.

This was because the State's plea offer stated the parties would be free to argue at sentencing and Estall had previously rejected a plea offer because probation was not guaranteed. The district court's findings are supported by the record and are not clearly wrong. We conclude the district court properly determined this ineffective-assistance-of-counsel claim did not establish the prejudice necessary to overcome the procedural bar. See *Missouri v. Frye*, 566 U.S. 134, 147 (2012); *Rippo v. State*, 134 Nev. 411, 426, 423 P.3d 1084, 1100 (2018).

Fourth, Estall claimed trial counsel was ineffective during the trial. To this end, he argued counsel was unprepared for trial as evidenced by the fact he conducted meetings with Estall and his family each day to discuss the case, the defense strategy, and the witnesses. And he further asserted counsel refused to cross-examine the victims' daughter. The district court made the following findings. Estall failed to show that counsel's meetings with Estall and his family to discuss the case was conduct that fell below an objective standard of reasonableness or that it was somehow prejudicial. And counsel made a strategic decision not to cross-examine the victims' daughter based on his belief that such a cross-examination would be harmful to the defense. The district court's findings are supported by the record and are not clearly wrong. We conclude the district court properly determined this ineffective-assistance-of-counsel claim did not establish the prejudice necessary to overcome the procedural bar. See *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996).

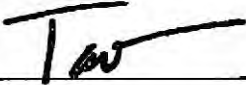
Estall also claimed the cumulative effect of trial counsel's errors deprived him of a fair trial. The district court found that Estall failed to demonstrate any of his ineffective-assistance-of-counsel claims warranted relief. The district court's finding is supported by the record and is not

clearly wrong. We conclude the district court properly determined this cumulative error claim did not establish the prejudice necessary to overcome the procedural bar. *See Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481-82 (2008).

We conclude the district court did not err in determining that Estall's petitions were procedurally barred and Estall failed to demonstrate good cause to excuse the procedural bar. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

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