

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DONALD KIE, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79189-COA

FILED

AUG 10 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Donald Kie, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

Kie argues the district court erred by denying the claims of ineffective assistance of counsel he raised in his July 31, 2018, petition and later-filed supplement. 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 687. To warrant an evidentiary hearing, the petitioner must raise claims 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, Kie argued his trial counsel was ineffective for failing to request a *Petrocelli*¹ hearing regarding evidence of Kie's participation in a drug deal or a limiting instruction concerning that evidence. The State contended Kie used the drugs as payment to induce a person to attack the victim in the underlying case. Prior to trial, the State filed a motion requesting admission of the drug-sale evidence and Kie did not oppose the motion. During the hearing concerning the State's motion, Kie's counsel informed the trial court the State merely sought admission of evidence it already utilized during the preliminary hearing and the State would not seek to introduce any further evidence concerning Kie's prior wrongdoing unless the defense opened the door to such information. Counsel stated that, based upon those reasons, he chose not to oppose the motion. The district court found that counsel's decision to decline to oppose the motion was objectively reasonable under the circumstances of this case and the record supports the district court's decision.

In addition, on direct appeal this court concluded that evidence concerning Kie's participation in the drug deal was properly admitted at trial pursuant to the *res gestae* rule to prove Kie engaged in a conspiracy by providing drugs to another person in exchange for an attack on the victim. *Kie, Jr. v. State*, Docket No. 71905-COA (Order of Affirmance, December 15, 2017). Because the evidence concerning Kie's participation in a drug deal was properly admitted at trial, Kie failed to demonstrate a reasonable probability of a different outcome had counsel argued against the admission of the challenged evidence. In addition, in light of the significant evidence

¹*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), *superseded in part by statute as stated in Thomas v. State*, 120 Nev. 37, 44-45, 83 P.3d 818, 823 (2004).

of Kie's guilt presented at trial, he failed to demonstrate a reasonable probability of a different outcome had counsel requested a limiting instruction concerning the drug-deal evidence. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

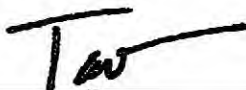
Second, Kie argued his trial counsel was ineffective for failing to ensure Kie personally viewed the surveillance video depicting the crime. Kie contended he should have been permitted to view the video when deciding whether to accept a plea offer. The district court found the State utilized the surveillance video during the preliminary hearing when it questioned witnesses and Kie was present at that hearing. The district court further found that, because Kie attended the preliminary hearing, he would have been aware of the nature of the evidence against him and had the opportunity to utilize that knowledge when weighing plea offers. Therefore, the district court concluded, Kie failed to demonstrate a reasonable probability of a different outcome had counsel ensured he viewed the surveillance video when deciding whether to accept a plea offer. The record supports the district court's decision.

Moreover, Kie did not demonstrate a reasonable probability there was a plea offer from the State that he would have accepted absent counsel's alleged deficiency, the State would not have withdrawn its plea offer in light of intervening circumstances, and the district court would have accepted such an offer. *See Lafler v. Cooper*, 566 U.S. 156, 163-64 (2012); *see also Missouri v. Frye*, 566 U.S. 134, 147 (2012) ("To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time."). Therefore,

we conclude the district court did not err by denying this claim without conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Cristina D. Silva, District Judge
Zaman & Trippiedi, PLLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk