

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID JOHN DINUNZIO,  
Appellant,  
vs.  
BRIAN WILLIAMS,  
Respondent.

No. 79867-COA

DAVID JOHN DINUNZIO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 80030-COA

FILED

NOV 09 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

David John Dinunzio appeals from identical orders of the district court, filed in district court case numbers A-19-791822-W (Docket No. 79867) and C-15-309893-1 (Docket No. 80030), denying a postconviction petition for a writ of habeas corpus filed on March 25, 2019. These cases were consolidated on appeal. *See* NRAP 3(b). Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Dinunzio claims the district court erred by denying his ineffective-assistance-of-counsel claims. 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); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry

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must be shown, *Strickland*, 466 U.S. at 687, 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).

First, Dinunzio claimed counsel was ineffective for failing to mention his multiple mental health diagnoses at sentencing. Dinunzio claimed he had been diagnosed with major depression, delusional disorder, alcohol use disorder, methamphetamine disorder, and adjustment disorder. The district court held an evidentiary hearing on this claim. Counsel testified he knew about Dinunzio's diagnoses but chose not to use them at sentencing because they were not "Axis 1 diagnoses." Counsel did not believe the diagnoses were severe enough to work in Dinunzio's favor at sentencing and chose to focus on other arguments.

The district court found that Dinunzio failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at sentencing had counsel presented this evidence. Based on the testimony presented at the evidentiary hearing, we conclude the district court did not err by denying this claim. *See Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (observing strategic decisions are virtually unchallengeable under most circumstances).

Second, Dinunzio claimed counsel was ineffective at sentencing for comparing Dinunzio to himself. At the evidentiary hearing, counsel explained he made the comparison to show the affect alcohol and drugs had on Dinunzio's life and to humanize Dinunzio. And he knew, from previous

interactions with the district court, that the district judge took that type of argument to heart and listened to it.

The district court found that Dinunzio failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at sentencing had counsel not made this argument at sentencing. Based on the testimony presented at the evidentiary hearing, we conclude the district court did not err by denying this claim. *See id.*

Next, Dinunzio claims the district court erred by denying his claim that the sentencing judge was biased against him. Dinunzio raised this claim on direct appeal from his judgment of conviction, and it was rejected by this court. *See Dinunzio v. State*, Docket No. 74257-COA (Order of Affirmance, October 31, 2018). Therefore, this claim was barred by the doctrine of law of the case, which cannot be avoided by a more detailed and precisely focused argument. *See Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Accordingly, we conclude the district court did not err by denying this claim.


Next, Dinunzio claims the district court erred by denying his motion for the appointment of 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.* However, the issues in this matter were not difficult, Dinunzio was able to comprehend the proceedings, and discovery with the aid of counsel was not necessary. *See* NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 761 (2017). Therefore, we

conclude the district court did not abuse its discretion by denying the petition without appointing postconviction counsel.

Finally, Dinunzio claims the district court erred by having him appear at the evidentiary hearing by telephone. Dinunzio claims the hearing consisted of the district court yelling at him. This claim is belied by the record. The district court did not spend the hearing yelling at Dinunzio. Instead, the district court allowed Dinunzio to explain and argue his claims and allowed him to question counsel regarding his claims. Therefore, we conclude Dinunzio failed to demonstrate the district court erred.

Having concluded Dinunzio is not entitled to relief, we  
ORDER the judgments of the district court AFFIRMED.

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

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

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

cc: Hon. William D. Kephart, District Judge  
David John Dinunzio  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk