

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TARVEION WEATHERSPOON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79970-COA

FILED

DEC 08 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Tarveion Weatherspoon appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 7, 2019, and a supplemental petition filed on July 20, 2019. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Weatherspoon contends the district court erred by denying his claims that defense counsel was ineffective without first conducting an evidentiary hearing. To demonstrate ineffective assistance of defense counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that, but for counsel's errors, there is a reasonable probability petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996). Both components of the inquiry must be shown. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We give deference to the 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). To warrant an evidentiary hearing, 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, Weatherspoon claimed counsel was ineffective for advising him to waive his preliminary hearing, because counsel could have tested the State's evidence by impeaching the witnesses with their inconsistent statements. Further, Weatherspoon claimed counsel was ineffective for failing to discuss and give him the discovery in his case, because then he would have known there were inconsistent statements. Weatherspoon claimed that, had counsel impeached the witnesses or shown him the discovery, he would not have pleaded guilty and would have gone to trial. He also claimed he would have been in a better negotiating position to receive a more favorable guilty plea agreement.

Weatherspoon failed to allege below what the inconsistent statements were.¹ Therefore, he failed to allege specific facts that, if true, would entitle him to relief. Moreover, we note that Weatherspoon admitted to pleading guilty to avoid adjudication as a habitual criminal, making it unlikely that knowledge of the alleged inconsistencies would have affected his decision to plead guilty. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

¹Weatherspoon did not allege what the inconsistent statements were until his reply brief on appeal. Therefore, we need not consider the allegations. See NRAP 28(c) (limiting reply briefs to answering new matters set forth in the opposing brief); *McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

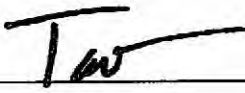
Second, Weatherspoon claimed counsel was ineffective for failing to file a motion for discovery. Weatherspoon claimed that, had counsel filed the motion, he may have been given records showing the victim or her mother had previous convictions for domestic violence. Weatherspoon's claim was based on mere speculation and was not supported by specific factual allegations. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Finally, Weatherspoon claimed counsel was ineffective for failing to investigate possible defenses. Specifically, he claimed counsel should have researched and discovered that Weatherspoon actually committed drawing a deadly weapon in a threatening manner. While Weatherspoon admits drawing a deadly weapon in a threatening manner is not a lesser-included offense of assault with the use of a deadly weapon, he claims the jury could have been instructed on it because it would have been his theory of defense.

Weatherspoon failed to demonstrate he would have been entitled to a jury instruction on drawing a deadly weapon in a threatening manner. A defendant is not entitled to an instruction on a lesser-related offense, because the fairness of a verdict for a crime the State did not attempt to prove would be questionable. *See Peck v. State*, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 1269, 147 P.3d 1101, 1109 (2006). Weatherspoon failed to allege specific facts that demonstrate counsel was objectively unreasonable or Weatherspoon was prejudiced by it. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Ronald J. Israel, District Judge
Jeannie N. Hua
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk