

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHAWN HEMINGWAY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 81140-COA

**FILED**

**FEB 25 2021**

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

*ORDER OF AFFIRMANCE*

Shawn Hemingway appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 14, 2017, and a supplemental petition filed on April 17, 2018. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

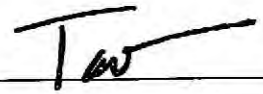
Hemingway argues the district court erred by denying a claim of ineffective assistance of trial counsel. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted 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 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).

Hemingway asserts trial counsel was ineffective at the sentencing hearing for failing to present mitigating evidence. He claims counsel should have called witnesses regarding his good character as a husband and father and the effects of his childhood trauma on his substance abuse, and secured a substance abuse evaluation. The district court found that the sentencing judge reviewed Hemingway's long history of substance abuse, six felony convictions, one gross misdemeanor conviction, and thirteen misdemeanor convictions, including Hemingway's seven convictions that were DUI-related. Further, the district court found that, after discussing Hemingway's criminal history and risk to public safety, the sentencing judge opined, "It is just the sentence that is commanded by the history. There is no other way to look at it." Additionally, the district court found that counsel summarized the mitigating evidence for the sentencing judge. These findings are supported by substantial evidence in the record. Hemingway has thus failed to demonstrate a reasonable probability of a different outcome had counsel presented the mitigating evidence in a different manner. Therefore, we conclude the district court did not err by denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Kathleen M. Drakulich, District Judge  
Oldenburg Law Office  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk