

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT D. ESTABROOK,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 37625

FILED

NOV 6 5 2002

ORDER OF AFFIRMANCE

CLERK OF THE SUPREME COURT  
J. Richards  
DEPUTY CLERK

This is an appeal from a district court order denying appellant Robert D. Estabrook's postconviction petition for a writ of habeas corpus. On appeal, Estabrook argues that the district court improperly denied his petition. We disagree.

We have stated that "[c]laims of ineffective assistance of counsel are properly presented in a timely, first post-conviction petition for a writ of habeas corpus."<sup>1</sup> To prevail on a claim for ineffective assistance of counsel, a defendant must show that his counsel's performance was both deficient and prejudicial.<sup>2</sup>

However, "[a] defendant seeking post-conviction relief cannot rely on conclusory claims," but must support his claims "with specific factual allegations that if true would entitle him" to relief.<sup>3</sup> It follows that a defendant is not entitled to an evidentiary hearing regarding the claims in his petition if these claims are belied or repelled by the record.<sup>4</sup>

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<sup>1</sup>Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 507 (2001).

<sup>2</sup>Id. at 622, 28 P.3d at 508 (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

<sup>3</sup>Id. at 621, 28 P.2d at 507.

<sup>4</sup>Id.

Here, in his petition, Estabrook claims his counsel (1) failed to produce the testimony of witnesses during a pre-trial Petrocelli<sup>5</sup> hearing regarding the admissibility of prior bad acts; (2) failed to object to the admission of prior bad acts into evidence; (3) failed to call witnesses to testify; (4) failed to elicit testimony of an expert witness; (5) had a conflict of interest because counsel's sister was a school teacher and the victim was a school teacher; (6) failed to properly cross-examine the victim; (7) failed to properly cross-examine expert witnesses; (8) failed to address evidence of prior bad acts; (9) failed to move for a judgment of acquittal; (10) failed to preserve constitutional issues for appeal; (11) failed to properly argue on appeal that Estabrook's prior bad acts were improper evidence; (12) committed cumulative error; and (13) gave ineffective representation during a preliminary hearing. Since these allegations involve overlapping issues, each will be addressed accordingly.

Allegations one and three

Before an evidentiary hearing regarding his first claim, Estabrook filed a stipulation acknowledging that he could not factually support the allegation that Karen Kovatch and Joe Moroni had exculpatory evidence regarding Estabrook's prior bad acts and abandoned the claim as "unproven." Based on this stipulation, Estabrook acknowledges his failure to show any factual basis as to how these witnesses would have aided his defense; therefore, we conclude that allegations one and three are unsupported and without merit.

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<sup>5</sup>See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

Allegations two, ten, and eleven

Minute transcripts of pretrial hearings show Estabrook's counsel filed a motion in limine regarding the admissibility of evidence of prior bad acts and objected to the testimony of witnesses during a hearing on the motion. Based on these actions, we conclude Estabrook's second allegation is belied by the record.<sup>6</sup> Moreover, this court has reviewed and affirmed the admissibility of the prior bad acts in Estabrook's direct appeal. Therefore, this issue is governed by the law of the case and will not be reconsidered.<sup>7</sup> We also conclude Estabrook's tenth and eleventh claims of ineffective assistance of counsel during his direct appeal are unsupported and, therefore, without merit.

Allegations four, six, seven, eight, and thirteen

Despite notice from this court, Estabrook failed to provide a complete record, including a transcript of his trial and preliminary hearing. Estabrook's fourth, sixth, seventh, and eighth allegations involve the conduct of his counsel during trial with respect to the examination of witnesses and preserving issues on appeal by raising objections. Estabrook's thirteenth claim involves the conduct of his counsel during his preliminary hearing. Given Estabrook's failure to provide us with a proper record for review, we conclude Estabrook failed to meet his burden to overcome the presumption that the district court did not err in denying his petition.<sup>8</sup>

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<sup>6</sup>Evans, 117 Nev. at 621, 28 P.3d at 507.

<sup>7</sup>See McNelson v. State, 115 Nev. 396, 415, 990 P.2d 1263, 1275 (2000).

<sup>8</sup>Lee v. Sheriff, 85 Nev. 379, 380-81, 455 P.2d 623, 624 (1969).

Allegation five

We have stated that "a conflict [of interest] exists when an attorney is placed in a situation conducive to divided loyalties."<sup>9</sup> Here, Estabrook's ex-wife, the victim, was a schoolteacher. According to Estabrook, his counsel's sister was also a schoolteacher. Based on this situation, Estabrook implies his counsel somehow had sympathy toward the victim and, therefore, could not effectively represent him.

However, we conclude that a defense attorney who has a family member in the same profession as the victim in a case does not present an actual conflict of interest. If such a generalized standard were employed for finding an actual conflict of interest, nearly every attorney could be disqualified on such grounds for one reason or another. Rather, Estabrook has failed to show an actual conflict existed; therefore, we conclude his allegation is without merit.

Allegation nine

Given that Estabrook was found guilty of one count of sexual assault after a trial by jury and this court affirmed Estabrook's conviction on appeal, we conclude Estabrook has failed to show a motion for acquittal would have been granted. Therefore, we conclude his counsel was not ineffective for not bringing a motion likely to fail.<sup>10</sup> Moreover, as noted above, Estabrook has failed to provide a complete record on appeal to

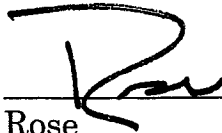
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<sup>9</sup>Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)).

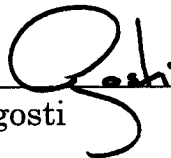
<sup>10</sup>See Evans, 117 Nev. at 622, 28 P.3d at 508 (stating that to show prejudice supporting a claim of ineffective assistance of counsel, the defendant "must show a reasonable probability that but for counsel's errors the result of the trial would have been different").

allow this court to determine whether such a motion was even made.  
Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>11</sup>

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Young

  
\_\_\_\_\_, J.  
Agosti

cc: Hon. Connie J. Steinheimer, District Judge  
Scott W. Edwards  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk

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<sup>11</sup>See Lee, 85 Nev. at 380-81, 455 P.2d at 624. Estabrook argues in allegation twelve that cumulative error during his trial and direct appeal supports this court in granting his petition. Given the above conclusions, we also conclude that this claim is without merit.