

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANK "PUMPKIN" SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81186-COA

FILED

MAY 20 2021

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

ORDER OF AFFIRMANCE

Frank "Pumpkin" Smith appeals from a district court order dismissing a postconviction petition for a writ of habeas corpus filed on January 27, 2017, and a supplemental petition for a writ of habeas corpus filed on May 30, 2019. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Smith argues the district court erred by dismissing his ineffective-assistance-of-counsel claims without first conducting an evidentiary hearing. 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. To warrant an evidentiary hearing, a 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).

Smith first claimed counsel was ineffective for failing to request an evidentiary hearing on Smith's fair-cross-section challenge to the jury venire. Smith's bare claim failed to allege specific facts that demonstrated he could have met all of the elements of a prima facie violation of the right to a venire selected from a fair cross section of the community. *See Williams v. State*, 121 Nev. 934, 940, 125 P.3d 627, 631 (2005). Therefore, Smith failed to show that counsel was deficient and a reasonable probability of a different outcome but for counsel's failure to request an evidentiary hearing on Smith's fair-cross-section challenge. We therefore conclude the district court did not err by dismissing this claim without first conducting an evidentiary hearing.

Smith next claimed counsel was ineffective for failing to investigate and present mitigating evidence at sentencing regarding his mental state at the time of the homicide. Smith claimed he was under the influence of alcohol and controlled substances. Smith claimed an expert could have explained to the sentencing court how these substances could have adversely affected his reasoning, judgment, behavior, and impulse control. Smith likewise claimed that an expert could have explained mitigating factors related to Smith's childhood exposure to trauma and the facts surrounding his juvenile murder conviction.

The sentencing court was presented with information regarding Smith's childhood, mental health, and substance abuse history, and Smith did not demonstrate counsel's performance fell below an objective standard

of reasonableness by failing to present expert testimony regarding these issues or a reasonable probability of a different outcome had counsel presented expert testimony regarding that information. We therefore conclude the district court did not err by dismissing this claim without first conducting an evidentiary hearing.

Finally, Smith claimed counsel was ineffective for failing to secure letters from family members to present on his behalf at sentencing. Smith contends that he was never informed by counsel that family members could submit letters in lieu of live testimony and that had such mitigation evidence been presented at sentencing, there was a reasonable probability that Smith would have received the same sentence as his codefendant. Smith himself submitted a written statement to the sentencing court with the intent to rely on it during sentencing. Moreover, Smith's counsel informed the sentencing court that Smith "indicated on at least two occasions that there were no witnesses that he wished to have testify for him at sentencing." The sentencing court canvassed Smith, and he confirmed that he spoke with counsel and indicated there were no witnesses or evidence he wanted to present at his sentencing hearing. Finally, while Smith claims the letters would have portrayed him as a loving person who took care of his family, he fails to demonstrate a reasonable probability that he would have received the same sentence as his codefendant in light of his prior murder conviction and evidence demonstrating that he fired the shot that caused the fatal injury. Smith thus failed to demonstrate counsel was deficient and a reasonable probability of a different outcome but for counsel's failure to inform Smith about his ability to present family letters

to the sentencing court in mitigation. We therefore conclude the district court did not err by dismissing this claim without first conducting an evidentiary hearing.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.¹


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Scott N. Freeman, District Judge
Oldenburg Law Office
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

¹To the extent Smith argues on appeal that counsel was ineffective in preparing to rebut any argument about Smith's prior murder conviction, this claim was not raised below, and we decline to consider this argument on appeal in the first instance. See *McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).