

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NEEL SHAH,
Appellant,
vs.
CITY OF HENDERSON,
Respondent.

No. 82050-COA

FILED

NOV 05 2021

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

ORDER OF AFFIRMANCE

Neel Shah appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 13, 2020. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Shah filed his petition more than one year after issuance of the remittitur on direct appeal to the district court on April 2, 2019. Thus, Shah's petition was untimely filed. *See* NRS 34.726(1). Shah's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.*

Cause for the delay

Shah argued that his petition was not late because the remittitur issued on April 11, 2019; the one year deadline for filing a timely petition fell on Saturday April 11, 2020; and he filed his petition on the first judicial day thereafter. This claim did not provide good cause because, as stated above, the remittitur issued on April 2 and not April 11. Therefore, Shah failed to demonstrate good cause to overcome the procedural time bar.

Undue prejudice

To demonstrate undue prejudice to overcome the procedural time bar, “a petitioner must show that errors in the proceedings underlying the judgment worked to the petitioner’s actual and substantial disadvantage.” *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012). “A showing of undue prejudice necessarily implicates the merits of the . . . claim.” *Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018).

Shah first argued that he was entitled to have a jury hear his battery-constituting-domestic-violence case. Shah argued that *Andersen v. Eighth Judicial District Court*, which stated that defendants facing misdemeanor convictions for battery constituting domestic violence have the right to a jury trial, 135 Nev. 321, 324, 448 P.3d 1120, 1124 (2019), should apply retroactively. Shah failed to demonstrate he was entitled to relief on this claim because the Nevada Supreme Court has specifically stated that *Andersen* does not apply retroactively to cases that were final at the time *Andersen* was issued.¹ See *Hildt v. Eighth Judicial Dist. Court*, 137 Nev., Adv. Op. 12, *6-7, 483 P.3d 526, 530 (2021). Shah’s case was final

¹To the extent Shah argues this court should overrule *Hildt*, this court cannot overrule Nevada Supreme Court precedent. See *People v. Solorzano*, 63 Cal. Rptr. 3d 659, 664 (Ct. App. 2007), *as modified* (Aug. 15, 2007) (“The Court of Appeal must follow, and has no authority to overrule, the decisions of the California Supreme Court.” (quotation marks and internal punctuation omitted)); see also *Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting) (observing stare decisis “applies *a fortiori* to enjoin lower courts to follow the decision of a higher court”).

two months before *Andersen* was issued. *Id.* Therefore, Shah failed to demonstrate undue prejudice as to this claim.

Shah next argued that he was denied the opportunity to confront the witnesses against him. This claim could have been raised on direct appeal and, therefore, was waived absent a demonstration of good cause and prejudice. *See* NRS 34.810(1)(b)(2). Shah did not allege any good cause or prejudice to demonstrate why he was unable to raise this claim on direct appeal. Therefore, Shah failed to demonstrate undue prejudice as to this claim.

Next, Shah argued he received ineffective assistance of 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.

First, Shah claimed counsel was ineffective for failing to request a jury trial. At the time Shah was convicted, the controlling law as to whether he was entitled to a jury trial was the Nevada Supreme Court's decision in *Amezcuca v. Eighth Judicial District Court*, which concluded that defendants facing convictions for misdemeanor battery constituting domestic violence were not entitled to jury trials, 130 Nev. 45, 51, 319 P.3d 602, 606 (2014). And Shah did not allege facts that demonstrated counsel

was objectively unreasonable for not challenging the law. *See Doyle v. State*, 116 Nev. 148, 156, 995 P.2d 465, 470 (2000) (“The failure of counsel to anticipate a change in the law does not constitute ineffective assistance.”). Further, Shah failed to demonstrate there was a reasonable probability of a different outcome at trial had a jury heard the case. The battery was witnessed by a man who happened to be driving by the incident. That witness called the police and testified at trial that he witnessed Shah push the victim and pull her hair. Further, Shah testified at trial that he did push the victim and grabbed and pulled her hair. Thus, sufficient facts were presented at trial to convict Shah of battery constituting domestic violence. Accordingly, Shah failed to demonstrate undue prejudice as to this claim.

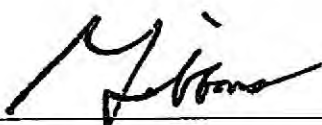
Second, Shah claimed counsel was ineffective for failing to seek out a plea negotiation to resolve Shah’s case prior to trial. NRS 200.485(8) (2009) prohibits a prosecuting attorney from dismissing a count of battery constituting domestic violence in exchange for a plea of guilty to a lesser charge, and Shah received the minimum sentence he could after conviction. Therefore, Shah’s claim failed to demonstrate a plea deal was possible or that counsel was deficient for failing to seek one out. Accordingly, Shah failed to demonstrate undue prejudice as to this claim.

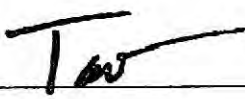
Evidentiary hearing


Shah argues on appeal that the district court erred by denying his petition without first conducting an evidentiary hearing. We conclude Shah has failed to demonstrate he was entitled to an evidentiary hearing, because his claims were procedurally barred. *See Rubio v. State*, 124 Nev. 1032, 1046 n.53, 194 P.3d 1224, 1234 n.53 (2008) (noting a district court

need not conduct an evidentiary hearing concerning claims that are procedurally barred when the petitioner cannot overcome the procedural bars). Moreover, even if Shah's petition was not procedurally barred, he would not have been entitled to an evidentiary hearing because, as the preceding discussions indicate, Shah failed to allege specific facts 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). Accordingly, we conclude the district court did not err by denying the petition without first conducting an evidentiary hearing, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Department 2
Law Office of Julian Gregory, LLC
Attorney General/Carson City
Henderson City Attorney
Eighth District Court Clerk