

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THOMAS CASH,
Appellant,
vs.
WILLIAM A. GITTERE, WARDEN,
Respondent.

No. 82060-COA

FILED

MAR 04 2022

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

ORDER OF AFFIRMANCE

Thomas Cash appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on August 3, 2020. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

Cash argues the district court erred by denying his claims of ineffective assistance of trial counsel without 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. 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). 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).

First, Cash claimed trial counsel failed to investigate but merely relied on the State's open file policy in preparing his defense. Cash failed to specifically allege what the results of an investigation would have been and how they would have affected the outcome of the proceedings. Accordingly, Cash failed to demonstrate that counsel's failure to investigate fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for the failure. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (providing that a petitioner claiming counsel did not conduct an adequate investigation must allege what the results of a better investigation would have been and how it would have affected the outcome of the proceedings). Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Cash claimed trial counsel should have canvassed Cash's neighbors "to see if they had relevant information." Cash failed to specifically allege what any neighbors would have said. Accordingly, Cash failed to demonstrate that counsel's failure to canvass his neighbors fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for the failure. *See id.* Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Cash claimed trial counsel failed to engage a pathologist to review the evidence and testify at trial. At trial, the State's pathologist testified that the victim's cause of death was a single stab wound to the chest that traveled in an upward motion. During closing argument, counsel argued the pathologist's testimony supported the conclusion that Cash stabbed the taller victim one time in self-defense. Cash failed to specifically allege what a different pathologist's review of the evidence would have revealed, what his or her testimony would have been, or how it would have affected the outcome of Cash's trial. Accordingly, Cash failed to demonstrate that counsel's failure fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for the failure. *See id.* Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Cash claimed trial counsel failed to interview A. Turner and elicit testimony from her supporting his theory of self-defense. Cash failed to indicate how Turner's testimony would have differed had counsel interviewed her and whether her resulting testimony would have affected the outcome of his trial. Accordingly, Cash failed to demonstrate that counsel's failure to interview Turner fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for the failure. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fifth, Cash claimed trial counsel failed to interview S. Cash Earl (Earl) and call her as a witness. Cash claimed Earl was present at a prior incident involving another witness who threatened Cash and other

family members. Cash alleged the prior threats supported his theory that he acted in self-defense or in defense of others. In an affidavit filed in support of Cash's petition, Earl stated she never told Cash about the prior incident, and Cash did not allege he knew of the threats prior to the crime.

Cash also claimed he told counsel that Earl was present at the scene of the crime and "would corroborate his testimony." Cash did not testify at trial, and two of Cash's family members, including one called by the defense, testified that Earl was not present during the incident. Accordingly, Cash failed to demonstrate that counsel's failure to interview Earl or call her as a witness fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel's inaction. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Cash also argues the district court erred by denying a claim of ineffective assistance of appellate counsel. To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Cash claimed his appellate counsel failed to support his direct appeal allegation of prosecutorial misconduct with legal authority. Cash's opening brief on direct appeal argued that the State committed prosecutorial misconduct by improperly telling the jury that Cash had a duty to retreat. The Nevada Supreme Court denied this claim on appeal because it was not supported with cogent argument or citation to relevant authority. *See Cash v. State*, No. 77018, 2019 WL 4391202, *1 n.1 (Nev. Sep. 12, 2019) (Order of Affirmance and Remand to Correct Clerical Error).

The challenged statements were in support of the State's argument that Cash was an original aggressor and was not entitled to act in self-defense because he never retreated or made a good faith effort to stop the struggle despite opportunities to do so. This was an accurate description of the law. *See Culverson v. State*, 106 Nev. 484, 489, 797 P.2d 238, 241 (1990) (providing that an original aggressor may act in self-defense if he has satisfied the duty to retreat); NRS 200.200(2) (providing that, where the person killed was not the assailant, a person who kills in self-defense must have in good faith "endeavored to decline any further struggle before the mortal blow was given"). Accordingly, Cash failed to demonstrate that there was a reasonable probability of a different outcome but for counsel's failure. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Cash argues the district court erred by denying his claim that he was entitled to relief due to the cumulative effect of counsel's errors. Even if multiple instances of deficient performance may be cumulated for purposes of demonstrating prejudice, *see McConnell v. State*, 125 Nev. 243,

259 & n.17, 212 P.3d 307, 318 & n.17 (2009), Cash did not demonstrate multiple instances of deficient performance to cumulate, *see Morgan v. State*, 134 Nev. 200, 201 n.1, 416 P.3d 212, 217 n.1 (2018). We therefore conclude Cash is not entitled to relief on this claim.

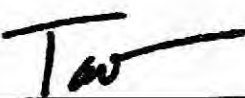
Next, Cash argues the district court abused its discretion by making findings of fact consistent only with the State's version of the events. The district court properly directed the State to prepare an order. *See Byford v. State*, 123 Nev. 67, 69, 156 P.3d 691, 692 (2007) (“[T]he district court may request a party to submit proposed findings of facts and conclusions of law . . .”). Even assuming the district court erred by failing to allow Cash an opportunity to review and respond to the proposed draft order, *see id.* at 71, 156 P.3d at 693, Cash fails to demonstrate how the error affected his substantial rights. *See* NRS 178.598 (“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”). We therefore conclude Cash is not entitled to relief on this claim.

Finally, Cash argues the district court abused its discretion by declining to appoint postconviction counsel. The appointment of counsel in this matter was discretionary. *See* NRS 34.750(1). When deciding whether to appoint counsel, the district court may consider factors, including whether the issues presented are difficult, whether the petitioner is unable to comprehend the proceedings, or whether counsel is necessary to proceed with discovery. *Id.*; *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 761 (2017). Because the district court granted Cash leave to proceed in forma pauperis and his petition was a first petition not subject to summary

dismissal, *see* NRS 34.745(1), (4), Cash met the threshold requirements for the appointment of counsel. *See* NRS 34.750(1); *Renteria-Novoa*, 133 Nev. at 76, 391 P.3d at 761. However, the record reveals that the issues in this matter were not difficult and Cash was able to comprehend the proceedings. For these reasons, the record supports the decision of the district court, and we conclude the district court did not abuse its discretion by denying the motion for the appointment of counsel. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Cristina D. Silva, District Judge
Jean J. Schwartzner
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk