

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RONALD EUGENE ALLEN, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83327-COA

FILED

APR 11 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Ronald Eugene Allen, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Carli Lynn Kierny, Judge.

Allen first argues the district court erred by denying his May 27, 2020, petition as procedurally barred. The district court found that Allen's petition was untimely filed pursuant to NRS 34.726(1). Issuance of the remittitur from Allen's direct appeal occurred on May 13, 2019, *see Allen v. State*, Docket No. 75329-COA (Order of Affirmance, April 16, 2019), so Allen's petition had to be filed by May 13, 2020, to be timely filed. The district court determined Allen's petition was untimely because it was filed on May 27, 2020. However, the petition was received by the district court on May 8, 2020, and it is the clerk's duty, not the parties', to file submitted documents. *See Sullivan v. Eighth Judicial Dist. Court*, 111 Nev. 1367, 1372, 904 P.2d 1039, 1042 (1995). Thus, Allen's petition was timely submitted to the clerk for filing, and it was the clerk's delay in filing the petition that resulted in it being filed beyond the one-year time limit. Accordingly, the district court erred insofar as it found that Allen's petition

was untimely filed. However, for the reasons discussed below, we nevertheless affirm the district court's decision to deny relief.

Allen next argues the district court erred by addressing the merits of his claims without first conducting an evidentiary hearing. In his petition, Allen claimed that his trial counsel was ineffective. 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, Allen claimed that his trial counsel was ineffective for failing to object during the State's rebuttal argument when the State improperly implied that it had personal knowledge of Allen's prior bad acts. During closing arguments, the State may "assert inferences from the evidence and argue conclusions on disputed issues." *Truesdell v. State*, 129 Nev. 194, 203, 304 P.3d 396, 402 (2013). The State is also allowed reasonable latitude to argue concerning the credibility of witnesses. *Rowland v. State*, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002). A review of the

State's rebuttal argument reveals the State did not imply that Allen committed uncharged prior bad acts but rather argued that the evidence produced at trial proved that Allen was guilty and urged the jury to find that its witnesses were credible. Accordingly, Allen did not demonstrate that his counsel's failure to object to the challenged statements fell below an objective standard of reasonableness.

In addition, significant evidence of Allen's guilt of battery upon an officer resulting in substantial bodily harm was presented at trial. The evidence included an officer's testimony that he was standing between Allen and a woman when Allen attempted to run toward the woman. The officer stated that Allen increased his speed when he realized that the officer was in his way. The officer testified that Allen ran into him at a high rate of speed and either pushed or punched him and that the resulting impact knocked him backward. The officer felt a pop in his leg and fell to the ground. The officer was subsequently transported to a hospital and required treatment for a partial tear in his right Achilles tendon. A second witness also testified that she viewed the incident and saw Allen run to the officer and punch him. In light of the significant evidence of Allen's guilt produced at trial, Allen failed to demonstrate a reasonable probability of a different outcome had counsel objected to the challenged statements during the State's rebuttal argument. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Allen claimed that his trial counsel was ineffective for failing to object when the State disparaged the defense during its rebuttal argument by stating that the defense blames everyone other than the defendant. Allen argued on direct appeal that the State committed misconduct by disparaging the defense during its rebuttal argument, and

this court concluded that he was not entitled to relief because he did not demonstrate error affecting his substantial rights. *Allen v. State*, Docket No. 75329-COA (Order of Affirmance, April 16, 2019). In light of this court's conclusion on direct appeal and the significant evidence of Allen's guilt produced at trial, Allen failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected to the State's comments. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Allen appeared to claim that his trial counsel was ineffective for failing to request the trial court to instruct the jury concerning resisting a public officer as a lesser-included offense of battery upon an officer. "[R]esisting a public officer under NRS 199.280 is a lesser-included offense of battery upon an officer under NRS 200.481." *Rosas v. State*, 122 Nev. 1258, 1264, 147 P.3d 1101, 1105 (2006), *abrogated on other grounds by Alotaibi v. State*, 133 Nev. 650, 654, 404 P.3d 761, 765 (2017). However, as explained previously, there was significant evidence presented at trial that Allen committed battery. See NRS 200.481(1)(a) ("Battery means any willful and unlawful use of force or violence upon the person of another." (internal quotation marks omitted)). Further, Allen did not identify any evidence at trial tending to reduce the greater offense. Therefore, Allen did not demonstrate his counsel acted in an objectively unreasonable manner by failing to request the instruction. See *Rosas*, 122 Nev. at 1265, 147 P.3d at 1106 ("[I]f the prosecution has met its burden of proof on the greater offense and there is no evidence at the trial tending to reduce the greater offense, an instruction on a lesser included offense may properly be refused." (quotation marks omitted)). Nor did Allen demonstrate a reasonable probability of a different outcome had counsel

requested the trial court to instruct the jury on resisting a public officer. *See Crawford v. State*, 121 Nev. 744, 756 & n. 30, 121 P.3d 582, 590 & n.30 (2005) (noting a trial court's error in refusing to give a jury instruction will be harmless when it is clear beyond a reasonable doubt that the jury's verdict was not attributable to the error). Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Allen claimed that the State committed misconduct by failing to adequately investigate his case and by permitting a witness to offer false testimony. Allen also asserted that the trial court erred by failing to instruct the jury concerning resisting a public officer. These claims could have been raised on direct appeal, and Allen did not demonstrate good cause for the failure to do so and actual prejudice. Therefore, he was not entitled to relief, *see* NRS 34.810(1)(b), and we conclude the district court did not err by denying these claims without conducting an evidentiary hearing.

Finally, Allen argues on appeal that the district court erred by denying his motion to appoint counsel.¹ 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 Allen's petition was a first petition not subject to

¹It appears that Allen's June 1, 2020, motion requesting the appointment of postconviction counsel was improperly filed in district court case number C-16-318225-1 instead of in district court case number A-20-815539-W. Therefore, we direct the clerk of the district court to file the motion in district court case number A-20-815539-W.

summary dismissal, *see* NRS 34.745(1), (4), he 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 issues in this matter were not difficult, Allen was able to comprehend the proceedings, and discovery with the aid of counsel was not necessary. 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. Carli Lynn Kierny, District Judge
Ronald Eugene Allen, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk