

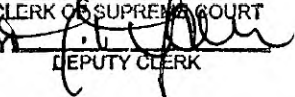
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WILLIAM BRODIE SURMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85648-COA

FILED

AUG 07 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

William Brodie Surman appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Surman argues that the district court erred by dismissing his February 7, 2020, petition and later-filed supplement. In his petition and supplement, Surman claimed his counsel was ineffective during the probation revocation proceedings.¹ To demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted

¹There is no absolute right to the effective assistance of counsel at a probation revocation proceeding. *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). However, in light of the record concerning the mitigation circumstances presented by Surman during the revocation proceedings, we conclude that the effective assistance of counsel was constitutionally required during those proceedings. *See id.* (stating that counsel is constitutionally required if the probationer makes a colorable claim (1) that he did not commit the alleged violations or (2) that there are justifying or mitigating circumstances which make revocation inappropriate and these circumstances are difficult or complex to develop or present); *see Fairchild v. Warden*, 89 Nev. 524, 525, 516 P.2d 106, 107 (1973) (adopting the approach set forth in *Gagnon*).

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, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). 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).

Surman argues that his counsel was ineffective for failing to timely request a continuance to allow Surman to undergo a psychological evaluation prior to the revocation hearing. Surman contends that he suffered from a serious brain injury and that injury contributed to his issues with substance abuse. Surman therefore asserts that his brain injury and its contribution to his substance abuse problems constituted significant mitigation circumstances such that his probation would not have been revoked had counsel timely requested a continuance to allow Surman to present a psychological evaluation at the revocation hearing.

The district court conducted an evidentiary hearing concerning this issue. Surman's counsel testified that there were difficulties in finding a person qualified to evaluate Surman because of the nature of Surman's brain injury. Counsel requested continuances in order to obtain sufficient time to complete the evaluation. The revocation court granted one continuance. However, the revocation court declined to grant a second continuance and ultimately decided to proceed with the revocation hearing without a psychological evaluation.

A psychologist also testified at the evidentiary hearing. The psychologist explained that she performed an evaluation of Surman during the postconviction proceedings. She stated that Surman utilized methamphetamine and alcohol as a maladaptive strategy to cope with issues stemming from his injury. The psychologist noted that Surman had issues with substance abuse prior to his injury, and she explained that she was unable to assess the level of impact that Surman's brain injury had on his problems with substance abuse.

After the evidentiary hearing, the district court found that counsel requested several continuances and that counsel explained to the revocation court why she believed the continuances to be warranted. Substantial evidence supports the district court's findings. In light of those findings, Surman does not demonstrate that counsel's performance fell below an objective standard of reasonableness due to any failure to ask for a continuance at an earlier time.

The district court also found that Surman did not meet his burden to prove by a preponderance of the evidence that his brain injury was a significant contributor to his substance abuse issues. In addition, the district court concluded that the evidence presented at the revocation hearing demonstrated that Surman's conduct was not as good as his probation conditions required and any mitigation evidence Surman may have been able to present did not outweigh the nature of his conduct. Substantial evidence supports the district court's findings. Surman therefore fails to demonstrate a reasonable probability of a different outcome at the probation revocation proceedings had the psychological evaluation been presented at the revocation hearing. *See Lewis v. State*, 90 Nev. 436, 438, 529 P.2d 796, 797 (1974) ("The evidence and facts must

reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation.”). Accordingly, we conclude that the district court did not err by dismissing this claim, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Lynne K. Simons, District Judge
Oldenburg Law Office
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk