


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL DUANE COLVIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87038-COA
FILED
SEP 11 2024
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

Michael Duane Colvin appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on December 14, 2017, and a supplemental petition filed on November 8, 2018. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

Colvin argues the district court erred by denying his claims that trial and appellate counsel were ineffective 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*). 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. 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 the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

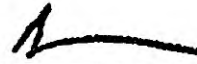
In his petition, Colvin argued that counsel were ineffective for: (1) failing to challenge count two, lewdness with a minor under the age of 14, and stipulating that Colvin be sentenced pursuant to the 2003 version of the statute rather than the 1999 version; (2) failing to request an independent psychological examination of the victim; (3) failing to request a jury instruction related to the first-degree kidnapping charge; (4) failing to object to, or raise on appeal, the fact that Colvin's custodial status was revealed to the jury; (5) failing to investigate a witness's unavailability and to argue a hearsay exception in order to introduce evidence related to the unavailable witness; and (6) failing to object to, or challenge on appeal, the reasonable doubt and "equal and exact justice" jury instructions. After reviewing the petition, the supplement, and the record, we conclude that, with the exception of claim six, Colvin supported his claims with specific factual allegations that are not belied by the record and, if true, would entitle him to relief. Therefore, we conclude the district court erred by denying these claims without first conducting an evidentiary hearing.

In claim six, Colvin argued that trial and appellate counsel were ineffective for failing to challenge the reasonable doubt and "equal and exact justice" jury instructions. Both instructions have been repeatedly

upheld, and Colvin failed to demonstrate trial or appellate counsel's performance was deficient or a reasonable probability of a different outcome at trial or on appeal had the instructions been challenged. *See* NRS 175.211 (defining reasonable doubt and providing that no other definition may be given to a jury); *Chambers v. State*, 113 Nev. 974, 982-83, 944 P.2d 805, 810 (1997) (upholding the reasonable doubt instruction provided in NRS 175.211); *Leonard v. State*, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998) (providing that where the jury has been instructed that the defendant is presumed innocent and that the State bears the burden of proving guilt beyond a reasonable doubt, the equal-and-exact-justice instruction does not deny defendant the presumption of innocence or lessen the burden of proof). Thus, we conclude that the district court did not err by denying this claim without first conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹


_____, C.J.
Gibbons


_____, J.
Bulla

¹The Honorable Deborah L. Westbrook did not participate in the decision in this matter.

cc: Hon. Mary Kay Holthus, District Judge
Law Office of Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk