

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARVIE LEE HILL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 87473-COA

**FILED**

DEC 30 2024

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Marvie Lee Hill appeals from a district court order denying a postconviction petition filed on December 29, 2016, and a supplement filed on May 15, 2023. Eighth Judicial District Court, Clark County; Carli Lynn Kierny, Judge.

Hill argues the district court erred by denying her claim that trial counsel was ineffective for failing to file a timely motion to admit the preliminary hearing transcript and visual recording of a witness, KV.<sup>1</sup> 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.

---

<sup>1</sup>The Nevada Supreme Court previously considered Hill's petition, affirmed the denial of the majority of claims raised on appeal, and remanded for an evidentiary hearing on this issue. *See Hill v. State*, No. 72872, 2018 WL 6617766 (Nev. Dec. 11, 2018) (Order Affirming in Part, Reversing in Part, and Remanding).

*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).

On the sixth day of trial, trial counsel filed a motion to admit the preliminary hearing transcript and a video recording of KV, who counsel claimed was unavailable to testify. Trial counsel included an affidavit from his investigator that the investigator attempted to find KV beginning on the first day of trial. The trial court concluded that the motion was untimely filed and denied the motion. Hill argues that, had counsel timely filed the motion prior to trial, it would have been granted and the transcript and video recording would have been presented at trial.

After holding an evidentiary hearing on this claim, the district court found that trial counsel's testimony supported a finding that KV was not unavailable prior to trial, and thus, trial counsel was not deficient for failing to file the motion earlier.<sup>2</sup> This finding and conclusion are supported

---

<sup>2</sup>Implicit in the district court's order is a finding that trial counsel was credible, and "[t]his court will not . . . evaluate the credibility of witnesses because that is the responsibility of the trier of fact." See *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). Further, Hill did not present

by the record. At the evidentiary hearing counsel testified that he believed KV would not be hard to locate because KV had been in contact with trial counsel leading up to trial. Therefore, prior to trial, a motion to admit the transcript and video recording based on KV's unavailability would have been futile. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (concluding counsel is not required to make futile motions). Accordingly, we conclude the district court did not err by finding that trial counsel's performance regarding the timing of the motion to admit was not deficient.

Further, the district court found that, had counsel sought KV before trial to demonstrate his unavailability in order to file the motion pretrial, it is likely that KV would have been found and would have been available to testify. Thus, the district court concluded that Hill failed to demonstrate she was prejudiced by counsel's performance. This finding and conclusion are supported by the record. At the evidentiary hearing, trial counsel testified that KV appeared at the courthouse after trial counsel filed the motion to admit. Thus, because KV was available to testify, Hill did not demonstrate a reasonable probability that his motion would have been granted had it been made pretrial. Further, trial counsel testified at the evidentiary hearing that he spoke with KV and, after that conversation, determined that KV's testimony would have been damaging to Hill's defense if presented at trial. Therefore, Hill did not demonstrate a reasonable probability of a different outcome at trial had counsel filed the

---

KV as a witness at the evidentiary hearing nor did Hill attempt to supplement the record with evidence to rebut counsel's testimony.

motion pretrial because counsel made a strategic decision to not present KV as a witness at trial based on his conversation with KV at the courthouse. Based on all of the above, we conclude the district court did not err by finding that Hill failed to demonstrate prejudice as a result of trial counsel's failure to file the motion to admit prior to trial. Therefore, we conclude that the district court did not err by denying the petition, and we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Bulla

  
\_\_\_\_\_, J.  
Westbrook

cc: Hon. Carli Lynn Kierny, District Judge  
Law Office of Christopher R. Oram  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk