

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICHARD DUANE DOW,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 90254-COA

FILED

FEB 10 2026

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *Elizabeth A. Brown*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Richard Duane Dow appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on November 20, 2023, and a supplemental petition filed on August 21, 2024. Ninth Judicial District Court, Douglas County; Thomas W. Gregory, Judge.

Dow was convicted, pursuant to a jury trial, of driving or being in actual physical control of a motor vehicle while being under the influence of an intoxicating liquor (DUI) with a prior felony DUI conviction. Dow argues the district court erred by denying his claims of ineffective assistance of 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, 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).

26-06416

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). 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).

First, Dow claims he was entitled to an evidentiary hearing on his claim that trial counsel was ineffective for failing to conduct adequate investigation. In his supplemental petition, Dow contended trial counsel did not investigate whether his truck was operable after it collided with an unoccupied sedan. Dow asserted that, if trial counsel had conducted an adequate investigation and found the truck was inoperable, trial counsel could have impeached the testimony of a reporting witness that Dow was trying to drive the truck and the testimony of a Nevada Highway Patrol trooper that the truck's engine was running.

The district court found that Dow did not make specific allegations regarding the truck's operability and did not allege that he had provided information to trial counsel about the truck's condition. The district court also found Dow failed to demonstrate a reasonable probability of a different outcome at trial had trial counsel conducted further investigation regarding the truck's operability after the collision because significant trial evidence—which included the trooper's body-worn camera footage depicting Dow moving the vehicle with the engine running—established Dow was driving or in actual physical control of an operable vehicle. Dow does not challenge the district court's findings on appeal, and these findings are supported by the record. Therefore, we conclude the

district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Dow claims he was entitled to an evidentiary hearing on his claim that trial counsel was ineffective for not calling two rebuttal witnesses. In his pro se petition, Dow asserted that he had lunch with two witnesses who could have testified that he was sober when he left the lunch before his encounter with law enforcement. The district court found that even assuming trial counsel was aware of the witnesses, he was not deficient for failing to call them because the State's theory of prosecution was that Dow's blood alcohol content was over the legal limit within two hours of the reporting witness seeing him in actual physical control of the truck. The district court further found that Dow failed to establish the witnesses' testimony would have changed the outcome of trial. These findings are supported by the record. Thus, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Dow claims he was entitled to an evidentiary hearing on his claim that trial counsel was ineffective for failing to request an expert witness jury instruction. At trial, a criminalist with the Washoe County Sheriff's Office testified as to the reliability of the breath alcohol instrument used to test Dow's blood alcohol content and the accuracy of the results generated by the instrument. Dow alleged below that, because trial counsel did not request an expert witness instruction, the jury did not know that the expert's testimony "should not be automatically considered better or more trustworthy than other evidence elicited at trial." The district court found Dow failed to articulate how trial counsel was deficient for not requesting an expert witness instruction because an objectively reasonable

attorney could have determined an expert witness instruction was not necessary because other jury instructions instructed the jury that they were the sole judges of the credibility, weight, and reasonableness of witness testimony. The district court further found that Dow failed to establish prejudice because he did not demonstrate that an expert witness instruction would have changed the jury's verdict considering the evidence introduced at trial. Dow does not challenge the district court's findings regarding this claim on appeal. Further, the record supports the district court's findings. Dow therefore failed to demonstrate a reasonable probability of a different outcome at trial had counsel requested an expert witness instruction. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Dow claims he was entitled to an evidentiary hearing on his claim that trial counsel was ineffective for not making an offer of proof to the trial court outlining Dow's intended testimony pursuant to *Warren v. State*, 121 Nev. 886, 894-95, 124 P.3d 522, 528 (2005). Dow claimed he was prejudiced by trial counsel's failure to provide such an offer of proof because he would have testified that immediately after the collision, he walked over 2.5 miles to call a towing company, purchased four beers, and walked back to his truck while drinking the beers. This testimony, Dow argued, would have supported an affirmative defense pursuant to NRS 484C.110(5), colloquially known as the "last-gulp" defense.¹

¹As mentioned, the State's theory of prosecution was that, within two hours of the witness seeing Dow driving or in actual physical control of his truck, he had a blood alcohol content of 0.08 or higher, a violation of NRS 484C.110(1)(c). Pursuant to NRS 484C.110(5), a defendant charged with a violation of NRS 484C.110(1)(c) may assert an affirmative defense that they "consumed a sufficient quantity of alcohol after driving or being in actual

The district court found Dow's claim conflicted with the proffer made by trial counsel prior to and during trial that Dow did not intend to testify, as well as trial counsel's statements during trial that Dow remained at his truck following the collision. The district court also found a reasonable attorney would have understood Dow's alleged intended testimony would have undermined a "last-gulp" defense because Dow would have admitted to consuming alcohol before the witness or trooper saw him driving or in actual physical control of his truck. As to prejudice, the district court found that Dow failed to demonstrate a reasonable probability of a different outcome at trial had he testified he made a five-mile round-trip walk because the trooper's testimony was that he did not perform all standard field sobriety tests after Dow reported he had recently undergone hip replacement surgery and had two "shot" knees." The district court further found the alleged intended testimony would not have provided grounds for a "last-gulp" defense. The record supports the district court's findings. Accordingly, the district court did not err in denying this claim without conducting an evidentiary hearing

Dow also claimed he was prejudiced by trial counsel's failure to make an offer of proof regarding his alleged intended testimony because such an offer of proof would have preserved his appellate claim that the State chilled his exercise of his right to testify by noticing its intent to impeach him with one of his four prior felony convictions for driving under the influence (DUI) if he testified. Specifically, Dow alleged that he "was

physical control of the vehicle, and before his or her blood or breath was tested, to cause the defendant to have a concentration of alcohol of 0.08 or more in his or her blood or breath."

greatly prejudiced as the [Court of Appeals] was unable to assess the chilling effect it had when [the district court] allowed in" his prior felony conviction for impeachment.

After noting it had never ruled on whether the State could impeach Dow with his prior felony DUI conviction, the district court found this claim of prejudice was not cognizable because *Strickland* requires courts to evaluate "whether as a result of trial counsel's unprofessional errors at trial, there is a reasonable probability that the result of the trial proceedings would be different." Further, the district court found that, even assuming Dow's claim of appellate prejudice was cognizable under *Strickland*, Dow failed to demonstrate the result of the appellate proceedings would have been different had trial counsel made an offer of proof regarding his intended testimony. The record supports the district court's findings. Accordingly, the district court did not err in denying this claim without conducting an evidentiary hearing.²

Fifth, Dow claims he was entitled to an evidentiary hearing on his claim that trial counsel was ineffective for failing to retain his client file for a period of five years after termination of representation. Dow's trial counsel died approximately one week after sentencing. Following trial counsel's death, trial counsel's heirs allegedly destroyed Dow's case file. Dow asserted below that the destruction of his case file rendered trial counsel's representation ineffective because RPC 1.15 requires attorneys to maintain client property, including case files, for a period of five years after

²The district court further found that trial counsel made a reasonable tactical decision in advising Dow not to testify at trial. Dow asserts on appeal that it was improper for the district court to make such a determination without conducting an evidentiary hearing. Based on the above conclusions, we conclude Dow has not shown he is entitled to relief.

the termination of representation. Dow further asserted that, because trial counsel's heirs allegedly destroyed his file, he could not determine whether trial counsel spoke with the two potential rebuttal witnesses who allegedly would have testified that Dow was not intoxicated.

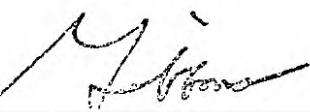
The district court found that Dow "failed to make a showing as to how counsel's post-trial death fell below an objective standard of reasonableness or why trial counsel fell below an objective standard of reasonableness for his handling of the file after he had passed away." As to prejudice, the district court found Dow made "no argument about why the result of the trial would have been different if trial counsel preserved the [case] file for five years after the trial." Dow does not challenge the district court's findings regarding this claim on appeal, and the district court's findings are supported by the record. Dow therefore failed to demonstrate either that counsel's performance was deficient or a reasonable probability of a different outcome at trial had trial counsel's heirs retained Dow's case file. Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Finally, Dow claims on appeal that the district court violated his Sixth Amendment right to confront witnesses against him by relying on trial counsel's in-court statements in denying his postconviction claims. Specifically, Dow asserts the district court violated his confrontation rights by relying on trial counsel's unsworn in-court statements to deny his petition without giving Dow the opportunity to challenge the statements. The right to confrontation is a trial right, *see Sheriff v. Witzenburg*, 122 Nev. 1056, 1060, 145 P.3d 1002, 1004 (2006), and it does not apply to postconviction proceedings, *see also Oken v. Warden*, 233 F.3d 86, 93 (1st Cir. 2000) ("[T]he Confrontation Clause does not apply to state post-

conviction proceedings"); *accord Skenandore v. Warden*, W.S.C.C. No. 84232, 2023 WL 2055197 (Nev. Feb. 16, 2023) (Order of Affirmance) (concluding, based on *Witzenburg* and *Oken*, that the district court properly rejected appellant's claim that his Confrontation Clause rights were violated where trial counsel passed away before the evidentiary hearing on his postconviction claims and he could not call counsel to testify). This claim therefore lacks merit. Having considered Dow's claims and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Bulla


_____, J.
Gibbons


_____, J.
Westbrook

cc: Hon. Thomas W. Gregory, District Judge
Karla K. Butko
Attorney General/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk