

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES EUGENE HERMANSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68832

FILED

JAN 19 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Voena
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant James Eugene Hermanson appeals from an order of the district court denying his September 10, 2013, postconviction petition for a writ of habeas corpus.¹ Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

Hermanson argues the district court erred in denying his claims of ineffective assistance of counsel. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry must be shown. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). We give deference to the court's factual findings if supported by substantial evidence and not clearly erroneous but review

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

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, Hermanson argued his counsel was ineffective for failing to file a motion to suppress the inculpatory statements he made to a sheriff's deputy. Hermanson alleged his statements were not voluntarily made because he had recently attempted suicide, overdosed on medication, used illegal drugs, did not receive adequate sleep, and suffered from further mental health and physical issues. Hermanson failed to demonstrate his counsel's performance was deficient or resulting prejudice.

"A confession is admissible only if it is made freely and voluntarily" and "must be the product of a rational intellect and a free will." *Passama v. State*, 103 Nev. 212, 213-14, 735 P.2d 321, 322 (1987) (internal quotation marks omitted). When reviewing whether a confession was made voluntarily, "[v]oluntariness must be determined by reviewing the totality of the circumstances." *Gonzales v. State*, 131 Nev. ___, ___, 354 P.3d 654, 658 (Nev. App. 2015).

The district court conducted an evidentiary hearing and Hermanson's counsel testified. Counsel testified he had reviewed Hermanson's statement and did not consider filing a motion to suppress because it was clear to him Hermanson did not have any difficulty understanding the discussion with the deputy. A review of the record reveals Hermanson's counsel's performance did not fall below an objective standard of reasonableness in this regard. *See id.*; *see also Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989) (tactical decisions of counsel "are virtually unchallengeable absent extraordinary circumstances."). The district court further concluded Hermanson's testimony, in which he asserted he did not comprehend the deputy's questions, to be incredible, particularly in light of Hermanson's detailed description during the

interrogation of his interactions with the victim. The district court's conclusions in this regard are supported by substantial evidence.

Further, the circumstances surrounding Hermanson's statement demonstrate it was voluntarily given. During the interrogation, the sheriff's deputy advised Hermanson of his *Miranda*² rights and Hermanson agreed to talk with the deputy. The deputy questioned Hermanson to ensure he understood the conversation, and Hermanson responded that he felt fine, he had no side effects from any medication, and his only issue stemmed from back pain due to a lack of pain medication while housed in the county jail. Hermanson then explained to the deputy that he had touched the victim's vagina in response to the victim's anatomy questions. Hermanson acknowledged his actions were sufficient for the authorities to detain him. Under these circumstances, Hermanson failed to demonstrate a reasonable probability he would have refused to plead guilty and would have proceeded to trial had counsel filed a motion to suppress his statements. Therefore the district court did not err in denying this claim.

Second, Hermanson argued his counsel was ineffective for failing to investigate and interview witnesses. Hermanson alleged he provided names of witnesses he believed would aid his case, but his counsel refused to take statements from those witnesses. Hermanson failed to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel stated he had discussed the case with witnesses Hermanson had believed would provide favorable evidence, but those persons had not actually provided anything helpful to

²*Miranda v. Arizona*, 384 U.S. 436 (1966).

the defense. The district court concluded counsel's testimony was credible and substantial evidence supports that conclusion.

Hermanson also presented the testimony of many of these witnesses at the evidentiary hearing, but the district court concluded that none of those witnesses provided testimony that was exculpatory in nature. Substantial evidence supports the district court's conclusion in this regard. In addition, the record reveals Hermanson admitted to touching a victim's genitals and, had Hermanson rejected the State's plea offer and proceeded to trial, he would have faced a sentence of life without the possibility of parole as he had previously been convicted of a sexual offense against a child.³ See NRS 200.366(4). Under these circumstances, Hermanson did not demonstrate a reasonable probability he would have refused to plead guilty and would have proceeded to trial had counsel conducted further investigation or interviews of witnesses. Therefore, the district court did not err in denying this claim.


Next, Hermanson argues he recently discovered the State withheld evidence demonstrating he did not have a probable cause hearing within 48 hours of his arrest and he was not promptly taken for a mental health examination when the Lyon County authorities learned he had mental difficulties. Hermanson also argues it is improper for a conviction involving an allegation of sexual abuse of a child to be supported merely by the testimony of the victim. On an appeal involving a postconviction petition for a writ of habeas corpus, this court generally declines to consider issues which were not raised in the district court in the first instance. See *McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276

³We note Hermanson was originally charged with lewdness with a child under the age of 14 and sexual assault of a child under the age of 16.

(1999). A review of the record before this court reveals Hermanson did not raise these claims in the instant petition before the district court. Because Hermanson does not demonstrate cause for his failure to raise these claims before the district court, we decline to consider them in this appeal.

Having concluded Hermanson is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.⁴


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

⁴Hermanson has raised multiple issues in the numerous filings he has submitted in this appeal, including asserting his postconviction counsel had not properly delivered his case file to the prison, the prison improperly opened that file outside of his presence, the prison has improperly refused to permit him to possess that file in his cell, and the prison requires him to view his legal paperwork in his case worker's office rather than his cell. We have reviewed all documents Hermanson has submitted in this matter, and we conclude no relief based upon those submissions is warranted. To the extent Hermanson has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we decline to consider them in the first instance.

cc: Hon. Leon Aberasturi, District Judge
James Eugene Hermanson
Attorney General/Carson City
Lyon County District Attorney
Third District Court Clerk