

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES DEAN VIOX,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71116

FILED

AUG 16 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Charles Dean Viox appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; Charles McGee, Senior Judge.

Charles Dean Viox argues the district court erred in denying the claims of ineffective assistance of trial counsel he raised in his November 8, 2012, petition and his March 7, 2016, supplement. To prove ineffective assistance of counsel, a petitioner must demonstrate 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, the outcome of the proceedings would have been different. *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 697, 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

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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, Viox argued his trial counsel was ineffective for failing to investigate Viox's medical information to support his theory of self-defense. During the incident, Viox's arm was in a cast due to a broken bone he suffered in a prior unrelated matter. Viox asserted in his petition the victim attacked him, resulting in a break in a second place in that same arm during the incident at issue in this matter, and he had to hit the victim with a baseball bat to repel the attack from the victim. Viox failed to demonstrate his trial counsel's performance was deficient or resulting prejudice.

At the evidentiary hearing, Viox's trial counsel testified he obtained Viox's x-rays and consulted a radiologist regarding the x-rays. Counsel testified the radiologist informed him the x-rays did not show a second break. Counsel testified he decided not to present the information regarding Viox's broken arm because it conflicted with Viox's version of events. Tactical decisions such as this one "are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which Viox did not demonstrate. In addition, the district court concluded the evidence presented during the postconviction proceedings demonstrated Viox did not suffer a second bone break during the incident and substantial evidence supports that decision. In light of those circumstances, Viox failed to demonstrate a reasonable probability

of a different outcome had trial counsel conducted further investigation into Viox's medical information. Therefore, we conclude the district court did not err in denying this claim.

Second, Viox argued his counsel was ineffective for advising him not to testify during the trial and for failing to explain that Viox needed to testify to support his self-defense claim. Viox failed to demonstrate his trial counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he advised Viox to testify at trial in support of his self-defense claim, but Viox declined to testify. Viox also stated at the evidentiary hearing that he decided not to testify at the trial. Under these circumstances, Viox failed to demonstrate his counsel acted in an objectively unreasonable manner or a reasonable probability of a different outcome had counsel offered different advice to Viox regarding testifying. Therefore, we conclude the district court did not err in denying this claim.

Next, Viox argues the district court erred in denying his claim of ineffective assistance of appellate counsel. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such 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 697.

Viox argued his appellate counsel was ineffective for failing to argue on direct appeal Viox was entitled to relief due to cumulative error.

Viox failed to demonstrate his appellate counsel's performance was deficient or resulting prejudice. On direct appeal, the Nevada Supreme Court only found one error and concluded it was harmless. *Viox v. State*, Docket No. 58647 (Order of Affirmance, June 13, 2012). Because there was only one error, Viox failed to demonstrate there were multiple errors which could have been cumulated. See *United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) ("One error is not cumulative error."). Accordingly, Viox failed to demonstrate his appellate counsel acted below an objective standard of reasonableness or that an assertion of cumulative error had a reasonable likelihood of success on appeal. Therefore, we conclude the district court did not err in denying this claim.

Next, Viox argues the State committed prosecutorial misconduct by failing to grant Viox's son immunity in exchange for his testimony, the trial court improperly did not explain to Viox's son the consequences Viox faced when Viox's son chose to invoke his Fifth Amendment right against self-incrimination rather than testify at Viox's trial, and the trial court improperly admitted Viox's son's hearsay statements during the trial. Viox also argues his trial and appellate counsel were ineffective for failing to raise these issues in the trial court or on direct appeal. 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 (1999). A review of the record before this court reveals Viox did not raise these claims in his petition or supplement before the district court and the

district court did not address these issues in its order denying the petition. Because Viox does not demonstrate cause for his failure to raise these claims in his petition or supplement before the district court, we decline to consider them in this appeal.¹

Next, Viox appears to argue his prior postconviction counsel improperly failed to pursue Viox's pro se motions seeking recusal of the district court judge due to bias. Viox failed to demonstrate this claim had

¹At the evidentiary hearing, Viox briefly testified regarding his son's availability to testify at the trial in relation to Viox's assertion that he is the victim of a conspiracy involving the State, defense attorneys, and district court judges. However, the district court specifically stated that it would not consider issues Viox raised during his evidentiary hearing testimony regarding the alleged conspiracy. To the extent Viox attempted to raise claims concerning his son's purported testimony, it was properly within the district court's discretion to decline to permit Viox to raise new issues at the evidentiary hearing. *See Barnhart v. State*, 122 Nev. 301, 304, 130 P.3d 650, 652 (2006) (stating "the district court is under no obligation to consider issues that are raised by a petitioner for the first time at an evidentiary hearing"). Viox also mentioned an issue regarding his son's invocation of his Fifth Amendment rights in a motion filed months after the evidentiary hearing in which he requested the district court judge to recuse himself from this matter. To the extent such a motion could be construed as a request to add a claim to his postconviction petition, Viox does not demonstrate the district court erred by failing to permit such a request. *See* NRS 34.750(5) (after a supplemental petition has been filed by appointed postconviction counsel "[n]o further pleadings may be filed except as ordered by the court."); *State v. Powell*, 122 Nev. 751, 758, 138 P.3d 453, 458 (2006) (explaining NRS 34.750 grants the district court broad authority regarding permitting supplemental pleadings in postconviction proceedings).

merit. The issues Viox raised in his pro se motions concerned rulings and actions the district court made during district court proceedings and “rulings and actions of a judge during the course of official judicial proceedings do not establish” bias sufficient to disqualify a district court judge. *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789-90, 769 P.2d 1271, 1275 (1988). Because Viox’s assertions in his pro se motions were insufficient to establish bias requiring disqualification of the district court judge, he failed to demonstrate his counsel should have pursued such motions.²


Finally, Viox argues the district court erred by failing to expeditiously examine the petition. Viox fails to demonstrate this claim has merit. The record demonstrates much of the delay in this matter was caused by Viox’s inability to cooperate with his postconviction counsel and by his multiple motions seeking recusal of different district court judges. The record further demonstrates the district court conducted the evidentiary hearing shortly after the petition was fully briefed. Given Viox’s actions toward his postconviction counsel, multiple pro se motions, and the timing of the evidentiary hearing, we conclude the district court examined the petition in an expeditious manner. In addition, as we

²To the extent Viox asserts his prior postconviction counsel provided ineffective assistance of counsel for failing to pursue disqualification of the district court judge, he did not raise this claim before the district court and we decline to consider it in the first instance. *See McNelton*, 115 Nev. at 416, 990 P.2d at 1276.

conclude the district court properly denied the petition, Viox fails to demonstrate prejudice stemming from any delay in examining the petition. Therefore, we conclude Viox is not entitled to relief for this claim.

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Charles McGee, Senior District Judge
Karla K. Butko
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk