

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DARIN SCOTT ROBBINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71892

FILED

FEB 13 2018

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

ORDER OF AFFIRMANCE

Darin Scott Robbins appeals from an order of the district court denying the postconviction petition for a writ of habeas corpus he filed on May 7, 2014, and the supplement he filed on July 1, 2015. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Robbins claims the district court erred by denying his claim counsel was ineffective for failing to file a petition for writ of habeas corpus ad testificandum for Robbins' codefendant, which would have secured the codefendant's presence at Robbins' trial. Robbins' codefendant, who was in federal custody in another state, provided an affidavit stating Robbins did not know the codefendant was going to rob the victim and Robbins did not participate in the robbery. Robbins claims counsel should have secured the codefendant's presence at trial in order to testify regarding claims in the affidavit.

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 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).


Robbins failed to demonstrate counsel was deficient or resulting prejudice. The district court held an evidentiary hearing, and counsel testified he specifically did not want Robbins' codefendant to testify because the codefendant told counsel he could not testify in support of the affidavit and because the affidavit was contradicted by the evidence presented at trial. This was a reasonable strategic decision by counsel. See *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (observing strategic decisions are virtually unchallengeable under most circumstances). Therefore, counsel was not deficient for failing to file a petition for a writ of habeas corpus ad testificandum to secure the codefendant's presence at trial.


Further, Robbins failed to demonstrate he was prejudiced by counsel's failure to seek Robbins' codefendant's presence at trial because he failed to demonstrate a reasonable probability of a different outcome at trial had the codefendant testified. The affidavit provided by the codefendant was contradicted by the testimony of the victim and the evidence presented at trial. Moreover, Robbins failed to demonstrate his codefendant's testimony at trial would have supported the claims in the affidavit.

Therefore, we conclude the district court did not err by denying this claim,
and we

ORDER the judgment of the district court AFFIRMED.¹


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Carolyn Ellsworth, District Judge
Nguyen & Lay
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

¹To the extent Robbins claimed counsel was ineffective for failing to know he could file a postconviction petition for a writ of habeas corpus ad testificandum, this claim lacked merit. Counsel testified at the evidentiary hearing, while he did not know the name of the writ he needed to file, he did know there was a procedure to secure the codefendant's presence at the trial.