

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DANIEL ANDREW BASHAM, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73959-COA

FILED

NOV 06 2018

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

ORDER OF AFFIRMANCE

Daniel Andrew Basham, Jr., appeals from a district court order denying a "petition for judicial review" filed on May 5, 2014, and a supplemental postconviction petition for a writ of habeas corpus filed on May 20, 2016. Second Judicial District Court, Washoe County; William A. Maddox, Senior Judge.

Basham claims the district court erred by denying his petition because he received ineffective assistance of defense and appellate counsel. To establish ineffective assistance of defense counsel, a petitioner who has been convicted pursuant to a guilty plea must demonstrate counsel's performance was deficient because it fell below an objective standard of reasonableness, and resulting prejudice in that there is a reasonable probability, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial. *Kirksey v. State*, 112 Nev. 980, 997-88, 923 P.2d 1102, 1107 (1996). Similarly, to establish ineffective assistance of appellate counsel, a petitioner must demonstrate counsel's performance was deficient because it fell below an objective standard of reasonableness, and resulting prejudice in that the omitted issue had a reasonable probability of success on appeal. *Id.* at 998, 923 P.2d at 1114.

The petitioner must demonstrate both components of the ineffective-assistance inquiry—deficiency and prejudice. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). We give deference to the district court's factual findings if they are supported by substantial evidence and are not clearly wrong, but we 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, Basham claims defense counsel was ineffective for failing to object during sentencing when the State misrepresented his risk of recidivism, argued his conduct constituted child abuse, and presented the victim impact testimony of three witnesses who falsely described his conduct and asked for a maximum sentence. Basham further claims counsel was ineffective for failing to object to District Judge Patrick Flanagan's assertion that a child neglect conviction carries a presumptive prison sentence.

The district court conducted an evidentiary hearing and made the following findings: The district court received a risk assessment that concluded Basham was "in the upper to mid low range for recidivism." The State fairly recited the facts of Basham's crime to support the Division of Parole and Probation's recommendation of prison instead of probation. The State was required to notify the victims of their right to make a statement at sentencing. The victims' right to make a statement at sentencing included the right to express an opinion about Basham's sentence. And the district court belief that a child neglect conviction carries a presumptive prison sentence was correct because a person "convicted of child neglect causing substantial bodily harm is not eligible for probation—unless he receives a qualified evaluation that concludes he is not a high risk to reoffend."

We conclude the district court's findings are supported by substantial evidence and are not clearly wrong, Basham failed to demonstrate counsel was deficient and he was prejudiced by counsel's performance, and the district court did not err by rejecting this claim. See NRS 176.015(3) & (4); NRS 176A.110(3)(d); NRS 200.508(1) & (2); *Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004); *Randell v. State*, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993).

Second, Basham claims defense counsel was ineffective for coercing and inducing his guilty plea with improper advice. He argues his guilty plea was unknowing because he believed he could be convicted of child abuse, it was coerced because it presented the only way he could be released on his own recognizance to see his child who was seriously ill and required surgery, and it was further coerced because he did not know that the State "never intended for him to be sentenced to a probationary term with a suspended sentence."

The district court made the following findings: Basham testified during the evidentiary hearing he did not want to withdraw his guilty plea. He acknowledged entering his guilty plea because it allowed him to be released on his own recognizance, he thought he might receive probation, and he realized he had indeed neglected the victim. He testified defense counsel was willing to go to trial. And he was given an opportunity at sentencing to file a motion to withdraw his guilty plea, but he decided to go forward with sentencing "because he knew . . . he failed to adequately supervise the . . . child."

We conclude the district court's findings are supported by substantial evidence and are not clearly wrong, Basham failed to demonstrate counsel was deficient and he was prejudiced by counsel's performance, and the district court did not err by rejecting this claim. See *Means*, 120 Nev. at 1012-13, 103 P.3d at 33.

Third, Basham claims defense counsel was ineffective for failing to properly investigate the underlying facts of his case. He argues counsel's failure to hire a medical expert to determine his factual innocence of the child-abuse charge fell below an objective standard of reasonableness and was prejudicial because the State was able to use the child abuse charge to coerce his guilty plea and obtain a larger-than-necessary sentence.

The district court made the following findings: Basham testified during the evidentiary hearing he did not want to withdraw his guilty plea. Defense counsel consulted with a registered nurse, presented the nurse's report as part of the sentencing memorandum, and the report addressed mitigating circumstances that were present as a result of the victim's health. The district court acknowledged the fact that Basham pleaded guilty to child neglect causing substantial bodily harm and not to child abuse causing substantial bodily harm. And the district court sentenced Basham based on his admission he neglected the victim—not because he abused the victim.

We conclude the district court's findings are supported by substantial evidence and are not clearly wrong, Basham failed to demonstrate counsel was deficient and he was prejudiced by counsel's performance, and the district court did not err by rejecting this claim. See *id.*


Finally, Basham claims appellate counsel was ineffective for failing to challenge Judge Flanagan's belief that a child neglect conviction carries a presumptive prison sentence.¹ The district court determined that


¹To the extent Basham claims appellate counsel was ineffective for failing to pursue claims that the State breached the guilty plea agreement, presented suspect evidence at sentencing, and misrepresented his risk of recidivism, we decline to consider these claims because they were not raised in the habeas petition or supplemental petition Basham filed in the court

Judge Flanagan's presumption was correct because "one who is convicted of child neglect faces a presumptive prison sentence. He will in fact go to prison unless he obtains an evaluation that declares he is not a high risk to reoffend. The presumption is not conclusive; it may be overcome by a qualified evaluation." The district court further found that Judge Flanagan knew that probation was a possibility in this case but determined prison was an appropriate sentence.

We conclude the district court's findings are supported by substantial evidence and are not clearly wrong, Basham failed to demonstrate counsel was deficient and he was prejudiced by counsel's performance, and the district court did not err by rejecting this claim. See NRS 176A.110(3)(d); NRS 200.508(1) & (2); *Means*, 120 Nev. at 1012-13, 103 P.3d at 33.

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

below, and, therefore, they were not considered by the district court in the first instance. See *Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means*, 120 Nev. 1001, 103 P.3d 25.

cc: Chief Judge, Second Judicial District Court
Hon. William A. Maddox, Senior Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk