

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID OWENS HOOPER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76316-COA

FILED

MAY 15 2019

EMMA BETH A. BROWN
CLERK OF THE COURT
BY *Chapman*
CHIEF CLERK

ORDER OF AFFIRMANCE

David Owens Hooper appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus filed on June 19, 2017.¹ Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.

Hooper argues the district court erred by denying his ineffective-assistance-of-counsel claims. 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*,

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

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).

First, Hooper argues the district court erred by denying his claim counsel was ineffective for failing to investigate his prior convictions. He claimed had counsel investigated, counsel would have discovered his conviction in 1990 was not lawfully obtained. And because the 1990 conviction was not lawfully obtained, all of his subsequent convictions were not proper because they were based on his 1990 conviction. Therefore, the "in lawful custody" element of battery by a prisoner in lawful custody would have been negated.

Hooper failed to demonstrate counsel was deficient or resulting prejudice. "In the context of defining lawful custody or confinement under NRS 200.481, we have noted that a person is a prisoner when one is held in custody under process of law or under lawful arrest." *Byars v. State*, 130 Nev. 848, 864, 336 P.3d 939, 950 (2014) (internal quotation marks and emphasis omitted). Here, Hooper was held in custody under process of law. Specifically, he was being held in prison pursuant to a judgment of conviction entered by way of a jury verdict. Alleged factual errors in his prior convictions would not negate the fact that he was in lawful custody at

the time of the instant criminal conduct. Therefore, we conclude the district court did not err by denying this claim.²

Second, Hooper claims the district court erred by denying his claim there was a conflict of interest between him and counsel because his counsel was a lifelong friend of the victim. Hooper failed to demonstrate there was an actual conflict of interest. *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). The Nevada Rules of Professional Conduct limit conflicts to those who are related to the attorney as a parent, child, sibling, or spouse. *See* NRPC 1.8(k). And Hooper failed to demonstrate the fact counsel knew the victim placed counsel in a situation conducive to divided loyalties, *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992), or that his counsel actively represented conflicting interests, *Burger v. Kemp*, 483 U.S. 776, 783 (1987). Therefore, we conclude the district court did not err by denying this claim.


Finally, to the extent Hooper claims the district court erred by denying his claim that there was a conspiracy to keep him imprisoned, this claim was not properly raised in Hooper's petition because it could have been raised in the trial court or on direct appeal from Hooper's judgment of conviction and Hooper failed to demonstrate good cause and prejudice for


²To the extent Hooper alleged counsel was ineffective for failing to raise the underlying claim on appeal regarding his custody being unlawful, he failed to demonstrate this claim had a reasonable probability of success on appeal. *See Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

his failure to do so. See NRS 34.810(1)(b). Therefore, we conclude the district court did not err by denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Steve L. Dobrescu, District Judge
David Owens Hooper
Attorney General/Ely
White Pine County Clerk

³We deny Hooper's motion for the appointment of counsel and motion for evidentiary hearing.

We have reviewed all documents Hooper has filed in this matter, and we conclude no relief based upon those submissions is warranted. To the extent Hooper 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.