

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTHONY JAMES PARKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69425

FILED

AUG 16 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Appellant Anthony James Parker argues the district court erred in denying his claims of ineffective assistance of counsel raised in his December 30, 2011, petition. To prove ineffective assistance of 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 there is a reasonable probability that, 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).

First, Parker argues his counsel was ineffective for coercing him into pleading guilty. Parker asserts counsel coerced his plea by failing to communicate the appropriateness of an accident defense and by failing to investigate possible defenses. Parker also asserts counsel coerced his plea by informing him he would leave prison in a "pine box" if he chose to proceed to trial. Parker failed to demonstrate his counsel's performance was deficient or resulting prejudice.

At the evidentiary hearing, counsel testified she discussed possible defenses with Parker and informed Parker he was likely to be convicted of first-degree murder if he went to trial. Counsel testified this was due to the child victim, the nature of the victim's injuries, and due to Parker's inconsistent statements regarding the incident at issue. Counsel also testified she investigated whether an accident defense would have been viable by retaining two experts to review the medical evidence in this matter, but neither expert provided information which could have been helpful to the defense. Counsel further testified she explained to Parker that a first-degree murder conviction carried the possibility of a sentence of life in prison without the possibility of parole. The district court concluded the testimony presented at the evidentiary hearing demonstrated Parker's trial counsel was diligent and gave frank and honest advice regarding this case. Substantial evidence supports this conclusion.

Further, Parker acknowledged in the written plea agreement that he did not act under duress or coercion and asserted at the plea canvass that he entered his guilty plea of his own free will. Parker also

acknowledged in the written plea agreement and at the plea canvass that he had discussed possible defenses with his counsel.

Given the record before this court, there was substantial evidence of Parker's guilt. Accordingly, Parker fails to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on going to trial had counsel had different discussions with him regarding use of an accident defense at trial, had conducted further investigation into this matter, or explained the sentence he faced had he gone to trial in a different manner. Therefore, we conclude the district court did not err in denying this claim.

Second, Parker argues his trial counsel was ineffective during the sentencing hearing because counsel failed to present mitigation evidence regarding Parker's disciplinary issues while he was housed in the county jail. During the sentencing hearing, the parties discussed the multiple disciplinary infractions committed by Parker while housed in the county jail. Parker argues counsel should have obtained the jail documents discussing the disciplinary issues as those documents would have demonstrated many of the issues concerned trivial matters. Parker failed to demonstrate his counsel's performance was deficient or resulting prejudice.

A review of the record reveals a number of Parker's disciplinary infractions involved him acting in a threatening manner towards jail staff members. Given the nature of those disciplinary infractions, Parker does not demonstrate objectively reasonable counsel would have argued Parker's jail behavior was appropriate or should not have been weighed against him when the court imposed sentence. See *Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). In addition,

the district court determined that the information Parker provided during the postconviction proceedings would not have resulted in a different sentence had counsel introduced it during the sentencing hearing. Substantial evidence supports that determination. Therefore, we conclude the district court did not err in denying this claim.

Third, Parker argues his trial counsel was ineffective for failing to file a motion asserting the offense alleged in the indictment was insufficient to demonstrate Parker was criminally liable for second-degree murder. Parker asserts that the indictment merely alleged he passively committed child neglect, and the State must allege he willfully committed child neglect to support a second-degree murder charge. Parker failed to demonstrate his counsel's performance was deficient or resulting prejudice.

A review of the indictment reveals that it alleged Parker willfully caused the child victim to "suffer unjustifiable physical pain as a result of neglect or to be placed in a situation where the child may suffer unjustifiable physical pain," stemming from head injuries the child victim sustained while in Parker's care. The indictment further alleged that the neglect "was inherently dangerous" and the death or injuries suffered by the child were "a foreseeable consequence of the defendant's neglect." Accordingly, the allegations contained in the indictment stated Parker willfully acted in an inherently dangerous manner, the child's death was a directly foreseeable consequence of Parker's illegal act, and there was an immediate and direct causal relationship between Parker's actions and the victim's death. These allegations were sufficient to support a charge for second-degree murder. *See Labastida v. State*, 115 Nev. 298, 307, 986 P.2d 443, 449 (1999); *see also* NRS 200.010; NRS 200.030.

Under these circumstances, Parker fails to demonstrate objectively reasonable counsel would have challenged the indictment on these bases or a reasonable probability of a different result had counsel done so. Therefore, we conclude the district court did not err in denying this claim.

Next, Parker argues the district court erred during the evidentiary hearing by admitting hearsay statements from non-testifying experts and by permitting questioning beyond the scope of direct examination.¹ Parker fails to demonstrate he is entitled to relief. We review a district court's evidentiary decisions for an abuse of discretion. *McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).


During the evidentiary hearing, counsel was questioned regarding her advice to Parker during this matter and the reasons she advised him to plead guilty. Counsel began to explain she obtained opinions from experts who had evaluated the medical evidence in this matter. Parker objected to admission of this testimony and the district court overruled the objection, stating the testimony was not considered as evidence of the truth of the matter asserted, permitted counsel to testify regarding the medical opinions to show the effect that information had on counsel's advice to Parker, and concluded this testimony was within the

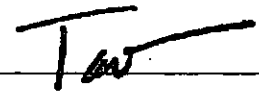
¹Parker also asserts that admission of information from non-testifying experts during the evidentiary hearing violated the Confrontation Clause of the Sixth Amendment. However, the right to confrontation is a trial right, *Sheriff v. Witzenburg*, 122 Nev. 1056, 1060, 145 P.3d 1002, 1004 (2006), and therefore, not applicable to Parker's postconviction proceedings.

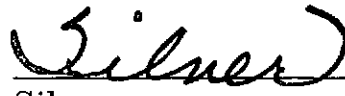
scope of direct examination. See NRA 51.035 (defining hearsay as "a statement offered in evidence to prove the truth of the matter asserted"); see also NRS 50.115(2) (discussing scope of cross-examination of witnesses). A review of the record reveals the district court did not abuse its discretion in admitting this testimony. Therefore, Parker is not entitled to relief for this claim.²

Having considered Parker's allegations and concluded they lack merit, we

ORDER the judgment of the district court AFFIRMED.


Gibbons, C.J.


Tao, J.


Silver, J.

cc: Hon. Connie J. Steinheimer, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

²Parker also asserts that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose the expert reports relied upon by Parker's counsel when counsel advised Parker to enter a guilty plea. Parker did not raise this issue in the district court and we decline to consider it in the first instance. See *McNelson v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).