

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BOIVAE FLEMING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79870-COA

FILED

OCT 09 2020

ELIZABETH BROWN
CLERK OF APPEALS COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Boivae Fleming appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on February 17, 2017. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

Ineffective assistance of counsel

Fleming claims the district court erred by denying his petition because defense counsel was ineffective. To prevail on a claim of ineffective assistance of trial counsel, a petitioner 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 outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The petitioner must show both components of the ineffective-assistance inquiry—deficiency and prejudice, *id.* at 697, and the petitioner must demonstrate the underlying facts of his claim by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We review the district court's resolution of ineffective-assistance claims de novo, giving deference to the court's factual findings if they are supported

by substantial evidence and not clearly wrong. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, Fleming claims the district court erred by denying his petition because defense counsel was ineffective for failing to adequately prepare and investigate. The district court made the following findings. Fleming's claims that counsel was ineffective for failing to adequately investigate the case, have an independent laboratory test the drugs, and determine whether various police reports were forged were bare and naked claims because they failed to show how a better preparation and investigation would have rendered a more favorable outcome probable. And Fleming's claims that counsel was ineffective for failing to investigate his alibi defense and the identity of the confidential informant were belied by the record because the record demonstrates that counsel did investigate the alibi defense and did seek the identity of the confidential informant. We conclude the district court's findings are not clearly wrong, Fleming failed to demonstrate that counsel was ineffective, and the district court did not err by rejecting Fleming's claims. See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004); *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Second, Fleming claims the district court erred by denying his petition because defense counsel was ineffective for failing to raise a sentencing entrapment defense. The district court conducted an evidentiary hearing on this claim and made the following findings. Fleming failed to show that counsel's performance was deficient. Fleming chose not to call counsel as a witness during the evidentiary hearing. Counsel was the only person who could have said whether an entrapment defense was considered and, if so, why it was not used. Fleming also failed to show he was prejudiced by counsel's performance because he failed to show that he was entrapped. We conclude the district court's findings are supported by

the record and are not clearly wrong, Fleming failed to demonstrate that counsel was ineffective, and the district court did not err by rejecting this claim.

Third, Fleming claims the district court erred by denying his petition because the cumulative effect of defense counsel's errors require reversal. However, even assuming multiple deficiencies in counsel's performance may be cumulated to find prejudice under the *Strickland* test, see *McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009), there was nothing to cumulate because Fleming failed to demonstrate any such deficiencies. Accordingly, we conclude the district court did not err by rejecting this claim.¹

Postconviction discovery motions

Fleming claims the district court erred by denying his postconviction "Motion for Las Vegas Metropolitan Police Department to Disclose All Video Tape Evidence Concerning the Arrest of the Defendant Boivae Fleming on May 21, 2007." The record demonstrates the district court held a hearing on this motion and ordered it "granted to the extent of the video existing." Accordingly, we conclude Fleming's claim is belied by the record.

Fleming also claims the district court erred by denying his postconviction "Motion for Release of Personnel Records Including Internal Affairs Files of Testifying Officers, Alternatively In Camera Inspection of Internal Affairs Officers Files by District Court." The burden is on the appellant to provide this court with an adequate record enabling this court

¹We decline to consider Fleming's claim that defense counsel was ineffective for failing to pursue viable defenses because it was raised for the first time in his reply brief and, therefore, the State did not have an opportunity to respond to it. See NRAP 28(c); *Browning v. State*, 120 Nev. 347, 368 n.53, 91 P.3d 39, 54 n.53 (2004).

to review assignments of error asserted on appeal. NRAP 30(b)(3); *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980).

Here, the district court held a hearing on Fleming's motion and ordered it denied. Fleming did not provide this court with a transcript of the hearing. Without the transcript, we are unable to review the district court's reasons for denying the motion. Accordingly, we conclude that Fleming has failed to overcome the presumption that the district court did not commit error in its ruling. *Cf. Lee v. Sheriff of Clark Cty*, 85 Nev. 379, 380-81, 455 P.2d 623, 624 (1969).

Dismissal of charges

Fleming claims the district court erred by failing to dismiss the charges because the State failed to preserve evidence. However, the record does not demonstrate that this claim was raised in Fleming's postconviction habeas petition or considered by the district court in the first instance; therefore, we decline to consider it in this appeal. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means*, 120 Nev. at 1013, 103 P.3d at 33.

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Mary Kay Holthus, District Judge
Terrence M. Jackson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk