

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RONALD EUGENE ALLEN, JR.,
Appellant,
vs.
WILLIAM A. GITTERE, WARDEN,
Respondent.

No. 81078-COA

FILED

JAN 22 2021

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

ORDER OF AFFIRMANCE

Ronald Eugene Allen, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on December 19, 2019. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Allen contends the district court erred by denying his ineffective assistance claims without first conducting an evidentiary hearing. In his petition below, Allen claimed he received ineffective assistance of trial and appellate counsel. To demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *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*). In the context of appellate counsel, a petitioner must demonstrate prejudice by showing that the omitted issue had a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923

P.2d 1102, 1114 (1996). Both components of the inquiry—deficiency and prejudice—must be shown. *Strickland*, 466 U.S. at 687.

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). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Counsel is not ineffective for failing to raise futile arguments. See *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

First, Allen claimed trial counsel failed to investigate the crime charged, locate and subpoena certain witnesses, and present the witnesses' testimony. Allen's bare claim did not identify the witnesses, specify what the outcome of the investigation would have been, indicate what their testimony would have been, or explain how their testimony would have affected the outcome of the trial. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing. See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

Second, Allen claimed trial counsel was ineffective for allowing him to stipulate to habitual criminal status when one crime may have been "non-qualifying" and another was reduced to a misdemeanor. The record does not indicate Allen stipulated to habitual criminal status. Further, the allegedly "non-qualifying" crime was not used to adjudicate Allen a habitual criminal. Finally, even if the state in which Allen committed possession of

cocaine with the intent to sell reduced the crime from a felony to a misdemeanor, the crime remains a felony in Nevada, *see* NRS 453.337(2)(a); NAC 453.510, and could thus be used to qualify him for habitual criminal treatment. *See* NRS 207.010(1)(b) (providing the qualifying crimes may be a felony under either law of the state in which the crime was committed or under Nevada law). Allen thus failed to demonstrate counsel was deficient or he was prejudiced. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Allen claimed appellate counsel was ineffective for failing to challenge the response given to the jury regarding malice and the associated jury instruction. Allen was acquitted of the only charge for which malice was an element. Because Allen was acquitted of the relevant charge, any claim regarding the malice jury instruction would have been futile. *See* NRS 178.598. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fourth, Allen claimed appellate counsel was ineffective for failing to argue that the State violated the notice requirement for witness Nichelle Carter. NRS 174.234(1)(a) requires parties to file written notice of lay witnesses not less than five judicial days before the start of trial. The State filed a supplemental notice of witnesses on February 24, 2017, and Allen's trial began on March 6, 2017, at least five judicial days later. Because the State provided notice of its intent to call the witness in accord with NRS 174.234(1)(a), any claim regarding the notice requirements would have been futile. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Allen also contends on appeal that the district court erred by denying his claim alleging trial court error. In his petition, Allen claimed the trial court should have allowed him to impeach a particular witness. Allen could have raised this claim on appeal and, accordingly, it was procedurally barred absent a demonstration of good cause and actual prejudice. NRS 34.810(1)(b). Allen did not attempt to demonstrate either. We therefore conclude the district court did not err by denying this claim.¹


Finally, Allen contends on appeal that the district court erred by denying his motion to appoint counsel. The appointment of counsel in this matter was discretionary. *See* NRS 34.750(1). When deciding whether to appoint counsel, the district court may consider factors, including whether the issues presented are difficult, whether the petitioner is unable to comprehend the proceedings, or whether counsel is necessary to proceed with discovery. *Id.* Allen appears to have met the threshold requirements for the appointment of counsel. *See* NRS 34.745(1), (4); NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 761 (2017). However, the district court found that the issues in this matter were not overly complex or difficult and there was no indication Allen was in need of counsel. *See* NRS 34.750(1); *Renteria-Novoa*, 133 Nev. at 76, 391 P.3d at 761. Therefore, the district court denied the motion to appoint counsel. The record supports the decision of the district court, and we conclude the

¹On appeal, Allen contends the ineffective assistance of appellate counsel constituted good cause. Because this argument was not raised below, we decline to consider it on appeal in the first instance. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

district court did not abuse its discretion by denying the motion for the appointment of counsel. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Jerry A. Wiese, District Judge
Ronald Eugene Allen, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk