

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES ERIC EPPS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81372-COA

FILED

APR 12 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

James Eric Epps appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on January 29, 2020. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Epps argues the district court erred by denying his ineffective-assistance-of-counsel claims without first conducting an evidentiary hearing. To demonstrate ineffective assistance of trial 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*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687. 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).

First, Epps claimed counsel was ineffective for failing to investigate whether the knife introduced at trial was the knife used in the

crime. Epps testified at trial that he had a knife that night and he accidentally stabbed the victim. And he did not allege facts in his petition that demonstrated it was material that the knife introduced at trial was the actual knife used in the crime. Therefore, Epps failed to demonstrate counsel was deficient or a reasonable probability of a different outcome had counsel investigated the knife. Thus, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Epps claimed counsel was ineffective for failing to investigate whether the victim had a propensity for violence and for failing to cross-examine witnesses regarding the victim's use of methamphetamine in an effort to show it may have affected the victim's aggression. Epps argued this would have supported his self-defense claim. Epps did not present a defense of self-defense at trial; instead, he testified it was an accident. Further, counsel cross-examined witnesses regarding the victim's use of methamphetamine and how that may have affected the victim's aggression. Therefore, Epps failed to demonstrate counsel was deficient or a reasonable probability of a different outcome had counsel investigated the victim's propensity for violence or further cross-examined the witnesses regarding the victim's methamphetamine use. Thus, we conclude the district court did not err by denying these claims without first conducting an evidentiary hearing.

Third, Epps claimed counsel was ineffective for failing to have an expert witness available to testify at trial. This expert would have testified regarding the fight or flight reaction in relation to self-defense. Prior to trial, the district court ruled that this witness could only testify if Epps testified that he acted in self-defense. Epps testified the stabbing was an accident. Therefore, the expert was not allowed to testify. Thus, counsel

was not deficient for failing to have the expert available to testify, and Epps failed to demonstrate a reasonable probability of a different outcome at trial had counsel had the expert available to testify. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fourth, Epps claimed counsel was ineffective for failing to call a witness to testify that Epps did not have a problem with the victim prior to the stabbing.¹ Epps argued this testimony would have supported his self-defense claim. At trial Epps testified he went to the victim's home because the victim owed him \$200. He also testified the stabbing was an accident. Therefore, had this witness testified, it would have contradicted Epps's own testimony, and because Epps did not claim self-defense at trial, the witness's testimony would not have been helpful in that respect. Thus, Epps failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at trial had counsel called the witness to testify. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fifth, Epps claimed counsel was ineffective for failing to request a self-defense jury instruction. A criminal defendant "has the right to have the jury instructed on [his or her] theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." *Crawford v. State*, 121 Nev. 744, 751, 121 P.3d 582, 586 (2005). Epps did not present any evidence of self-defense at trial; therefore, counsel was not deficient for failing to request a self-defense instruction. Further, Epps failed to demonstrate a reasonable probability of a different outcome at trial

¹This witness was not present during the fight and stabbing.

had counsel requested the instruction. Thus, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Sixth, Epps claimed counsel was ineffective for failing to object to the State's characterization of "deliberation" during closing argument. Epps claimed the State improperly equated the time it took to make the decision to kill a person with the amount of time it took to make the decision to run a red light. Epps failed to demonstrate this characterization was improper; therefore, he failed to demonstrate counsel was deficient. Further, because the deliberation element only went to first-degree murder, and Epps was not convicted of first-degree murder, he failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected. Thus, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Seventh, Epps claimed counsel was ineffective for failing to object to a jury instruction on general intent crimes. He argued he was charged with a specific intent crime and, therefore, it was improper to instruct on general intent. Epps was charged with open murder, which includes general intent crimes. *See Hancock v. State*, 80 Nev. 581, 583, 397 P.2d 181, 182 (1964). Therefore, Epps failed to demonstrate counsel was deficient, *see Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (counsel is not deficient for failing to make futile objections), or a reasonable probability of a different outcome at trial had counsel objected to the general intent instruction. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Next, Epps claimed he received ineffective assistance of appellate counsel. To demonstrate ineffective assistance of appellate

counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687.


Epps claimed counsel was ineffective for failing to argue the trial court erred by not giving a jury instruction on self-defense. Epps did not request a self-defense instruction be given at trial, nor did he present any evidence that he acted in self-defense. Therefore, he failed to demonstrate appellate counsel was deficient or that the claim would have had a reasonable probability of success on appeal. Thus, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Finally, Epps claims 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.* Because the district court granted Epps leave to proceed in forma pauperis and his petition was a first petition not subject to summary dismissal, see NRS 34.745(1), (4), Epps met the threshold requirements for the appointment of counsel. See 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 difficult, Epps was able to comprehend the proceedings, and discovery with the aid of counsel was not necessary. 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 district court did not abuse its discretion by denying the motion for the appointment of counsel.

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. 3
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk