

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PAMELA ANN ERWIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84687-COA

FILED

APR 07 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Pamela Ann Erwin appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on June 13, 2016, and supplemental pleadings filed on November 22, 2019, and July 23, 2020. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

Erwin argues the district court erred by denying her claims that counsel was ineffective at sentencing. 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*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 687, 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).

Erwin argues the district court erred by denying her claim that counsel should have investigated and presented at the sentencing hearing mitigating evidence that she suffered from battered woman's syndrome. At the evidentiary hearing on her petition, Erwin testified that her husband (the victim) and his uncle had abused her during their marriage. However, Erwin did not provide expert testimony to establish her claim that she suffered from battered woman's syndrome at the time she killed her husband. Further, it appears that Erwin presented three written statements with the presentence investigation report to the district court regarding the abuse she suffered at the hands of her husband.¹ The district court stated it read and considered those statements at sentencing. Therefore, Erwin failed to demonstrate counsel was deficient or that there was a reasonable probability of a different outcome at sentencing had counsel provided this alleged mitigating information. Thus, we conclude that the district court did not err by denying this claim.

Erwin argues for the first time on appeal that counsel was ineffective for failing to present mitigating evidence that she suffered a traumatic childhood. This claim was not raised in her petition below, and we decline to consider it for the first time on appeal. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

Erwin also argues the district court erred by denying her claim that appellate counsel was ineffective. To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel's

¹Erwin did not provide this court with these statements.

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). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 687, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means*, 120 Nev. at 1012, 103 P.3d at 33. 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). 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*, 121 Nev. at 686, 120 P.3d at 1166.

In her petition, Erwin argued appellate counsel was ineffective for filing a short brief on appeal. Erwin failed to allege what other facts, arguments, or issues counsel should have raised on direct appeal. Erwin thus failed to support this claim with specific facts that are not belied by the record and, if true, would entitle her to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, we conclude the district court did not err by denying this claim.


Erwin argues for the first time on appeal that her claim on direct appeal that the district court abused its discretion at sentencing would have had a reasonable probability of success had appellate counsel properly argued the facts and mitigation evidence relating to appellant's childhood and her ongoing status as a victim of her husband's domestic batteries and emotional abuse. Because this claim was not raised below,

we decline to consider it for the first time on appeal. *See McNelton*, 115 Nev. at 415-16, 990 P.2d at 1275-76. Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Michael Montero, District Judge
Karla K. Butko
Attorney General/Carson City
Humboldt County District Attorney
Humboldt County Clerk

²Erwin also appears to argue that the sentencing court abused its discretion at sentencing when it imposed a life sentence. This claim was not raised below, and we decline to consider it for the first time on appeal. *See McNelton*, 115 Nev. at 415-16, 990 P.2d at 1275-76.