

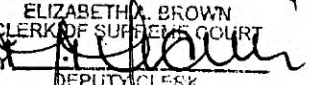
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEAIR JAMAL BOYD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85410-COA

FILED

AUG 07 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

Keair Jamal Boyd appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on May 27, 2020, and a supplemental petition filed on March 1, 2021. Eighth Judicial District Court, Clark County; Jasmin D. Lilly-Spells, Judge.

Boyd argues the district court erred by denying his claims of ineffective assistance of trial counsel 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). 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, Boyd argues that the district court erred by denying his claim that trial counsel was ineffective for failing to adequately cross-examine the victim. The victim stated that Boyd recorded them having intercourse and then threatened to disseminate the video if the victim did not work as a prostitute for him. In his petition, Boyd claimed that counsel should have impeached the victim with her prior inconsistent statements regarding when and where she and Boyd first had intercourse and when she was threatened with the video's dissemination. Boyd claimed that the victim's timeline of the events would mean she was threatened with the video prior to the video having been made.

As to the claim that the victim made prior inconsistent statements, Boyd failed to demonstrate the victim's statements were inconsistent. Boyd argued that the victim stated to police that they first had intercourse in June 2019 when the videotape was made. However, when the police officer questioned the victim as to whether June was the first time they had intercourse, the victim responded, "Hm." "Hm" is not a "yes" or a "no." And the victim stated elsewhere in the statement to the police that they first had intercourse the day after they first met in April.

As to the claim that counsel should have impeached the victim with the timing of the video, Boyd failed to demonstrate there was anything impeachable. The victim did not state that she was threatened with the video prior to the video having been made. The victim testified and made statements that Boyd threatened her throughout the relationship with

telling her family, with violence against her family, and then with the video. Thus, Boyd failed to demonstrate counsel was deficient or a reasonable probability of a different outcome had counsel attempted to further impeach the victim.¹ Therefore, we conclude that the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Boyd argues that the district court erred by denying his claim that trial counsel was ineffective for failing to adequately cross-examine the victim regarding who deleted the messaging application on her phone, her inconsistent statements as to which hotel she was trespassed from, her fake identifications, who she was meeting the day she met Boyd, and what her home life was like prior to being kicked out of her family home. Given the evidence presented at trial, Boyd failed to demonstrate a reasonable probability of a different outcome at trial had counsel cross-examined the victim as to the deletion of the messaging application from her phone and her inconsistency in the name of the hotel from which she was trespassed.

As to Boyd's claim that counsel should have cross-examined the victim on who she was meeting on the day she met Boyd and what her home life was like, Boyd failed to support these claims with anything other than speculation. Further, counsel asked her questions about her fake identifications. Thus, Boyd failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at trial. Therefore, we

¹Boyd argues that prejudice is presumed because he was denied the right to cross-examine the victim and cites to cases where the trial court limited counsel's ability to cross-examine a witness. Here, Boyd was not denied the right to cross-examine the victim. Instead, he is arguing that counsel failed to adequately cross-examine the victim, which is subject to the *Strickland* prejudice standard set forth above.

conclude that the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Boyd argues that the district court erred by denying his claim that trial counsel was ineffective for failing to retrieve the contents of the victim's phone, which would have shown that the victim was still in a relationship with her previous boyfriend and that she was the one who reached out to Boyd to get him to return from California to Las Vegas. The victim testified at trial that she was still in contact with her previous boyfriend. She also testified that she contacted Boyd to help her with a medical procedure and that he returned from California in order to help her. Thus, Boyd fails to demonstrate further evidence from the victim's phone would have resulted in a reasonable probability of a different outcome at trial. Therefore, we conclude that the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fourth, Boyd argues that the district court erred by denying his claim that trial counsel was ineffective for displaying racial animus by using racially derogatory language with him when trying to convince him to take the potential plea deal. In his petition below, Boyd appeared to claim that his counsel verbally assaulted him with racial threats and, as a result, he was not required to show prejudice. Specifically, Boyd claimed counsel told him that counsel "didn't need a nigger with no education or law experience to tell him what to do and if [Boyd] didn't take the deal and sign as a sex offender for 15 years [Boyd would] go to prison for sure." Counsel then added that "this is a cowboys country not a niggers" [sic]. And lastly, when Boyd asked about a bench trial, counsel responded "that [Boyd] was another stupid nigger who [the judge] would hang if [Boyd] took a bench trial and that a rapist has no chance in [the judge's] courtroom."

Even assuming all of his allegations are true, Boyd's claim did not allege specific facts that demonstrated counsel threatened him, see *Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 69, 412 P.3d 56, 62 (2018) (observing that one of the roles of an attorney is to provide candid advice to his client), or that, but for counsel's words, there was a reasonable probability of a different outcome. To the extent Boyd claimed counsel's alleged use of racial slurs constituted a conflict, Boyd failed to allege specific facts that demonstrated counsel suffered from an actual conflict of interest that adversely affected counsel's performance such that prejudice would be presumed. See *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) ("[I]n certain limited instances, a defendant is relieved of the responsibility of establishing the prejudicial effect of his counsel's actions. An actual conflict of interest which adversely affects a lawyer's performance will result in a presumption of prejudice to the defendant."). Thus, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.²

Fifth, Boyd argues that the district court erred by denying his claim that trial counsel was ineffective for failing to explain the consequences of the potential plea deal to him. He claimed that had counsel explained the potential lengthy prison term he faced if he went to trial, he would have pleaded guilty. "During plea negotiations defendants are entitled to the effective assistance of competent counsel." *Lafler v. Cooper*,

²To the extent Boyd argues that *Frazer v. United States*, 18 F.3d 778, 785 (9th Cir. 1994), states that prejudice is presumed simply when racial animus is found, *Frazer* was implicitly overruled by *Mayfield v. Woodford*, 270 F.3d 915, 924-25 (9th Cir. 2001) (declining to grant a certificate of appealability on a claim of racial animus on the ground that the petitioner failed to demonstrate it rose to an actual conflict of interest).

566 U.S. 156, 162 (2012) (internal quotation marks omitted). To demonstrate prejudice concerning the plea negotiation process, “a defendant must show the outcome of the plea process would have been different with competent advice.” *Id.* at 163.

The district court found that Boyd’s claim about racial animus belied his claim that counsel did not explain the consequences of the plea. In the declaration regarding the racial animus, Boyd stated that counsel told him he could be a “sex offender for 15 years” or, if he went to trial, “he would go to prison for sure.” This statement does not demonstrate that counsel explained the actual consequences of the plea and that Boyd was facing a potentially very lengthy prison sentence if he was convicted at trial. The record does not belie Boyd’s claim that counsel did not explain the consequences of the plea to him. Therefore, we conclude the district court erred by denying this claim without first conducting an evidentiary hearing.

Finally, Boyd argues that the district court erred by denying his claim that trial counsel was ineffective for failing to investigate and present several witnesses at trial. While Boyd failed to identify specific witnesses or their intended testimony in either his petition or supplemental petition, Boyd later filed a motion to supplement the record with affidavits from seven different witnesses. The State did not oppose the motion, and the district court allowed Boyd to supplement the record. However, in the district court’s order, it stated that:

[Boyd] admits that he is unable to obtain affidavits or sworn declarations of the witnesses he would have liked to have called at the time of trial. Defendant must show how a better investigation would have rendered a more favorable outcome. *Molina v. State*, 120 Nev. 185, 192 (2004). Defendant has put forth no evidence that the

results would be different had the investigation he requested been conducted.

The district court's conclusion that Boyd did not provide affidavits is belied by the record and is thus erroneous. Further, having made them part of the record, the district court should have considered the affidavits in determining whether, as a whole, Boyd's pleadings raised claims supported by specific factual allegations such that an evidentiary hearing was necessary. *See* NRS 34.770(1); *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. On remand, we order the district court to consider the affidavits to determine whether an evidentiary hearing is necessary. *But see Mann v. State*, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002) ("[I]t is improper for the district court to resolve a factual dispute created by affidavits without conducting an evidentiary hearing."). Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Jasmin D. Lilly-Spells, District Judge
Low Law LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk