

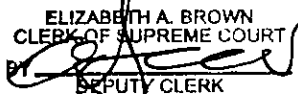
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TED MICHAEL DONKO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 88880-COA

FILED

JUL 30 2025

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Ted Michael Donko appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on May 20, 2022, and a supplemental petition filed on November 13, 2023. Eighth Judicial District Court, Clark County; Danielle K. Pieper, Judge.

Donko argues that the district court erred by denying his claim of ineffective assistance of counsel without 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 the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

According to the district court's findings of fact and conclusions of law and order, the State presented evidence during trial that the shooter wore a red shirt and that a red shirt containing Donko's DNA was found in the neighborhood after the shooting.<sup>1</sup> Donko contends trial counsel was ineffective for not testing that red shirt for gunshot residue and introducing the results of that test at trial.

Donko failed to allege sufficient facts to demonstrate deficiency. As observed by the district court, a negative result for gunshot residue testing would not necessarily exonerate Donko. Such a result could just as likely be the effect of dissipation of the residue due to storage conditions of the evidence or mere chance as it could be evidence that the wearer of the shirt did not fire a gun. See 32 New Jersey Practice, Criminal Practice and Procedure § 35:4 (2025 ed.) ("The residue is extremely fragile, and can dissipate very easily. In weapons that fire a small caliber projectile, ninety percent of the residue will dissipate within the first hour after a shooter fires a gun."); see also Irving C. Stone, *Capabilities of Modern Forensic Laboratories*, 25 Wm. & Mary L. Rev. 659, 666 (1984) (noting a forensic lab only detected gunshot residue in forty percent of suicides with handguns over a ten-year period). Given the low potential exculpatory value of a negative residue test, Donko did not allege sufficient facts to demonstrate that counsel's failure to test was objectively unreasonable.

---

<sup>1</sup>Donko failed to include the trial transcripts in his appendix. See NRAP 30(b)(1); (3) (requiring the appellant to provide "all transcripts that are necessary to the" court's review). And because it is the appellant's burden to ensure that a proper appellate record is prepared, we necessarily presume that the missing documents support the challenged decisions. Cf. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

Further, Donko failed to allege sufficient facts to demonstrate prejudice. According to the record, a witness identified Donko as the person who visited his home the day before the shooting and as the shooter. A neighbor identified the car he saw speeding through the neighborhood after hearing shots. A search of that car revealed a casing matching those left at the scene and Donko's fingerprint. An individual matching Donko's description in a red shirt was also captured on surveillance video walking in the neighborhood near where a red shirt with Donko's DNA was recovered. Considering this evidence, Donko did not demonstrate a reasonable likelihood of a different outcome at trial had counsel tested the shirt for gunshot residue. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (stating a petitioner claiming counsel did not conduct an adequate investigation must specify what a more thorough investigation would have uncovered). We therefore conclude the district court did not err in denying this claim without conducting an evidentiary hearing. Accordingly, the district court did not err by denying Donko's petition, and we

ORDER the judgment of the district court AFFIRMED.<sup>2</sup>

  
\_\_\_\_\_, C.J.  
Bulla

  
\_\_\_\_\_, J.  
Gibbons

---

<sup>2</sup>The Honorable Deborah L. Westbrook, Judge, did not participate in the decision in this matter.

cc: Hon. Danielle K. Pieper, District Judge  
The Gersten Law Firm PLLC  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk