

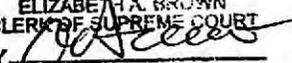
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN FRANCIS DUNHAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82405-COA

FILED

SEP 17 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

John Francis Dunham appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus filed on July 3, 2019, and a supplemental petition filed on April 23, 2020. Ninth Judicial District Court, Douglas County; Nathan Tod Young, Judge.

Dunham argues the district court erred by denying his claims of ineffective assistance of trial and appellate counsel without conducting an evidentiary hearing. 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*); see also *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry 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).

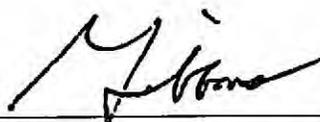
First, Dunham claimed trial counsel was ineffective for failing to argue that Dunham could not be convicted of home invasion because he had a legal right to enter the home. Dunham argued he had an ownership interest in the home because it was purchased with community funds and that he had consent to enter. “[A] person cannot commit the crime of home invasion by forcibly entering his or her own home if that person is a *lawful* occupant or resident of the home.” *Truesdell v. State*, 129 Nev. 194, 202, 304 P.3d 396, 401 (2013) (emphasis added). A protective order must be obeyed unless it is “dissolved or modified or expires by its terms.” *Id.* at 200, 304 P.3d at 400.

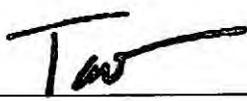
The district court found that, at the time of the offense, a protective order barred Dunham from coming within 100 yards of the home. This finding is supported by substantial evidence in the record. Therefore, even if Dunham had an ownership interest in the home, Dunham could not lawfully occupy or reside at the home at the time he committed the offense. *Cf. State v. White*, 130 Nev. 533, 538 & n.3, 539, 330 P.3d 482, 485-86 & n.3, 486 (2014) (holding “that a person with an absolute unconditional right to enter a structure cannot burglarize that structure,” but stating that “a husband does not have a right to enter the house he owns with his wife if the wife obtained a district court order granting her possession of the house” (citation omitted)). Accordingly, Dunham did not demonstrate that counsel’s failure to argue that Dunham could not be convicted of home invasion because he had a legal right to enter the home fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel’s alleged errors. Therefore, the district

court did not err by denying this claim without conducting an evidentiary hearing.

Second, Dunham argued trial counsel was ineffective for agreeing to join the home invasion and burglary charges and that appellate counsel was ineffective for failing to challenge the district court's decision to join the offenses on direct appeal. The second amended information alleged that the home invasion and burglary charges arose from Dunham's entry into the home occurring "on or about October 25-26, 2016." Because the charged offenses were based on the "same act or transaction," 1967 Nev. Stat., ch. 523, § 112, at 1413 (formerly NRS 173.115(1)), they were properly joined, see *Brown v. State*, 114 Nev. 1118, 1124, 967 P.2d 1126, 1130 (1998), and objecting to joinder would have been futile. Dunham thus failed to demonstrate that counsel's failure to challenge the district court's decision to join the charges fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel's alleged errors. See *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims."). Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing. For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Nathan Tod Young, District Judge
John E. Malone
Attorney General/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk