IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EDWARD JOSEPH HONABACH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85398-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Edward Joseph Honabach appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 27, 2020, and an amended petition filed on April 28, 2022. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Honabach argues the district court erred by denying his claims of ineffective assistance of trial-level counsel. 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*). To demonstrate prejudice regarding the decision to enter a guilty plea, a petitioner must show a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry—deficiency and

prejudice—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).

First, Honabach claimed trial-level counsel was ineffective for failing to review discovery before advising Honabach to plead guilty. The district court held an evidentiary hearing on Honabach's petition. Honabach testified at the evidentiary hearing that counsel never reviewed discovery with him—specifically his codefendants' statements—and that Honabach would have wanted to see those items. However, Honabach did not provide testimony or any other evidence regarding the substance of the discovery that counsel failed to review or how the substance of the discovery would have impacted his decision to plead guilty. Accordingly, Honabach failed to demonstrate that there was a reasonable probability he would not have pleaded guilty and would have insisted on going to trial had counsel reviewed discovery with him. Therefore, we conclude the district court did not err by denying this claim.

Second, Honabach claimed trial-level counsel was ineffective for failing to prepare him for sentencing or file a sentencing memorandum. During sentencing, counsel made multiple arguments in mitigation. Counsel argued that Honabach was using drugs heavily prior to the commission of the offense but was a different person while sober, had family support, and had used his time in custody constructively. Honabach testified at the evidentiary hearing that counsel did not prepare him for

sentencing nor file a sentencing memorandum and that he asked counsel to do those things. No evidence was presented regarding how counsel should have prepared Honabach for sentencing or what other mitigation evidence counsel should have presented to the sentencing court. Accordingly, Honabach failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome at sentencing absent counsel's alleged errors. Therefore, we conclude the district court did not err by denying this claim.

Honabach next argues the district court erred by denying his claim that the cumulative errors of trial-level counsel entitled him to relief. Even assuming that multiple deficiencies in counsel's performance may be considered cumulatively to establish prejudice, *see McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009), Honabach failed to establish trial-level counsel committed multiple errors. Therefore, we conclude the district court did not err by denying this claim.

Honabach next argues the district court erred by denying his claim that appellate counsel was ineffective. 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*, 112 Nev. at 998, 923 P.2d at 1114. Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687. 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).

Honabach claimed counsel was ineffective for depriving Honabach of a direct appeal by withdrawing his direct appeal without his consent. The district court first found that counsel represented that he withdrew the appeal after explaining the consequences of withdrawal to Honabach and obtaining his consent. However, neither party called counsel to testify, and the district court appeared to base its finding on the notice of withdrawal of appeal that counsel filed in Honabach's direct appeal case, which is not a sworn statement. *See* NRS 53.045 (providing when an unsworn declaration may be used); NRS 53.320 (defining a sworn declaration); NRS 53.330 (defining an unsworn declaration). Thus, the district court's finding of fact is not supported by substantial evidence in the record.

The district court next appeared to find that a letter counsel sent to Honabach contradicted Honabach's testimony that Honabach had asked counsel not to withdraw his appeal. However, the letter did not establish that Honabach gave counsel consent to withdraw his appeal. Thus, the district court's finding of fact is not supported by substantial evidence in the record.

The district court next found that Honabach failed to make specific factual allegations to support his claim. However, Honabach alleged sufficient facts for the district court to conduct an evidentiary hearing. To the extent the district court meant Honabach did not satisfy *Means* because he made only "naked allegations" during the evidentiary hearing, Honabach's allegations were made during his sworn testimony wherein Honabach explained: (1) he wanted to pursue a direct appeal, (2) he discussed his direct appeal with counsel, (3) he told counsel not to withdraw the appeal without his explicit consent and, (4) he never

ultimately consented to withdrawal of his direct appeal. A witness's uncorroborated testimony, without more, is sufficient evidence, *cf. Gaxiola v. State*, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005), and the district court failed to make specific findings regarding the credibility of Honabach's testimony, *see* NRS 34.830(1); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) (providing that this court will not "evaluate the credibility of witnesses because that is the responsibility of the trier of fact"). Thus, the district court's finding of fact is not supported by substantial evidence in the record.

Finally, the district court concluded that Honabach failed to establish that he had an issue to raise on appeal that would have been successful. However, counsel's duty to pursue a direct appeal when one is requested is not affected by the merits of the defendant's claims on appeal. *See Garza v. Idaho*, 586 U.S. ___, ___, 139 S. Ct. 738, 747 (2019); *see also Toston v. State*, 127 Nev. 971, 978, 267 P.3d 795, 800 (2011) (recognizing that counsel has a duty to file a notice of appeal when requested to do so even when the conviction arises from a guilty plea). Therefore, the district court erred by denying Honabach's petition on this basis.

For the above reasons, we conclude the district court erred in denying Honabach's claim that counsel was ineffective for withdrawing Honabach's direct appeal without his consent. Therefore, we reverse the district court's decision as to this claim, remand this matter to the district court, and direct the district court to conduct a new evidentiary hearing on this claim[1] and issue an order containing specific findings of fact and conclusions of law supporting its decision as required by NRS 34.830(1).

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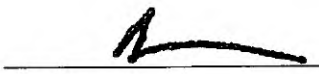
[1]We note that the judge who heard the evidentiary hearing is no longer a district court judge.

Honabach next argues the district court erred by denying his claim that his plea was involuntary because he was pressured into pleading guilty and because counsel failed to review discovery with him. The district court found that during his plea canvass, Honabach stated he was not forced or coerced into pleading guilty. These findings are supported by substantial evidence in the record. And as is discussed above, Honabach failed to demonstrate how counsel's failure to review discovery affected his decision to plead guilty. Therefore, we conclude Honabach is not entitled to relief based on these claims.

For the foregoing reasons, 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.[2]



_____, J.
Bulla

_____, J.
Westbrook

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Department 7
Law Office of Jim Hoffman
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[2]The Honorable Michael Gibbons, Chief Judge, did not participate in the decision in this matter.