

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TOMMY BRIAN FROST,  
Appellant,  
vs.  
WILLIAM A. GITTERE, WARDEN, ELY  
STATE PRISON; AND THE STATE OF  
NEVADA,  
Respondents.

No. 83065-COA

**FILED**

**APR 11 2022**

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Tommy Brian Frost appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

Frost argues the district court erred by denying his June 16, 2020, petition and later-filed supplement. In his petition, Frost argued his counsel was ineffective. 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, Frost argued his counsel was ineffective for failing to adequately investigate and present mitigation evidence at the sentencing hearing. At the evidentiary hearing on Frost's petition, counsel testified that he asked Frost if there was anyone who could provide favorable information on his behalf at the sentencing hearing but Frost did not provide him with any information of that type. In addition, counsel presented the sentencing court with a letter written by Frost in which he accepted responsibility for the crimes and requested concurrent terms. Counsel also informed the sentencing court that Frost wished to seek help and services during his incarceration. In light of the testimony presented at the evidentiary hearing and the record concerning the sentencing hearing, Frost failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness. Frost also failed to demonstrate a reasonable probability of a different outcome had counsel performed different actions concerning the presentation of mitigation evidence at the sentencing hearing. Therefore, we conclude that the district court did not err by denying this claim.

Second, Frost argued his counsel was ineffective for failing to communicate with him about his appellate rights and for failing to file a notice of appeal. Counsel has a duty to consult with a defendant concerning the right to a direct appeal "in the guilty-plea context only when the

defendant inquires about the right to appeal or in circumstances where the defendant may benefit from receiving advice about the right to a direct appeal.” *Toston v. State*, 127 Nev. 971, 977, 267 P.3d 795, 799 (2011). In addition, “trial counsel has a constitutional duty to file a direct appeal in two circumstances: when requested to do so and when the defendant expresses dissatisfaction with his conviction.” *Id.* at 978, 267 P.3d at 800. At the evidentiary hearing, counsel testified that he discussed Frost’s appellate rights with him when they reviewed the written plea agreement. Counsel also testified that Frost did not ask him to pursue a direct appeal. The district court found that Frost’s testimony at the evidentiary hearing presented in support of this claim was not credible. The record supports the district court’s decision. Accordingly, Frost did not demonstrate his counsel failed to communicate with him concerning his appellate rights. Frost also failed to demonstrate that he asked counsel to file an appeal or that he expressed the type of dissatisfaction which would have required counsel to file a notice of appeal. Therefore, we conclude the district court did not err by denying this claim.

Third, Frost argued his counsel was ineffective for failing to challenge the defense’s lack of access to Frost’s cell phone or have the cell phone inspected by a defense expert. Frost contended that the State failed to ensure that he had access to any potential evidence that could have been obtained from his cell phone.

At the evidentiary hearing, counsel testified that he would have attempted to review evidence concerning Frost’s cell phone and would have obtained an investigator to help with the cell phone evidence had the matter proceeded to trial but that Frost accepted a plea offer before that became necessary. In addition, counsel testified that he reviewed the case with

Frost and Frost concluded that entry of a guilty plea was in his best interest as compared to the possibility that he would face additional charges if he were to proceed to trial.

The district court found that counsel's testimony was credible, and substantial evidence supports that decision. In light of the testimony presented at the evidentiary hearing, counsel's investigation and preparation were reasonable under the circumstances of this case. Thus, Frost failed to demonstrate his counsel's performance fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 691 (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”). Frost also failed to demonstrate he would have refused to plead guilty and would have insisted on proceeding to trial had counsel sought access to the cell phone evidence or performed additional investigation in this matter. Therefore, we conclude the district court did not err by denying this claim.

Finally, Frost argued that his guilty plea was not knowingly and voluntarily entered. Frost contended he was coerced and pressured into entering a guilty plea, and he contended there was insufficient evidence of his guilt. “This court will not invalidate a plea as long as the totality of the circumstances, as shown by the record, demonstrates that the plea was knowingly and voluntarily made and that the defendant understood the nature of the offense and the consequences of the plea.” *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). At the evidentiary hearing, Frost's initial counsel testified he reviewed the evidence with Frost and that Frost informed him that he wished to enter a guilty plea. Frost's second counsel also testified that Frost informed him that he did not want to contest the charges and wanted to enter a guilty plea. Frost's second

counsel testified that he reviewed the plea agreement with Frost and that Frost stated he understood the agreement. Frost's second counsel also testified that he did not coerce Frost into pleading guilty.

In addition, in the written plea agreement, Frost acknowledged that he did not enter his guilty plea under duress but rather did so voluntarily. Frost also acknowledged in the written plea agreement that he discussed with counsel possible defenses, defense strategies, and circumstances that might be in his favor but believed that acceptance of the plea agreement was in his best interests. In light of both counsel's testimony at the evidentiary hearing and the written plea agreement, the totality of the circumstances demonstrate that Frost's guilty plea was entered knowingly and voluntarily. Therefore, we conclude the district court did not err by denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

  
\_\_\_\_\_, J.  
Tao

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

cc: Hon. John Schlegelmilch, District Judge  
Karla K. Butko  
Attorney General/Carson City  
Lyon County District Attorney  
Third District Court Clerk