

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ERIC DEAN WERRE,
Appellant,
vs.
WILLIAM HUTCHINGS, WARDEN,
SOUTHERN DESERT CORRECTIONAL
CENTER; AND THE STATE OF
NEVADA,
Respondents.

No. 84234-COA

FILED

JUN 13 2022

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

ORDER OF AFFIRMANCE

Eric Dean Werre appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 16, 2021. Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

Werre 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, Werre claimed that counsel was ineffective for failing to investigate his innocence of the trafficking charge. The district court found that counsel knew that a codefendant of Werre's had agreed to cooperate and testify against him. At the evidentiary hearing on Werre's petition, counsel testified that he and Werre discussed the defense theory that Werre was not connected to controlled-substance trafficking. Counsel further testified that he reviewed the evidence against Werre, determined that it was unlikely that he could successfully exclude the codefendant's testimony, and thus did not see the need for additional investigation.¹ The district court found that counsel's testimony was credible. The district court's findings are supported by substantial evidence.

In light of the testimony presented at the evidentiary hearing, Werre failed to demonstrate that counsel's decision not to conduct additional investigation was unreasonable. *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.”).

¹Our review of this claim was hampered by Werre's failure to provide this court with his codefendant's statement. We remind Werre it is his burden to make a proper appellate record for this court to review. *See Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980); *see also* NRAP 30(b)(3).

Thus, Werre failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness or a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial had counsel investigated his innocence of the trafficking charge. Therefore, we conclude the district court did not err by denying this claim.

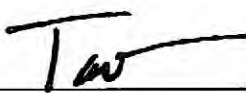
Second, Werre claimed that counsel was ineffective for failing to adequately argue at sentencing. Werre claimed that counsel should have argued that upcoming changes to Nevada's criminal statutes mitigated in favor of imposing the sentence recommended by the Division of Parole and Probation (Division). The district court found that the Division recommended an aggregate prison sentence that was longer than the aggregate sentence sought by Werre's counsel. The district court's findings are supported by substantial evidence. Werre failed to demonstrate counsel's performance fell below an objective standard of reasonableness. Further, Werre failed to demonstrate a reasonable probability he would have received a more favorable sentence had counsel argued differently. Therefore, we conclude that the district court did not err by denying this claim.

Finally, Werre challenged the constitutionality of his sentence. This claim neither challenged the validity of his guilty plea nor alleged that Werre received ineffective assistance of counsel. Accordingly, it is outside the scope of claims permissible in a postconviction petition for a writ of habeas corpus challenging a judgment of conviction based on a guilty plea. See NRS 34.810(1)(a). Moreover, the claim is waived because it could have been raised on direct appeal. See *Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), *overruled on other grounds by Thomas v. State*, 115

Nev. 148, 150, 979 P.2d 222, 223-24 (1999). For these reasons, we conclude that the district court did not err by denying this claim, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Leon Aberasturi, District Judge
Michael Lasher LLC
Attorney General/Carson City
Lyon County District Attorney
Third District Court Clerk