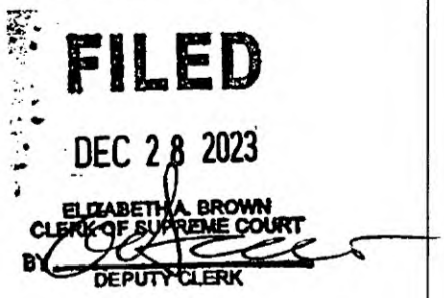
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GERALD LEE WHATLEY, JR.,
Appellant,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK,
Respondent.

No. 86185-COA



ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Gerald Lee Whatley, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on November 16, 2022, and a supplemental petition filed on November 17, 2022. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Whatley first argues the district court erred by denying his claims that 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*). 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).

Whatley claimed counsel was ineffective for failing to challenge at sentencing his prior convictions for driving under the influence and to argue that they were not certified. Whatley admits the State provided his prior driving-under-the-influence convictions but argued counsel did not challenge whether those convictions were certified. Whatley does not argue that the convictions were not actually certified, nor does he dispute that he was previously convicted of driving under the influence. Thus, Whatley failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at sentencing had counsel challenged the convictions. Accordingly, we conclude the district court did not err by denying this claim.

Whatley also claimed counsel was ineffective for failing to file a timely notice of appeal from his judgment of conviction. When a convicted defendant requests an appeal, counsel has an affirmative duty to perfect the appeal. *See Lozada v. State*, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994). Here, appellate counsel admitted she failed to file a timely notice of appeal based on a misunderstanding with her co-counsel about who was to file the notice of appeal. *See Whatley v. State*, Docket No. 85077 (Response to Order to Show Cause, August 18, 2022); *see also* NRS 47.150(1) ("A judge or court may take judicial notice, whether requested or not."); *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) (stating this court "may take judicial notice of facts generally known or capable of verification from a reliable source"). Thus, Whatley has demonstrated counsel was deficient.

However, the district court denied this claim because Whatley failed to demonstrate he was prejudiced by counsel's failure to file a timely notice of appeal. "[W]hen the petitioner has been deprived of the right to appeal due to counsel's deficient performance, the second component (prejudice) may be presumed." *Toston v. State*, 127 Nev. 971, 976, 267 P.3d 795, 799 (2011). This court requested the State to respond to this claim on appeal. In its response, the State argued that presuming prejudice is permissive or rebuttable because of the use of the word "may" in *Toston* and *Lozada*, 110 Nev. at 357, 871 P.2d at 949, and the district court did not abuse its discretion by determining that prejudice had not been demonstrated.

A careful reading of *Lozada* demonstrates that the Nevada Supreme Court did not intend the presumption of prejudice to be a permissive or rebuttable standard. The supreme court found that "we incorrectly required Lozada to establish prejudice in his appeal from the denial of his petition for post-conviction relief. Assuming Lozada's trial counsel failed to perfect an appeal without Lozada's consent, Lozada presumably suffered prejudice because he was deprived of his right to appeal." *Lozada*, 110 Nev. at 357, 871 P.2d at 949; *see also Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000) (holding that "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal"); *United States v. Cronic*, 466 U.S. 648, 659-60 (1984) (holding that the complete denial of counsel at a critical stage warrants the presumption

of prejudice). Thus, because Whatley established counsel was deficient, we conclude that the district court erred by not concluding that prejudice was presumed. Accordingly, we reverse the district court's decision to deny this claim, and we remand this matter to the district court to comply with NRAP 4(c).

Next, Whatley claims the district court erred by denying his claim that counsel was ineffective for failing to file a motion to suppress the results from his blood draw. This claim was not properly before the district court. Whatley raised this claim for the first time in a pleading filed after the State responded to his petition and supplemental petitions, but the district court had not given Whatley permission to file further pleadings, *see* NRS 34.750(5). And the district court did not consider this claim in its written order below. Therefore, we decline to consider this claim for the first time on appeal. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

Next, Whatley argues the district court erred by denying his claims that the trial court erred at sentencing. Such claims are appropriate to raise on direct appeal. *See* NRS 34.810(1)(b). Therefore, we conclude the district court did not err by denying these claims.

Finally, Whatley argues the district court erred by denying his petition and supplement without giving him sufficient time to reply to the State's response to his petition and supplement. The district court has the discretion to allow a petitioner to file documents to supplement his initial petition, *see* NRS 34.750(5), but the district court did not grant Whatley permission to file additional documents. Because Whatley did not have

permission to file additional documents in support of his petition, he fails to demonstrate he is entitled to relief on this claim. Accordingly, 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.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Eric Johnson, District Judge
Gerald Lee Whatley, Jr.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk