

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN LEE ZERBEL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51133

**FILED**

SEP 18 2008

FRAGIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Brian Zerbel's post conviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

On November 20, 2006, the district court convicted Zerbel, pursuant to a guilty plea, of burglary and theft. The district court sentenced Zerbel to serve a prison term of 48 to 120 months for burglary and a consecutive term of 24 to 60 months for theft. Zerbel did not file a direct appeal.

On April 23, 2007, Zerbel filed a post conviction petition for a writ of habeas corpus in the district court. Zerbel subsequently filed supplemental points and authorities in support of the petition. The State opposed the petition. The district court denied Zerbel's petition on January 25, 2008, after conducting an evidentiary hearing. This appeal followed.

Zerbel's sole contention on appeal is that the district court erred by denying his claim that his counsel was ineffective for failing to perfect an appeal. This claim lacks merit.

08-24143

To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.<sup>1</sup> The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.<sup>2</sup> "[A] habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence."<sup>3</sup> Factual findings of the district court that are supported by substantial evidence and are not clearly wrong are entitled to deference when reviewed on appeal.<sup>4</sup>

In his petition, Zerbel claimed that his counsel was ineffective for failing to file a direct appeal. The district court held an evidentiary hearing on this claim. Counsel testified that Zerbel did not ask him to file an appeal. Zerbel testified that he discussed his disappointment with his sentences with his counsel, and counsel informed him about the possibility of an appeal, discussed the likelihood of success on an appeal, and informed him that he had 30 days from the entry of the judgment to

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<sup>1</sup>Hill v. Lockhart, 474 U.S. 52, 57, 59 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

<sup>2</sup>Strickland v. Washington, 466 U.S. 668, 697 (1984).

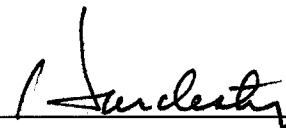
<sup>3</sup>Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

<sup>4</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

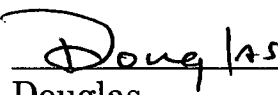
appeal. After this discussion, Zerbel informed his counsel that he would think about pursuing an appeal. Zerbel testified that he did not ask his counsel to file a notice of appeal within the 30-day appeal period because he did not have a way to contact his counsel after he was transported to the prison.

The district court found that Zerbel did not ask or direct his counsel to file an appeal and Zerbel's claim that he was unable to contact his counsel was not credible. The district court determined that Zerbel's counsel was not ineffective for failing to file a notice of appeal. The district court's determination was supported by substantial evidence and was not clearly wrong. Therefore, we conclude the district court did not err by denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. J. Michael Memeo, District Judge  
Lockie & Macfarlan, Ltd.  
Attorney General Catherine Cortez Masto/Carson City  
Elko County District Attorney  
Elko County Clerk