

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY LYNN DAVIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52112

FILED

FEB 11 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Third Judicial District Court, Lyon County; Robert E. Estes, Judge.

On April 13, 2006, in two separate district court cases, appellant Jerry Lynn Davis was convicted, pursuant to guilty pleas, of one count of unlawful use of a controlled substance and one count of being an ex-felon in possession of a firearm. The district court sentenced Davis to serve a prison term of 16 to 48 months for the unlawful use of a controlled substance count and a consecutive prison term of 24 to 72 months for the ex-felon in possession of a firearm count. Davis did not file direct appeals.

Davis filed a petition for a writ of habeas corpus in both cases. On appeal, we affirmed the denial of the petition in part, reversed the denial of Davis' appeal deprivation claim, and remanded for an evidentiary hearing on Davis' appeal deprivation claim. After conducting

an evidentiary hearing, the district court denied Davis' appeal deprivation claim. This appeal followed.

Davis claims that the district court erred by denying his claim that his counsel was ineffective for failing to file a direct appeal pursuant to his request. We disagree.

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. Hill v. Lockhart, 474 U.S. 52, 57, 59 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996). The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. Strickland v. Washington, 466 U.S. 668, 697 (1984). "[A] habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). 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. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

"[A]n attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction." Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994). Prejudice is presumed where a defendant expresses

a desire to appeal and counsel fails to do so. Mann v. State, 118 Nev. 351, 353-54, 46 P.3d 1228, 1229-30 (2002).

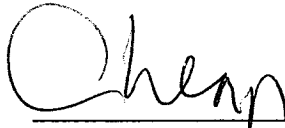
At the evidentiary hearing, Davis testified that after sentencing he told his counsel that he wanted to appeal. Davis further testified that a few days after sentencing he sent his counsel a letter indicating that he was dissatisfied with his sentence. Davis' counsel testified that, prior to sentencing, he discussed Davis' right to file a direct appeal, in the event the district court imposed consecutive sentences, and his likely chances of success on appeal. Counsel further testified that Davis never requested him to file a direct appeal or expressed a desire that he file a direct appeal. Both Davis and counsel testified that the letter sent by Davis requested counsel to file a motion in the district court seeking reconsideration of Davis' sentence, and a copy of the letter was admitted into evidence.

The district court found that counsel was the more credible of the two witnesses. The district court further found that, although Davis expressed dissatisfaction with his sentence, he did not express any dissatisfaction with the conviction, and Davis never requested counsel to file a direct appeal. The district court determined that counsel was not ineffective for failing to file a direct appeal. Davis has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, Davis has not demonstrated that the district court erred as a matter of law. Therefore, we conclude that the

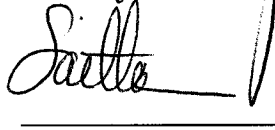
district court did not err by denying Davis' post-conviction petition for a writ of habeas corpus.

Having considered Davis' contention on appeal and concluded it is without merit, we

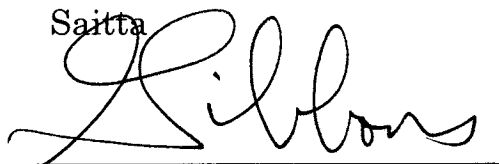
ORDER the judgment of the district court AFFIRMED.¹

 _____, J.

Cherry

 _____, J.

Saitta

 _____, J.

Gibbons

cc: Third Judicial District Court Dept. 3, District Judge
Jacob N. Sommer
Attorney General Catherine Cortez Masto/Carson City
Lyon County District Attorney
Lyon County Clerk

¹Because Davis is represented by counsel in this matter, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, this court shall take no action on and shall not consider the proper person documents Davis has submitted to this court in this matter.