

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID GILBERT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53277

DAVID GILBERT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53278 ✓

FILED

FEB 03 2010

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

ORDER OF AFFIRMANCE

These are consolidated appeals from district court orders denying appellant David Gilbert's first, timely post-conviction petitions and supplemental petitions for writs of habeas corpus filed in two different district court cases. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

First, Gilbert contends that the district court abused its discretion by failing to conduct an evidentiary hearing before dismissing his claims that his counsel was ineffective for (1) failing to mitigate his sentence; (2) failing to conduct a hearing pursuant to Anaya v. State, 96 Nev. 119, 606 P.2d 156 (1980); (3) failing to investigate and prepare for the probation revocation hearing; and (4) failing to have the probation revocation proceeding continued until his misdemeanor matter was concluded. This contention lacks merit because, as the district court

determined, these claims were either belied by the record or lacked the specific evidentiary and factual support necessary to warrant an evidentiary hearing. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

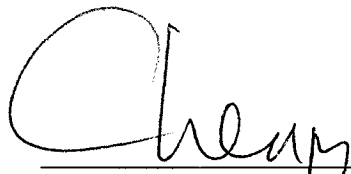
Second, Gilbert contends that the district court abused its discretion by denying his claim that his counsel was ineffective for failing to appeal from his probation revocation. When reviewing the district court's resolution of an ineffective-assistance claim, we give deference to the court's factual 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). After conducting an evidentiary hearing, the district court found that Gilbert knew he could appeal from the order revoking probation, never expressed a desire to appeal to his counsel, and did not identify any issues that would have had a reasonable likelihood of success on appeal. The district court determined that Gilbert's counsel was not ineffective for failing to file an appeal. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984) (establishing a two-part test for ineffective assistance of counsel). The district court's findings are supported by substantial evidence and are not clearly wrong, and the district court did not err as a matter of law. Therefore, we affirm the denial of this claim.

Finally, Gilbert contends that the process used by the district court in the probation revocation proceedings violated his due process rights and his Fifth Amendment right to be free from self-incrimination. Gilbert waived his due process claim by failing to seek an appeal from the order revoking probation. See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State,

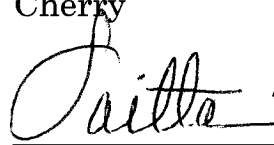
115 Nev. 148, 979 P.2d 222 (1999). Therefore, we conclude that the district court did not abuse its discretion by dismissing this claim without first conducting an evidentiary hearing. Gilbert's Fifth Amendment claim was not raised in the district court and is therefore improperly raised for the first time on appeal. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004). Accordingly, we decline to address this claim.

Having considered Gilbert's contentions and concluded they either lack merit or are not properly raised in this appeal, we

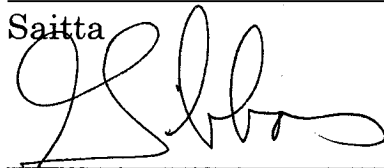
ORDER the judgments of the district court AFFIRMED.

 _____ J.

Cherry

 _____ J.

Saitta

 _____ J.

Gibbons

cc: Hon. Steven R. Kosach, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk