IN THE SUPREME COURT OF THE STATE OF NEVADA

DEREK BRANDON CHRISTENSEN,
Appellant,
vs.
JAMES BENEDETTI,
Respondent.

No. 58997

FILED

JUN 13 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY D. Malone
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus and motion to withdraw his guilty plea. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

On appeal from the denial of his March 30, 2010, petition, appellant argues that the district court's biblical reference[1] during sentencing was an abuse of discretion and a violation of his due process rights. We decline to address this claim because he raised it in his petition only in the context of ineffective assistance of counsel. 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, 1012-13, 103 P.3d 25, 33 (2004). To the extent that appellant attempts to argue separately on appeal that counsel was ineffective at sentencing for failing to object to the

[1]The district court stated, "And whether you go back to the Old Testament, Exodus and Deuteronomy, or the New Testament, the public seeks justice, they look at proportionality, and if a life is taken, a life must be given."

biblical reference, we conclude that the district court did not err in denying this claim. To prove ineffective assistance of counsel, a petitioner must demonstrate that 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, the outcome of the proceedings would have been different. 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 697, 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 regarding ineffective assistance of counsel 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).

Appellant's bare claim in his petition, which stated only that counsel failed to challenge the district court's use of the Bible to justify appellant's sentence, did not explain how he was prejudiced by his counsel's failure to object to the biblical reference. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Appellant now argues on appeal that the district court's use of the Bible resulted in consecutive rather than concurrent sentences and constitutes a due process violation under United States v. Bakker, 925 F.2d 728 (4th Cir. 1991). However, he did not present this argument to the district court, nor does the record support his conclusory allegation of prejudice. The district court made no reference to his own religious beliefs in sentencing appellant, and there is no indication that the judge's personally held religious convictions formed the basis of the sentencing decision. See U.S. v. Traxler, 477 F.3d 1243, 1248-49 (10th Cir. 2007) (explaining that Bakker's holding is limited to

when a sentence is based on a judge's personal religious view); Arnett v. Jackson, 393 F.3d 681, 687-88 (6th Cir. 2005) (same). Thus, appellant failed to demonstrate a reasonable probability that the outcome of the proceedings would have been different had his counsel objected to the district court's statement.

Appellant next argues that the district court erred in rejecting his claim that his trial counsel was ineffective for failing to cross-examine the victim and her mother at sentencing. However, appellant presented this argument to the district court only in the context of a due process violation, and the district court did not consider it as an ineffective-assistance claim in its order denying the petition. Therefore, because appellant failed to raise this ineffective-assistance claim below, we decline to address it on appeal. See Davis, 107 Nev. at 606, 817 P.2d at 1173; see also Hill v. State, 114 Nev. 169, 178, 953 P.2d 1077, 1084 (1998). To the extent that appellant challenges the denial of his due process claim concerning the testimony of the victim and her mother at sentencing, we conclude that this claim is barred by the doctrine of the law of the case, as the issue was raised and denied on the merits on direct appeal. Christensen v. State, Docket No. 52466 (Order of Affirmance, August 5, 2009); Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

Finally, appellant argues that the district court erred in denying his claim that his plea was not knowingly and intelligently entered because he was unaware that he was ineligible for probation, and neither his counsel nor the district court informed him that prison was mandatory for his offenses. He also claims that counsel was ineffective for failing to file a post-sentence motion to withdraw his guilty plea on this

basis.[2] The district court denied these claims without an evidentiary hearing, finding that the record did not support appellant's assertion that he did not know that he was ineligible for probation when he entered his guilty plea. The record, however, does not belie appellant's claims, which, if true, might demonstrate that appellant's guilty plea was not knowingly and intelligently entered. See Little v. Warden, 117 Nev. 845, 847-48, 851, 34 P.3d 540, 542-44 (2001). While the written guilty plea agreement stated that appellant was not eligible for probation, appellant asserted at the guilty plea canvass that probation was available to him and no one in that proceeding corrected this mistake. Because the record on appeal does not belie his allegation that he believed probation was an option, we conclude that the district court erred in denying the claims regarding the validity of his guilty plea without an evidentiary hearing. See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Therefore, we remand this case for a limited evidentiary hearing on these claims. 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.

_____, J.
Saitta

_____, J.
Pickering

_____, J.
Hardesty

[2]Appellant failed to demonstrate, however, that counsel had a duty to file a post-conviction motion to withdraw his guilty plea.

cc: Hon. Patrick Flanagan, District Judge
Story Law Group
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk