

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN DUNCKLEY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 59958

**FILED**

JAN 16 2013

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Appellant Brendan Dunckley raises multiple arguments on appeal, including claims of ineffective assistance of counsel. 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 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. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Factual findings of the district court that are supported by substantial evidence and are not clearly wrong are entitled to deference. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

First, Dunckley argues that the district court erred by denying his claim that counsel was ineffective for failing to conduct an investigation into his alibi defense and that, but for counsel's errors, he would not have pleaded guilty. Dunckley asserts that he was not in the state at the time of the alleged acts and that he provided counsel with evidence supporting this claim. The district court denied Dunckley relief on this ground because it found credible counsel's testimony that he investigated Dunckley's alibi defense yet Dunckley insisted on pleading guilty in an attempt to receive probation. Because the district court's factual findings are supported by substantial evidence and are not clearly wrong, Dunckley failed to demonstrate that counsel's performance was deficient. In addition, because Dunckley did not demonstrate what an investigation could have revealed that would have caused him to insist on going to trial rather than plead guilty, especially considering that Dunckley informed counsel of his alibi defense, he also failed to demonstrate prejudice. Accordingly, we conclude that he is not entitled to relief on this claim. Kirksey, 112 Nev. at 994, 923 P.2d at 1111.

Second, Dunckley argues that the district court erred by denying his claim that counsel was ineffective for failing to fully investigate his case, including interviewing the sexual assault victims. We disagree. The district court concluded that Dunckley had not presented any evidence that the victims would have spoken to counsel or what, if anything, they would have said that would have made Dunckley to insist on going to trial rather than pleading guilty. In addition,

Dunckley did not demonstrate what an investigation would have revealed. Thus, Dunckley failed to establish that counsel's performance fell below objective standards of reasonableness and that he would have otherwise not pleaded guilty. Id.

Third, Dunckley argues that counsel was ineffective for failing to provide him with the results of a DNA test until after sentencing. Counsel testified that although he did not physically turn over the results of the DNA test to Dunckley, they did discuss it and its implications. The district court found that Dunckley's testimony to the contrary was not credible and denied his claim. Because the district court's factual findings are not clearly wrong, we conclude that Dunckley has failed to demonstrate that counsel's performance fell below objective standards of reasonableness and therefore he was not entitled to relief on this claim. Id.

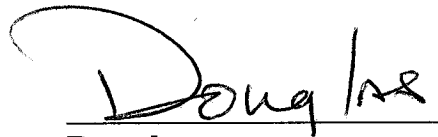
Dunckley also argues that the district court mistakenly believed that probation was not an available sentence through an ex-post-facto application of NRS 176A.110. Because we have previously considered and rejected this claim on direct appeal, Dunckley v. State, No. 52383 (Order of Affirmance, May 8, 2009), and the record demonstrates that the district court applied the correct version of the statute, we

conclude that the law of the case bars further consideration of this claim.  
Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).<sup>1</sup>

Having considered Dunckley's contentions and concluded that they do not warrant relief, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Gibbons

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

  
\_\_\_\_\_, J.  
Saitta

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<sup>1</sup>Dunckley also argues that the State breached the spirit of the guilty plea agreement by allowing him to posture himself for probation and then arguing for incarceration. However, because this argument falls outside the scope of permissible claims related to a guilty plea that can be raised in a post-conviction petition, he is not entitled to relief. NRS 34.810(1)(a). To the extent that Dunckley now argues that counsel was ineffective for failing to raise this claim on direct appeal, he did not specifically raise the issue below and raises it for the first time in his reply brief. This is inappropriate, and therefore we do not consider the merits of this claim. NRAP 28(c).

cc: Hon. Connie J. Steinheimer, District Judge  
Story Law Group  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk