

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES ROBINSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60234

FILED

NOV 14 2012

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

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

In his petition, filed on May 3, 2011, appellant raised several claims of ineffective assistance of trial counsel. To prove a claim of 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 in 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 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). However, where an appellant's claim is that he was deprived of his right to appeal, counsel's deficiency is presumed to have resulted in prejudice. Toston v. State, 127

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

Nev. ___, ___, 267 P.3d 795, 799 (2011); Lozada v. State, 110 Nev. 349, 356-57, 871 P.2d 944, 948-49 (1994). A petitioner has the burden of establishing by a preponderance of the evidence that counsel had a duty to perfect an appeal. See Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

First, appellant claimed counsel was ineffective for failing to conduct a statistical analysis of racial disparity in habitual criminal adjudications and for failing to advise appellant of the State's burden of proof in habitual adjudications such that the district court relied on improper and inaccurate information. Appellant's bare, naked claims failed to demonstrate deficiency or prejudice. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that a petitioner is not entitled to an evidentiary hearing where his claims are unsupported by specific factual allegations that, if true, would have entitled him to relief). Appellant did not provide any statistics to support his claim of disparate treatment, nor did he identify any improper or inaccurate information on which the district court relied in sentencing him. We therefore conclude that the district court did not err in denying these claims.

Second, appellant claimed counsel was ineffective for failing to require the district court to first impose a sentence for the underlying offense, then vacate it and sentence appellant as a habitual criminal. Appellant failed to demonstrate deficiency or prejudice as no law or statute requires such a procedure. The judgment of conviction entered by the district court appropriately announced findings of guilt of the underlying offenses and imposed habitual criminal penalties. We therefore conclude that the district court did not err in denying this claim.

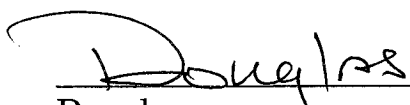
Third, appellant claimed counsel was ineffective for failing to explain that he could receive life sentences for his crimes. Appellant failed to demonstrate prejudice. In both his guilty plea agreement and his plea canvass, appellant was advised and affirmatively acknowledged that he understood that he could be facing a sentence of life with or without the possibility of parole. Appellant thus failed to demonstrate a reasonable probability of a different outcome. We therefore conclude that the district court did not err in denying this claim.

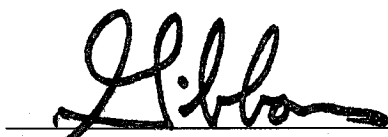
Fourth, appellant claimed counsel was ineffective for failing to turn over the records appellant wanted for his direct appeal and for the instant petition. Appellant failed to demonstrate prejudice. He did not state how having the records would have affected his direct appeal, and the proper person notice of appeal was untimely such that having the records would not have affected the outcome. Further, appellant did not state how having the records would change the outcome of the instant, timely, post-conviction habeas petition. We therefore conclude that the district court did not err in denying this claim.

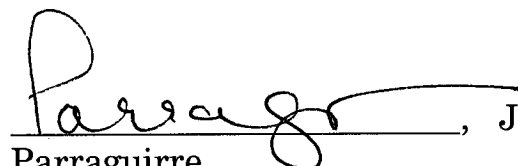
Finally, appellant claimed that counsel was ineffective for failing to file an appeal from appellant's judgment of conviction. The preponderance of the evidence from the evidentiary hearing indicated that counsel had a duty to perfect an appeal. When a convicted defendant requests an appeal, counsel has an affirmative duty to perfect one. Toston, 127 Nev. at ___, 267 P.3d at 800; Lozada, 110 Nev. at 354, 871 P.2d at 947; see also Roe v. Flores-Ortega, 528 U.S. 470, 477-78 (2000). Appellant claimed that he had requested counsel file a notice of appeal. Counsel's testimony at the evidentiary hearing—that she did not believe he could succeed on appeal—did not dispute appellant's claim. Counsel's

duty to file a notice of appeal when one is requested is not affected by the perceived merits of the defendant's claims on appeal. We therefore conclude that the district court erred in not granting this claim and providing the relief set forth in NRAP 4(c).² Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.³


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. Valerie Adair, District Judge
Charles Ernest Robinson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²The district court's sole factual finding was that appellant wanted to appeal simply because he was dissatisfied with his sentence. This finding is irrelevant to the question of whether appellant was deprived of his right to appeal and is thus due no deference. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). The district court also wrongly concluded that dissatisfaction with a sentence did not give appellant a right to appeal. See Toston, 127 Nev. at ___, 267 P.3d at 800.

³We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein.

In light of the disposition of this claim, we decline to reach the merits of appellant's remaining claims.