

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERTO GARZA-MARTINEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63049

FILED

NOV 14 2013

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's post-conviction petition for a writ of habeas corpus. First Judicial District Court, Carson City; James E. Wilson, Judge.

Appellant argues that the district court erred by denying his petition, in which he alleged that he received ineffective assistance of counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and 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 deficiency and prejudice must be demonstrated, *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 if they are supported by substantial evidence and are not clearly wrong 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).

First, appellant argues that counsel was ineffective for failing to personally discuss appellate remedies with him after being sentenced pursuant to a guilty plea and that counsel should have known that he wanted to file an appeal based upon his dissatisfaction with the conviction. Appellant failed to demonstrate that counsel's performance was deficient. "We have held that trial counsel does not have a constitutional duty to always inform his client of, or consult with his client about, the right to a direct appeal when the client has been convicted pursuant to a guilty plea." *Toston v. State*, 127 Nev. ___, ___, 267 P.3d 795, 799 (2011). The duty only arises "when the defendant inquires about the right to appeal or in circumstances where the defendant may benefit from receiving advice about the right to a direct appeal." *Id.* At the evidentiary hearing, counsel testified that he was aware that appellant was disappointed after being sentenced and that he mailed appellant a notice of his right to appeal and a reminder of the applicable deadline. The district court found appellant's testimony that he told trial counsel he wanted to appeal not credible and found that appellant did not inquire about an appeal. We conclude that the district court did not err by determining that counsel was not ineffective.

Second, appellant claims that trial counsel was ineffective for failing to challenge whether NRS 453.3405(2) (the substantial-assistance statute) violates the Equal Protection Clause of the United States Constitution. Appellant argues that, because of the no-bail, Immigration and Customs Enforcement (ICE) hold put in place due to his status as an illegal alien, he had less of an opportunity to comply with NRS 453.3405

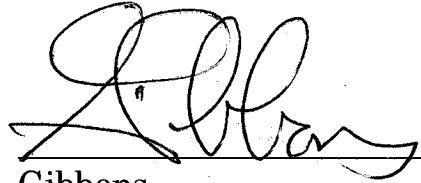
than U.S. citizens, making the law unconstitutional as applied to non-citizens. Appellant failed to demonstrate deficient performance. The district court found that the State had other grounds, besides the no-bail, ICE hold, to decline appellant's offer of assistance and that counsel was not ineffective for failing to challenge the constitutionality of NRS 453.3405 because the statute was not applicable to appellant's case as law enforcement declined appellant's offer of assistance. We conclude that the district court did not err by determining that counsel was not ineffective.

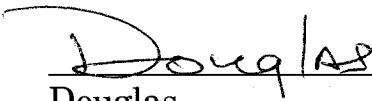
Third, appellant argues that counsel was ineffective for failing to litigate the "substantial assistance" provision of NRS 453.3405(2) as unconstitutionally vague. As appellant did not render any assistance that would trigger the provision, he lacks standing to challenge that provision of the statute. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (setting forth three elements required for standing). Therefore, the district court did not err by denying this claim.

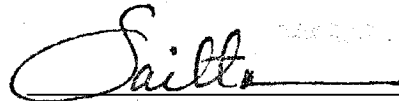
Fourth, appellant argues that counsel was ineffective for failing to mitigate appellant's sentence by facilitating compliance with NRS 453.3405. Appellant failed to demonstrate deficient performance as the district court found that counsel contacted the district attorney's office no less than twice regarding the possibility of appellant providing information to get the benefit of the substantial-assistance statute but did not receive a favorable response. Appellant further contends that counsel was ineffective for failing to challenge the reasonableness of his sentence. As appellant failed to demonstrate that counsel's performance was deficient, we conclude that the district court did not err by denying this claim.

Having considered appellant's claims and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.¹


Gibbons, J.


Douglas, J.


Saitta, J.

cc: Hon. James E. Wilson, District Judge
Karla K. Butko
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk

¹Despite counsels' verifications that the fast track statement and response comply with applicable formatting requirements, the fast track statement does not comply with NRAP 32(a)(4) because it is not double spaced and NRAP 32(a)(5) because the typeface is smaller than permitted, while the fast track response does not comply with NRAP 32(a)(4) because it does not have 1-inch margins on all four sides and is not double spaced. See NRAP 3C(h)(1). We caution counsel that future failure to comply with the Nevada Rules of Appellate Procedure when filing briefs with this court may result in the imposition of sanctions. See NRAP 3C(n); NRAP 28.2(b).