

IN THE SUPREME COURT OF THE STATE OF NEVADA

LON VICTOR POST,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63121

FILED

MAR 12 2014

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 appellant Lon Victor Post's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

First, Post contends that counsel was ineffective for (1) misadvising him of the possible sentence, causing him to turn down a guilty plea offer, and (2) failing to challenge the use of his 1997 felony driving under the influence (DUI) conviction to enhance his instant conviction.¹ 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

¹At the outset, we note that Post never addresses the district court's Findings of Fact, Conclusions of Law and Order or argues that the district court erred by denying his claims. Post also failed to provide this court with the petition filed in the district court or its supplements. We remind counsel for Post that this court is one of appeal, and that it is appellant's burden to provide all matters essential to the decision of issues presented on appeal. See NRAP 30(b)(2)-(3); *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980). The State has provided this court with the necessary documents.

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*). We give deference to the district 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).

The district court conducted an evidentiary hearing, wherein Post repeatedly stated that counsel told him the correct penalty range but he chose to proceed to trial anyway; thus, the district court found that his misadvisement claim was "unsupported and without merit." See *Missouri v. Frye*, 566 U.S. ___, ___, 132 S. Ct. 1399, 1409 (2012) (to demonstrate prejudice, a defendant must show that but for counsel's deficient performance he would have accepted a plea offer). The district court also found that counsel was not ineffective for failing to challenge the 1997 DUI conviction because the statute in effect at the time he committed the instant offense allowed for any prior felony DUI to be used as an enhancement; thus, challenging the conviction would have been futile. See 2005 Nev. Stat. 22nd Spec. Sess., ch. 6 § 3 at 103; see also *Dixon v. State*, 103 Nev. 272, 274, 737 P.2d 1162, 1164 (1987) ("On the day [appellant] elected to commit the offense here under consideration, reference to the statute would have indicated precisely the penalty he risked."); see also *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (counsel is not ineffective for failing to lodge futile objections). We agree with the district court's determinations and conclude that it did not err by denying these claims.

Second, Post contends that the State breached the guilty plea agreement relating to his 1997 conviction. The district court concluded that this claim lacked merit because nothing in that agreement limited its use for future enhancement purposes. We agree and conclude that the district court did not err by denying this claim. *See Speer v. State*, 116 Nev. 677, 680, 5 P.3d 1063, 1065 (2000).²

Having considered Post's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Cherry, J.
Cherry

cc: Hon. Elissa F. Cadish, District Judge
The Law Office of Dan M. Winder, P.C.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²To the extent that Post suggests his guilty plea relating to his 1997 conviction is invalid, we similarly conclude that this claim lacks merit. *See Dixon*, 103 Nev. at 274 n.2, 737 P.2d at 1164 n.2.