

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES DAVID MCCLAIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63329

FILED

JAN 16 2014

TRACEE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Shagrat*
DEPUTY CLERK

ORDER OF AFFIRMANCE

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 Tenth Judicial District Court, Churchill County; Robert E. Estes, Senior Judge.

In his petition, filed on January 27, 2013, appellant raised several claims of ineffective assistance of trial counsel. 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.

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).

First, appellant claimed counsel Cheri Emm-Smith, who represented him through his sentencing hearing, was ineffective for failing to investigate appellant's mental status during the commission of the crime. Appellant's bare claim 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 failed to allege any facts that should have caused counsel to investigate his mental state, what such an investigation would have revealed, *see Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004), or how it would have affected the outcome of the proceedings below. We therefore conclude that the district court did not err in denying this claim.

Second, appellant claimed counsel Ms. Emm-Smith was ineffective for failing to tell appellant that he could appeal his conviction and for failing to file an appeal. Appellant's bare claim failed to demonstrate deficiency or prejudice. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Appellant was informed in his guilty plea memorandum—which he acknowledged that he had read, understood, and signed—of his limited right to appeal his conviction, and he did not allege that he expressed dissatisfaction with his conviction or that he requested a direct appeal be filed, nor did he identify any circumstances under which counsel would have been obligated to advise him of the right to appeal. *See Toston v. State*, 127 Nev. ___, ___ 267 P.3d 795, 799-800 (2011). His claim that counsel should have appealed the sentencing court's denial of an oral request for a mental evaluation was likewise bare, and he failed to

allege any facts that would have warranted such an evaluation. We therefore conclude that the district court did not err in denying this claim.

Third, appellant claimed counsel John Schlegelmilch was ineffective for failing to file a notice of appeal. Appellant failed to demonstrate deficiency or prejudice. Mr. Schlegelmilch was appointed to represent appellant on September 27, 2012, more than two months after the filing of the judgment of conviction on July 3, 2012. Accordingly, any notice of appeal would have been untimely, NRAP 4(b); NRAP 26(a); NRAP 26(c), and this court would have lacked jurisdiction to consider the appeal, *Lozada v. State*, 110 Nev. 349, 352, 871 P.2d 944, 946 (1994). Counsel cannot be considered ineffective for not filing futile pleadings. *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). We therefore conclude that the district court did not err in denying this claim.

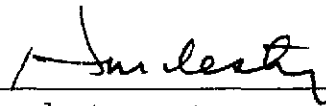
Fourth, appellant claimed counsel Paul Drakulich, who apparently was co-counsel with Ms. Emm-Smith, was ineffective because he had a conflict of interest. Appellant failed to demonstrate deficiency and, thus, that he was prejudiced. More specifically, appellant failed to demonstrate that counsel's having represented appellant as a juvenile indicated any divided loyalties such "that an actual conflict of interest adversely affected his lawyer's performance," *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980); *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992). We therefore conclude that the district court did not err in denying this claim.

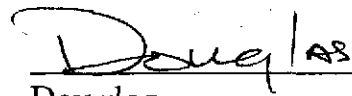
Finally, appellant claimed that Detective J. Edwards had a conflict of interest and that the author of a report regarding appellant's release on his own recognizance misrepresented his residential and familial information. These claims were outside the scope of claims

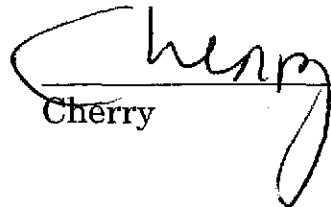
allowed where a defendant was convicted pursuant to a guilty plea. NRS 34.810(1)(a). We therefore conclude that the district court did not err in denying these claims.

For the foregoing reasons, we conclude that appellant's claims were without merit, and we

ORDER the judgment of the district court AFFIRMED.²


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. Thomas Stockard, District Judge
Hon. Robert E. Estes, Senior Judge
James David McClain
Attorney General/Carson City
Churchill County District Attorney/Fallon
Churchill County Clerk

²We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.