

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTHONY TERRELL HAMPTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66175

FILED

JAN 21 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

This is an 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; Michael Villani, Judge.

In his May 1, 2014, petition, appellant claimed that his counsel was ineffective. 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*). To demonstrate prejudice regarding the decision to enter a

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 *Luckett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

guilty plea, a petitioner must demonstrate 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). Both components of the inquiry must be shown, *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).

First, appellant claimed that, during his resentencing hearing, his counsel failed to object to his adjudication as a habitual criminal or otherwise argue that imposition of the habitual criminal enhancement was not appropriate. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Appellant did not identify any objection or argument against adjudication as a habitual criminal that reasonably diligent counsel would have made. A bare claim, such as this one, is insufficient to demonstrate a petitioner is entitled to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Appellant failed to demonstrate a reasonable probability of a different outcome had counsel objected to or argued against adjudication as a habitual criminal. Therefore, the district court did not err in denying this claim.

Second, appellant claimed that his counsel failed to argue that his sentence as a habitual criminal pursuant to NRS 207.010 violated the Double Jeopardy Clause because the State initially filed a notice of its intent to seek treatment as a habitual felon under NRS 207.012. Appellant failed to demonstrate either deficiency or prejudice for this claim as the Nevada Supreme Court has already considered the

underlying claim and concluded that appellant received proper notice of the State's intent to seek adjudication as a habitual criminal. *Hampton v. State*, Docket No. 61771 (Order Affirming in Part, Reversing in Part and Remanding, June 13, 2013). To the extent appellant asserted his sentence was improper because he believed he received two sentencing enhancements, appellant's assertion is without merit as the district court only sentenced appellant under the habitual criminal enhancement. Therefore, the district court did not err in denying this claim.


Third, appellant claimed that his counsel was ineffective for failing to send appellant a copy of his case file. Appellant failed to demonstrate that he was prejudiced. Appellant failed to demonstrate a reasonable probability of a different outcome had counsel sent him a copy of the case file. Therefore, the district court did not err in denying this claim.


Fourth, appellant claimed that his counsel failed to file a direct appeal despite appellant's request that she do so following the resentencing hearing on September 17, 2013. We conclude that the district court erred in denying this claim without conducting an evidentiary hearing. Appellant is entitled to an evidentiary hearing if he raises claims that, if true, would entitle him to relief and if his claims are not belied by the record. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. An indication that a defendant wishes to appeal may require counsel to file a direct appeal. *See Toston v. State*, 127 Nev. ___, ___, 267 P.3d 795, 800-01 (2011). Therefore, an evidentiary hearing is necessary to ascertain whether counsel and appellant discussed proceeding to a direct appeal and whether appellant declined to proceed after such discussion. Accordingly,

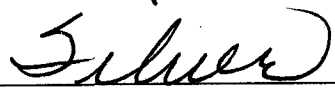
we reverse the district court's denial of this claim and remand for an evidentiary hearing on this claim.²

Fifth, appellant claimed that the cumulative effect of ineffective assistance of counsel warrants vacating his judgment of conviction. Appellant failed to demonstrate any errors, even if considered cumulatively, amount to ineffective assistance of counsel sufficient to warrant vacating the judgment of conviction. Therefore, the district court did not err in denying this claim. Accordingly, we

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

²If the district court determines that appellant was deprived of a direct appeal, the district court should provide the remedy set forth in NRAP 4(c).

cc: Hon. Michael Villani, District Judge
Anthony Terrell Hampton
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk