

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICARDO ANDERSON, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 66338

**FILED**

MAY 20 2015

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

*ORDER OF AFFIRMANCE*

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. First Judicial District Court, Storey County; James E. Wilson, Judge.

Appellant Ricardo Anderson, Jr., argues that the district court erred in denying his claims of ineffective assistance of counsel raised in his June 11, 2012, petition. 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 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). 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).

First, Anderson argues that his counsel was ineffective for advising him to plead guilty because counsel could have discovered evidence demonstrating that Anderson did not commit embezzlement. Anderson fails to demonstrate that his counsel's performance was deficient or that he was prejudiced.

At the evidentiary hearing, counsel testified that he reviewed all of the evidence the State had against Anderson and believed that the State would have proven Anderson's guilt had this matter proceeded to trial. Anderson also testified that the State's plea offer was generous, as it reduced the number of charges from 40 to only 3 and State agreed not to seek adjudication as a habitual criminal. Counsel testified that, based on those considerations, he concluded that the plea offer was in Anderson's best interests and so advised Anderson. Tactical decisions, such as this one, "are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which Anderson does not demonstrate.

In addition, the evidence in the record reveals that there was strong evidence of Anderson's guilt, and therefore, Anderson fails to

demonstrate a reasonable probability that he would have refused to plead guilty had counsel performed further investigation into this matter or offered different advice regarding the plea negotiations. The district court concluded that Anderson was not entitled to relief for this claim and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Second, Anderson argues that his counsel was ineffective for advising him to plead guilty because counsel could have discovered evidence demonstrating that Anderson did not attempt to obtain money by false pretenses or that he only committed a misdemeanor offense. Anderson fails to demonstrate that his trial counsel's performance was deficient or that he was prejudiced.

At the evidentiary hearing, counsel again testified that he had reviewed the evidence against Anderson for this charge and again concluded that the State would have proven Anderson's guilt at trial. Counsel also testified that Washoe County authorities were investigating Anderson for a similar charge and counsel concluded that a guilty plea in Storey County for this charge would have precluded further charges in Washoe County.

Moreover, counsel believed that Anderson would receive a substantial bargain from the plea offer, due to the substantial reduction in charges and possible sentences. Counsel testified that, based on those considerations, he concluded that the plea offer was in Anderson's best interests and so advised Anderson. Tactical decisions, such as this one, "are virtually unchallengeable absent extraordinary circumstances," *id.*, which Anderson does not demonstrate. In addition, the evidence in the

record reveals that there was sufficient evidence of Anderson's guilt, and therefore, Anderson fails to demonstrate a reasonable probability that he would have refused to plead guilty had counsel performed further investigation into this matter or offered different advice regarding the plea negotiations. The district court concluded that Anderson was not entitled to relief for this claim and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Third, Anderson argues that his counsel was ineffective for failing to object to the imposition of the total amount of restitution because the victim had been covered for some of the losses by insurance and because Anderson did not transfer approximately \$11,000 to himself. Anderson fails to demonstrate that his counsel's performance was deficient or that he was prejudiced. The Nevada Supreme Court has previously held that "[a] defendant's obligation to pay restitution to the victim may not, of course, be reduced because a victim is reimbursed by insurance proceeds." *Martinez v. State*, 115 Nev. 9, 12, 974 P.2d 133, 135 (1999). Accordingly, counsel properly did not assert that Anderson's restitution amount should have been reduced due to an insurance policy. In addition, by entry of his guilty plea, Anderson agreed that he embezzled the challenged \$11,000, and therefore, the district court properly ordered Anderson to pay restitution for that amount. See NRS 176.033(1)(c). Anderson fails to demonstrate a reasonable probability of a different outcome regarding restitution had counsel raised these arguments during the sentencing hearing. The district court concluded that Anderson was not entitled to relief for this claim and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Fourth, Anderson argues that his counsel was ineffective for recommending a harsher suspended prison term in order to obtain probation. Anderson fails to demonstrate that his counsel's performance was deficient or that he was prejudiced. Counsel testified that, due to Anderson's lengthy criminal record, he believed the district court was unlikely to grant probation. However, counsel testified that Anderson and he agreed upon a strategy to seek probation while requesting a lengthy suspended sentence so as to convince the district court that Anderson would be forced to comply with the rules out of concern for the prison term. Counsel testified that he believed such a recommendation was the only way the district court would actually grant probation given the convictions and Anderson's criminal history. Tactical decisions, such as this one, "are virtually unchallengeable absent extraordinary circumstances," *Ford*, 105 Nev. at 853, 784 P.2d at 953, which Anderson does not demonstrate. Given the facts of Anderson's crimes and his lengthy criminal record, Anderson fails to demonstrate a reasonable probability of a different outcome had counsel presented a different recommendation at the sentencing hearing. The district court concluded that Anderson was not entitled to relief for this claim and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Fifth, Anderson argues that his counsel was ineffective at the probation revocation hearing because counsel should have sought a

modification of his sentence.<sup>1</sup> Anderson fails to demonstrate that his counsel's performance was deficient or that he was prejudiced. Counsel requested a modification of the sentence at the probation revocation hearing, but that request was denied by the court. Anderson fails to demonstrate a reasonable probability of a different outcome had counsel raised further arguments regarding modification of Anderson's sentence. Therefore, the district court did not err in denying this claim.

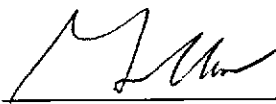
Sixth, Anderson argues that his counsel was ineffective for failing to appeal either the judgment of conviction or the revocation of probation. "[T]rial counsel has a duty to file a direct appeal when the client's desire to challenge the conviction or sentence can be reasonably inferred from the totality of the circumstances." *Toston v. State*, 127 Nev. \_\_\_, \_\_\_, 267 P.3d 795, 801 (2011). Expression of dissatisfaction with the conviction may require counsel to file a notice of appeal. *Id.* at 800-01. The district court concluded that Anderson did not ask counsel to file an appeal and that Anderson did not express dissatisfaction with his case. The district court concluded that Anderson was not entitled to relief for


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<sup>1</sup>The Nevada Supreme Court has recognized that an ineffective-assistance-of-counsel claim will lie only where the defendant had a constitutional or statutory right to the appointment of counsel. See *McKague v. Warden*, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996). Here, the district court apparently determined that Anderson was entitled to the effective assistance of counsel because the district court addressed the merits of Anderson's claims. See *Gagnon v. Scarpelli*, 411 U.S. 778, 790-91 (1973) (explaining when a defendant is entitled to counsel during probation revocation proceedings).

this claim and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Having concluded that Anderson is not entitled to relief, we  
ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

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