

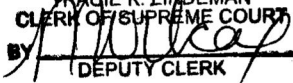
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LANCE JUSTIN APOLLO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 66765

**FILED**

JAN 21 2015

FRAGIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from an order of the district court denying a post-conviction petition.<sup>1</sup> Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

In his petition filed on April 21, 2014, appellant claimed that his counsel was ineffective at his probation revocation proceeding.<sup>2</sup> To prove ineffective assistance of counsel, a petitioner must demonstrate that

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<sup>1</sup>This 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).

<sup>2</sup>This 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 appellant was entitled to the effective assistance of counsel because the district court addressed the merits of the claims. *See Gagnon v. Scarpelli*, 411 U.S. 778, 790-91 (1973).

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, 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, appellant claimed that counsel was ineffective for failing to adequately prepare a defense for the revocation hearing. Appellant failed to demonstrate that counsel was deficient or that he was prejudiced. Contrary to appellant's assertion in his petition, counsel argued at the revocation hearing that appellant had a substance abuse problem and needed treatment. Further, as stated in the district court's order, it was the fact that appellant admitted to ingesting cocaine and appellant's lengthy criminal history that caused the district court to revoke his probation. Therefore, appellant failed to demonstrate a reasonable probability of a different outcome at the hearing had counsel argued further regarding appellant's violations. Accordingly, the district court did not err in denying this claim.

Second, appellant claimed that counsel was ineffective for failing to request an *Anaya* hearing. *See Anaya v. State*, 96 Nev. 119, 122, 606 P.2d 156, 157-58 (1980). Appellant failed to demonstrate that counsel was deficient or that he was prejudice because he failed to support this claim with specific facts that, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Specifically, he failed to allege what information would have been revealed at this hearing and how the hearing would have had a reasonable probability of changing the outcome of the revocation proceeding. Therefore, the district court did not err in denying this claim.

Finally, appellant claimed that counsel was ineffective for failing to argue for a modification of appellant's sentence pursuant to NRS 176A.630.<sup>3</sup> Appellant failed to demonstrate that he was prejudiced by counsel's failure to request a modification because he failed to demonstrate that the district court would have granted a modification. Appellant violated his probation by ingesting cocaine within a month of beginning his term of probation. Further, appellant had a lengthy criminal history and the district court stated in its order denying the petition that it only gave appellant probation because the underlying


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<sup>3</sup>To the extent that appellant claimed that trial counsel was ineffective at sentencing for failing to argue for a lower underlying sentence, this claim was not timely raised. *See* NRS 34.726(1). This claim could have been raised in a timely post-conviction petition from appellant's original judgment of conviction and the order revoking probation did not provide good cause for raising this claim in the instant petition. *See Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).

sentence was the maximum appellant could receive if he violated his probation. Therefore, the district court did not err in denying this claim.

Having concluded that appellant's claims lack merit, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Elliott A. Sattler, District Judge  
Lance Justin Apollo  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk