

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DERRICK JAMINE BUSBY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 70121

**FILED**

SEP 20 2016

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

*ORDER OF AFFIRMANCE*

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Appellant Derrick Busby claims the district court erred by denying his ineffective-assistance-of-counsel claims raised in his petition filed on April 8, 2015, and in his supplemental petition filed on September 15, 2015. 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; 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, Busby claims counsel was ineffective for failing to review his prior Nebraska conviction for burglary. He claims had counsel carefully reviewed it, counsel would have discovered he was only sentenced to one year in prison for that conviction, which would make the conviction a gross misdemeanor in Nevada. Busby fails to demonstrate counsel was deficient or resulting prejudice. The conviction in Nebraska was a felony in Nebraska and, therefore, counted as a prior conviction for habitual criminal treatment. *See* NRS 207.010(1)(a); Neb. Rev. Stat. § 28-507 ("Burglary is a Class IIA felony"); Neb. Rev. Stat. § 28-105 (penalty for a Class IIA felony is 0 to 20 years in prison). Therefore, the district court did not err in denying this claim.

Second, Busby claims counsel was ineffective for failing to review his 2005 prior Nebraska conviction for theft by receiving stolen property. Busby claims had counsel carefully reviewed it, he would have discovered that the conviction packet provided by the State did not include the sentencing order which is similar to Nevada's judgment of conviction. Busby fails to demonstrate he was prejudiced because he fails to demonstrate a reasonable probability of a different outcome at sentencing had counsel discovered the sentencing order was absent and brought it to the district court's attention. Even without this conviction, Busby still had four prior convictions, which more than qualified him for small habitual criminal treatment. *See* NRS 207.010(1)(a). Further, the district court concluded it was the fact Busby had earned the felony convictions and five misdemeanor convictions in a span of nine years that weighed in favor of imposing the habitual criminal enhancement. Substantial evidence

supports the decision of the district court, and we conclude the district court did not err by denying this claim.


To the extent Busby argues counsel was ineffective for failing to give him an opportunity to explain or deny the above mentioned prior Nebraska convictions, Busby fails to demonstrate counsel was deficient or resulting prejudice. Busby was given an opportunity to address the district court and did not comment on these prior convictions. Further, Busby fails to demonstrate a reasonable probability of a different outcome at sentencing had he been given a specific opportunity to explain or deny these convictions. As stated previously, Busby still had three prior felony convictions and the extensive criminal history he incurred over a short span of time. Therefore, the district court did not err in denying this claim.


Finally, Busby claims the district court erred by denying his claim that counsel was ineffective for failing to file a direct appeal. Busby claims he asked counsel to file an appeal and counsel failed to do so. “[T]rial counsel has a constitutional duty to file a direct appeal in two circumstances: when requested to do so and when the defendant expressed dissatisfaction with his conviction, and that failure to do so in those circumstances is deficient for purposes of proving ineffective assistance of counsel.” *Toston v. State*, 127 Nev. 971, 978, 267 P.3d 795, 800 (2011). “[W]hen the petitioner has been deprived of the right to appeal due to counsel’s deficient performance, the second component (prejudice) may be presumed.” *Id.* at 976, 267 P.3d at 799.


At the evidentiary hearing, counsel testified that after sentencing he informed Busby of the right to appeal, but Busby waved him off and he never heard from Busby again. The district court found counsel

had a better than normal recollection of this case because counsel testified he felt the district court's sentence was unjust. The district court also found counsel to be credible and Busby never asked him to file a direct appeal. Thus, the district court concluded counsel was not deficient. Substantial evidence supports the decision of the district court, and we conclude the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Stefany Miley, District Judge  
Kuzemka Law Group  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk