

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

AARON LEE TURPENING,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 69978

**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.<sup>1</sup> Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Appellant Aaron Turpening claims the district court erred by not being an impartial decision-maker, not appointing counsel, and not having him present for argument on the petition. Turpening fails to demonstrate the district court erred. Turpening fails to demonstrate the district court was not an impartial decision maker or the district court abused its discretion by failing to appoint counsel to represent him. See NRS 34.750(1). Further, Turpening fails to demonstrate any argument was made regarding the petition outside of his presence. The district court did not conduct an evidentiary hearing for this matter. The district court's hearing merely set forth the reasons for denying the petition and ordered the State to prepare a proposed order. This action did not rise to an improper ex parte evidentiary hearing. *Cf. Gebers v. State*, 118 Nev.

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<sup>1</sup>This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

500, 506, 50 P.3d 1092, 1095 (2002) (concluding a defendant's rights were violated when he was not present at a hearing where testimony and evidence were presented); *Gallego v. State*, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001) (explaining a criminal "defendant does not have an unlimited right to be present at every proceeding"), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 776 n.12, 263 P.3d 235, 253 n.12 (2011).

Next, Turpening claimed the district court erred by denying his claims of ineffective assistance of counsel. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his 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, but for counsel's errors, the outcome would have been different. *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 v. Washington*, 466 U.S. 668, 697 (1984). We give deference to the 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, Turpening claimed counsel was ineffective for failing to object when the district court sentenced him to consecutive sentences. Turpening failed to demonstrate counsel was deficient or resulting prejudice. As Turpening acknowledged in his guilty plea canvass and in the guilty plea agreement, sentencing was up to the district court and no one had promised him a particular sentence. Although the parties

recommended concurrent sentences, the district court rejected the recommendation and imposed consecutive terms. Turpening failed to demonstrate an objection would not have been futile, *see Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (stating counsel is not deficient for failing to make futile objections and motions), and he failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel objected. Therefore, the district court did not err in denying this claim.

Second, Turpening claimed counsel was ineffective for failing to file a direct appeal from his judgment of conviction. Turpening failed to allege he requested an appeal to be filed or that he expressed dissatisfaction about his sentence. *See Toston v. State*, 127 Nev. 971, 978, 267 P.3d 795, 800 (2011) (“[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”). Therefore, the district court did not err in denying this claim.


Third, Turpening claimed counsel was ineffective for failing to discover and challenge the fact the Nevada Revised Statutes were derived from an illegal and unlawful body, the joint concurrent resolution that created the Nevada Revised Statutes does not contain constitutionally required items, there is no proof a bill was voted upon and signed in order to enact the Nevada Revised Statutes as laws, the Nevada Revised Statutes are held out as laws of the state based upon fraudulent acts of prior justices and unknown legislators, and the Office of the Secretary of State no longer has custody or control of the legislative history for the period during which the Nevada Revised Statutes were enacted.


Turpening failed to demonstrate counsel was objectively unreasonable for not challenging his charges on the abovementioned grounds.<sup>2</sup> Further, Turpening failed to demonstrate a reasonable probability he would not have pleaded guilty but would have insisted on going to trial had counsel challenged the charges on the abovementioned grounds. Therefore, the district court did not err in denying this claim.

To the extent Turpening claims his plea was not entered intelligently because counsel failed to do a pretrial investigation, this claim was not raised below and we decline to address it in the first instance on appeal. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) *overruled on other grounds by Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004).

Having concluded the Turpening's is not entitled to relief, we  
ORDER the judgment of the district court AFFIRMED.

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

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

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

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<sup>2</sup>We note the Statutes of Nevada contain the law with the enacting clauses required by the constitution. The Nevada Revised Statutes simply reproduce those laws as classified, codified, and annotated by the Legislative Counsel. *See* NRS 220.120.

cc: Hon. William D. Kephart, District Judge  
Aaron Lee Turpening  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk