

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EDWARD CHARLES BARBER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69960

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.¹ Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

In his petition filed on March 18, 2015, and in his supplemental petition filed on September 9, 2015, appellant Edward Barber claimed he received 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, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*,

¹This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).

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, Barber claimed counsel was ineffective for failing to file a direct appeal. “[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.

The district court found counsel was not deficient for failing to file an appeal. The decision of the district court is supported by substantial evidence. Barber failed to allege in his petition or at the evidentiary hearing that he requested counsel to file an appeal or that he expressed dissatisfaction with his conviction. At the evidentiary hearing, counsel testified he explained the limited right to appeal to Barber while reviewing the plea agreement with him. He also testified Barber never asked him to file an appeal. The district court found counsel to be

credible. Therefore, we conclude the district court did not err in denying this claim.


Second, Barber claims counsel was ineffective for failing to explain to him the differences between “duty to stop at scene of accident involving death and personal injury,” and “leaving the scene of the accident.” Barber claimed because counsel never explained they were actually the same charge, he did not understand he was not receiving a benefit by pleading guilty to leaving the scene of an accident.


The district court concluded this claim was without merit because counsel testified Barber was only ever charged with leaving the scene of an accident, and they discussed the charge, the evidence against him, and the possible defenses he had to the charge. Counsel also testified Barber did receive a benefit because he was allowed to be released on his own recognizance prior to sentencing and the State agreed not to recommend a particular sentence, which would make it easier to request probation. We conclude substantial evidence supports the decision of the district court; therefore, the district court did not err in denying this claim.

Finally, to the extent Barber claimed he received ineffective assistance of counsel due to a conflict of interest between him and counsel, he failed to demonstrate there was an actual conflict of interest. See *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). He failed to demonstrate his counsel was placed in a situation conducive to divided loyalties, *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992), or his counsel actively represented conflicting interests, *Burger v. Kemp*, 483 U.S. 776,

783 (1987). Therefore, the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. William D. Kephart, District Judge
Edward Charles Barber
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²We conclude the district court did not abuse its discretion by failing to appoint counsel. See NRS 34.750(1).