

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LUIS FRIAS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 70414

**FILED**

DEC 14 2016

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Appellant Luis Frias appeals 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; Carolyn Ellsworth, Judge.

In his January 4, 2016, petition, Frias claimed his counsel was ineffective. 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*, 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).

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<sup>1</sup>This 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).

First, Frias claimed his counsel did not explain Frias could be sentenced to serve consecutive terms. Frias failed to demonstrate his counsel's performance was deficient or resulting prejudice. In the written plea agreement, Frias acknowledged his counsel had explained all of the consequences of the plea agreement and counsel had answered all of his questions regarding the agreement. Frias further acknowledged in the written plea agreement he understood the sentencing court had the discretion to order his sentences to be served either concurrently or consecutively. Accordingly, Frias does not demonstrate his counsel failed to explain the sentencing court's authority to sentence him to consecutive terms. Frias fails to demonstrate a reasonable probability of a different probability he would have refused to plead guilty and would have insisted on trial had counsel provided further explanation of the sentencing court's sentencing authority. Therefore, the district court did not err in denying this claim.<sup>2</sup>

Second, Frias claimed his counsel was ineffective for failing to file a notice of appeal or properly explain his right to a direct appeal. Frias failed to demonstrate that he was improperly deprived of a direct appeal. "[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. 971, 979,

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<sup>2</sup>Frias also appeared to assert he should be able to withdraw his guilty plea because he did not know the district court could sentence him to serve consecutive terms. Because Frias was informed of the district court's authority to sentence him to consecutive terms in the written plea agreement, Frias failed to demonstrate withdrawal of his plea was necessary to correct a manifest injustice. See NRS 176.165.


267 P.3d 795, 801 (2011). The duty to inform or consult with a client with respect to appealing a judgment of conviction based on a guilty plea only arises “when the defendant inquires about the right to appeal or in circumstances where the defendant may benefit from receiving advice about the right to a direct appeal.” *Id.* at 977, 267 P.3d at 799. Frias did not claim he asked counsel to file an appeal and counsel failed to do so and he did not allege he expressed the type of dissatisfaction which would have required counsel to file a notice of appeal. *See id.* 978-79, 267 P.3d at 800-01. Further, Frias specifically waived his right to appeal in his guilty plea agreement and Frias did not allege there were any circumstances in which he would have benefitted from receiving advice regarding a direct appeal. Therefore, the district court did not err in denying this claim.


Next, Frias claimed the district court erred by sentencing him to serve consecutive prison terms and Frias sought a modification of his sentence. This claim was not based upon an allegation that Frias’ plea was involuntarily or unknowingly entered or that his plea was entered without the effective assistance of counsel, and therefore, was not within the scope of Frias’ postconviction petition. *See* NRS 34.810(1)(a). Therefore, the district court did not err in denying relief for this claim.

Finally, Frias appeared to assert the district court erred by conducting a hearing without his presence and without ordering Frias’ initial counsel to withdraw from this matter. A criminal defendant does not have an unlimited right to be present at every proceeding. *See Gallego v. State*, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001). A “defendant must show that he was prejudiced by the absence.” *Kirksey v. State*, 112 Nev. 980, 1000, 923 P.2d 1102, 1115 (1996). The record indicates the hearing at issue was limited to the district court stating that the petition was denied.

*Cf. Gebers v. State*, 118 Nev. 500, 50 P.3d 1092 (2002) (concluding that defendant's rights were violated when he was not present at hearing where testimony and evidence were presented). Frias does not demonstrate the outcome of this matter would have been different had he been present or had the district court ordered the withdrawal of counsel prior to deciding the petition. Accordingly, we conclude the district court did not err in this regard and we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Carolyn Ellsworth, District Judge  
Luis Frias  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk