

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TREMAYNE L. SCHULER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70841

FILED

MAY 17 2017

ELIZABETH A. DOWD
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Tremayne L. Schuler appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Schuler argues the district court erred in denying his claims of ineffective assistance of counsel raised in his May 26, 2015, petition. 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). 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, Schuler argued his counsel was ineffective for failing to pursue 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 expresses dissatisfaction with his conviction.” *Toston v. State*, 127 Nev. 971, 978, 267 P.3d 795, 800 (2011). At the evidentiary hearing, Schuler testified he asked his counsel to file a direct appeal and his counsel asserted he did not recall Schuler asking him to pursue a direct appeal, but would have pursued a direct appeal had Schuler done so. After hearing the testimony provided at the evidentiary hearing regarding this issue, the district court concluded Schuler was not credible, particularly in light of the fact his testimony regarding this issue differed from statements contained in his petition.¹ The district court concluded under the circumstances in this case, counsel did not have an obligation to pursue a direct appeal and substantial evidence supports that conclusion. *See id.* at 979, 267 P.3d at 801 (explaining the defendant has the burden to indicate his desire to pursue a direct appeal). Therefore, we conclude the district court did not err in denying this claim.

¹In his petition, Schuler asserted his counsel had failed to inform him of his right to pursue a direct appeal, but at the evidentiary hearing Schuler testified he had discussed this matter with counsel by requesting counsel to file a direct appeal and his counsel had not done so. Schuler argues the district court should have permitted him to amend his claim regarding this issue to conform with his testimony at the evidentiary hearing. However, “the district court is under no obligation to consider issues that are raised by a petitioner for the first time at an evidentiary hearing,” *Barnhart v. State*, 122 Nev. 301, 304, 130 P.3d 650, 652 (2006), and therefore, Schuler fails to demonstrate the district court should have permitted him to amend his appeal-deprivation claim to conform with his testimony.

Second, Schuler argues his counsel was ineffective for failing to assert the presentence investigation report should have contained further information regarding his mental health issues and for failing to seek an evaluation to determine Schuler's risk of reoffending. On an appeal involving a postconviction petition for a writ of habeas corpus, this court generally declines to consider issues which were not raised in the district court in the first instance. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). Schuler acknowledges he did not raise these issues before the district court, but asserts the record contains sufficient information regarding these issues to permit this court to evaluate these claims. However, the record before this court plainly does not contain sufficient information to permit this court to review these issues in the first instance as counsel's actions and decisions regarding this type of information are not in the record before this court. Further, Schuler did not provide good cause as to why he neglected to raise these issues before the district court. *See id.* Because Schuler did not demonstrate cause for his failure to raise these issues in the district court, we decline to consider them on appeal.

Next, Schuler argues the district court erred in denying his assertion that his guilty plea was not entered knowingly because he had mental health issues and was taking medication for those issues, and because he cannot read or write. Schuler further asserts the district court erred by considering his pre-plea competency findings when evaluating this claim and by failing to consider this claim at the evidentiary hearing. We conclude Schuler failed to meet his burden to demonstrate he did not enter a knowing and voluntary plea. *See Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

Approximately one month before Schuler entered his guilty plea, the district court concluded, based upon competency evaluations, that Schuler was competent because he had the ability to consult with his attorney with a reasonable degree of rational understanding and he had a rational and factual understanding of the proceedings against him. See *Melchor-Gloria v. State*, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983) (citing *Dusky v. United States*, 362 U.S. 402 (1960)). As the competency finding demonstrated Schuler had the ability to consult with his attorney and understand the proceedings, the district court appropriately considered this information when evaluating Schuler's postconviction assertion that his mental health issues prevented him from knowingly entering a guilty plea. Schuler also acknowledged in both the written plea agreement and at the plea canvass he understood the guilty plea agreement and wished to enter a guilty plea. Under the circumstances in this case, we conclude the district court properly concluded Schuler's mental health issues did not prevent him from knowingly entering a guilty plea.

Further, at the plea canvass Schuler informed the district court he could read, write, and understand English, he had read and understood the written plea agreement, and he had signed the written plea agreement. Given the facts of this case, we conclude the district court properly found this claim was belied by the record and denied it without considering it at the evidentiary hearing.² See *Hargrove v. State*, 100 Nev.


²Schuler also asserts the district court erred in concluding this claim was belied by the record given his assertions contained in his petition regarding his inability to read, write, or understand the proceedings based

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498, 503, 686 P.2d 222, 225 (1984) (“A defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record.”).

Having conclude Schuler is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Matthew D. Carling
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

... continued

on his mental health issues. However, “[a] claim is belied when it is contradicted or proven to be false by the record as it existed at the time the claim was made.” *Mann v. State*, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002) (internal quotation marks omitted). When Schuler raised the instant claim, the record in this case specifically contradicted the assertions Schuler put forth in his petition. Therefore, the district court properly concluded this claim was belied by the record.