

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RAFAEL MENDEZ-SOTO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 71676

**FILED**

JUL 12 2017

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

*ORDER OF AFFIRMANCE*

Rafael Mendez-Soto appeals from an order of the district court denying the postconviction petition for a writ of habeas corpus he filed on June 18, 2015, and the supplemental petition he filed on March 1, 2016. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Mendez-Soto claims the district court erred by denying his claims counsel was ineffective for failing to inform him about his right to appeal and counsel was ineffective for failing to file an appeal on his behalf. To prove ineffective assistance of counsel, a petitioner must demonstrate counsel's performance was deficient in that it fell below an objective standard of reasonableness. *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*). When a petitioner alleges counsel was ineffective for failing to inform him regarding the right to appeal or failing to file an appeal, prejudice is presumed. *Toston v. State*, 127 Nev. 971, 976, 267 P.3d 795, 799 (2011). 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

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facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).


Mendez-Soto failed to demonstrate counsel was ineffective for failing to inform him regarding his right to appeal. 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. The district court held an evidentiary hearing on this issue and found Mendez-Soto never asked counsel about an appeal nor were there circumstances where Mendez-Soto would have benefited from advice about the right to an appeal because there were no non-frivolous claims to be raised on direct appeal. Substantial evidence supports the decision of the district court, and we conclude the district court did not err by denying this claim.

Mendez-Soto also failed to demonstrate counsel was ineffective for failing to file an appeal on his behalf. “[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.” *Id.* at 978, 267 P.3d at 800. At the evidentiary hearing, counsel testified he did not recall Mendez-Soto asking him to file an appeal or expressing dissatisfaction at the sentence he received. Further, counsel testified he would have filed a notice of appeal on Mendez-Soto’s behalf had he been asked to file an appeal. Counsel also testified he did not receive any phone calls from Mendez-Soto after his conviction. The district court found counsel to be credible and found Mendez-Soto did not ask for an appeal and did not express dissatisfaction regarding his

sentence. Further, the district court found Mendez-Soto's claims regarding telling counsel to "keep fighting" occurred during the plea negotiations and were made in regard to going to trial and not in regard to filing an appeal. Substantial evidence supports the decision of the district court, and we conclude the district court did not err by denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Elizabeth Goff Gonzalez, Chief Judge  
Oronoz, Ericsson & Gaffney, LLC  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk