

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GUSTAVO ALVIZAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72856

FILED

APR 11 2018

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

ORDER OF AFFIRMANCE

Gustavo Alvizar appeals from a district court order denying the postconviction petition for a writ of habeas corpus he filed on July 21, 2014, and the supplemental petition for a writ of habeas corpus he filed on February 11, 2015. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

In his petition, Alvizar claimed he received ineffective assistance of counsel. To establish ineffective assistance of counsel, a petitioner who has been convicted pursuant to a guilty plea must demonstrate counsel's performance was deficient because it fell below an objective standard of reasonableness, and resulting prejudice in that there is a reasonable probability, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial. *Kirksey v. State*, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

The petitioner must demonstrate both components of the ineffective-assistance inquiry—deficiency and prejudice. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). We give deference to the district court's factual findings—including credibility determinations—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); *Little v. Warden*, 117 Nev. 845, 854, 34 P.3d 540, 546 (2001).

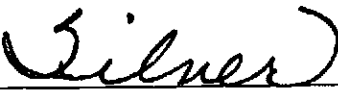
First, Alvizar claimed defense counsel was ineffective for failing to file a direct appeal and misinforming him as to his right to an appeal. The district court conducted an evidentiary hearing and found Alvizar did not indicate to defense counsel that he wanted to file a direct appeal or otherwise act in a manner giving rise to a duty to file an appeal. We conclude the district court's finding is supported by substantial evidence and is not clearly wrong, Alvizar failed to demonstrate counsel's performance was deficient, and the district court did not err in rejecting this claim. See *Toston v. State*, 127 Nev. 971, 978, 267 P.3d 795, 800 (2011) ("[Defense] 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."); *Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004) (petitioner bears the burden of proving ineffective assistance).

Second, Alvizar claimed defense counsel was ineffective for failing to conduct an adequate investigation. The district court conducted an evidentiary hearing and made the following findings. Alvizar failed to allege or prove any facts that an independent investigation would have revealed. He did not identify what prejudice resulted from any failure to investigate. And he did not provide defense counsel with any direction that would have given rise to an obligation to conduct an independent investigation. We conclude the district court's finding is supported by substantial evidence and is not clearly wrong, Alvizar failed to demonstrate counsel's performance was deficient, and the district court did not err in rejecting this claim. See *Means*, 120 Nev. at 1012-13, 103 P.3d at 33; *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (a petitioner claiming

counsel did not conduct an adequate investigation must specify what a more thorough investigation would have uncovered).

Third, Alvizar claimed defense counsel was ineffective for failing to ensure conflict-free counsel was appointed during the status hearing to consider his request to withdraw his guilty plea. The district court conducted an evidentiary hearing and made the following findings. Alvizar failed to identify any facts that gave rise to an actual conflict with his defense counsel. If Alvizar had chosen to proceed with a motion to withdraw his guilty plea, the district court would have appointed independent counsel for the purposes of an evidentiary hearing. Alvizar chose not to attempt to withdraw his guilty plea; therefore, the appointment of independent counsel was not warranted. We conclude the district court's finding is supported by substantial evidence and is not clearly wrong. Alvizar failed to demonstrate counsel's performance was deficient, and the district court did not err in rejecting this claim. *See Means*, 120 Nev. at 1012-13, 103 P.3d at 33; *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (a petitioner is not entitled to postconviction relief if his claims are repelled by the record).

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Chief Judge, Second Judicial District Court
Oldenburg Law Office
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk