

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANCISCO VIVAR-GALVEZ, A/K/A  
FRANCISCO VIVARGALVEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 73042

FILED

MAR 14 2018

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

*ORDER OF AFFIRMANCE*

Francisco Vivar-Galvez appeals from a district court order denying the postconviction for a writ of habeas corpus he filed on May 13, 2016.<sup>1</sup> Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

In his petition, Vivar-Galvez 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.*

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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).

*Washington*, 466 U.S. 668, 697 (1984). 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 facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, Vivar-Galvez claimed defense counsel was ineffective for failing to investigate the statement he made to the police and the victim's background. Relying on *Tollett v. Henderson*, 411 U.S. 258 (1973), the district court found Vivar-Galvez waived his claim that defense counsel was ineffective for failing to investigate the constitutionality of his statement when he entered his guilty plea. The district court further found Vicar-Galvez failed to show that but for counsel's failure to investigate the eight-year-old victim he would not have pleaded guilty and insisted on going to trial.

We reject the district court's finding of waiver because the district court erred in its interpretation of *Tollett*. See *Mahrt v. Beard*, 849 F.3d 1164, 1170 (9th Cir. 2017) (“[A]lthough freestanding constitutional claims are unavailable to habeas petitioners who plead guilty, claims of pre-plea ineffective assistance of counsel are cognizable . . . when the action, or inaction, of counsel prevents petitioner from making an informed choice whether to plea.” (citing *Tollett*, 411 U.S. at 267-69)). However, we conclude the district court reached the right result in rejecting this claim because Vicar-Galvez failed meet his burden to show that but for defense counsel's failure to conduct an adequate investigation he would not have pleaded guilty and would have insisted on going to trial. See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004); *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

Second, Vivar-Galvez claimed defense counsel was ineffective for failing to file a motion to suppress the statement he made to the police. The district court found a motion to suppress the statement Vivar-Galvez made to the police would have been futile because he had agreed to speak to the police, was advised of his *Miranda*<sup>2</sup> rights, had the assistance of a Spanish interpreter, and nothing in the record suggests the presence of police coercion or abuse. We conclude the district court's factual findings are supported by substantial evidence and are not clearly wrong and the district court did not err in rejecting this claim. See *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

Third, Vivar-Galvez claimed defense counsel was ineffective for failing to invoke the corpus delicti rule. He argued defense counsel should have challenged the fact "there was no independent evidence other than the complaining witness's testimony." The district court found any such objection would have been futile because "[t]he Nevada Supreme Court has repeatedly stated that the uncorroborated testimony of the victim, without more, is sufficient to uphold a conviction." We conclude the district court's factual finding is supported by substantial evidence and is not clearly wrong and the district court did not err in rejecting this claim. See *Rose v. State*, 123 Nev. 194, 203, 163 P.3d 408, 414 (2007); *Ennis*, 122 Nev. at 706, 137 P.3d at 1103.

Fourth, Vivar-Galvez claimed defense counsel was ineffective for failing to request a psychological examination of the victim. The district court found this claim was nothing more than a bare allegation. We conclude the district court's factual finding is supported by substantial

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<sup>2</sup>*Miranda v. Arizona*, 384 U.S. 436 (1966).

evidence and is not clearly wrong and the district court did not err in rejecting this claim. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).


Fifth, relying on *Mazzan v. State*, 100 Nev. 74, 675 P.2d 409 (1984), Vivar-Galvez claimed defense counsel was ineffective for failing to subject his case to any meaningful adversarial testing. The district court found Vivar-Galvez' reliance on *Mazzan* (a jury trial case) was misplaced and his claim was nothing more than a bare allegation. We conclude the district court's factual finding is supported by substantial evidence and is not clearly wrong and the district court did not err in rejecting this claim. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225.


Sixth, relying on *Flores-Ortega*, 528 U.S. 470 (2000), Vivar-Galvez claimed defense counsel was ineffective for not explaining his appellate rights and not filing an appeal on his behalf. The district court found Vivar-Galvez unconditionally waived his right to an appeal, he was advised of his limited right to appeal, and his reliance on *Flores-Ortega* was misplaced because he has not claimed defense counsel was instructed to file an appeal. We conclude the district court's factual findings are supported by substantial evidence and are not clearly wrong and the district court did not err in rejecting this claim. *See Toston v. State*, 127 Nev. 971, 977, 267 P.3d 795, 799 (2011); *Cruzado v. State*, 110 Nev. 745, 747, 879 P.2d 1195, 1195 (1994), *overruled on other grounds by Lee v. State*, 115 Nev. 207, 985 P.2d 164 (1999).

Based on our review of Vivar-Galvez' claims, we conclude the district court did not err by denying his postconviction habeas petition without appointing counsel or conducting an evidentiary hearing. *See NRS 34.750(1); NRS 34.770(2); Renteria-Novoa v. State*, 133 Nev. \_\_\_, \_\_\_, 391

P.3d 760, 760-61 (2017); *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225.  
Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Douglas W. Herndon, District Judge  
Francisco Vivar-Galvez  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk