

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE OCEGUEDO-GIL, A/K/A JOSE
OCEGUEDOGIL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72055

FILED

DEC 28 2017

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

ORDER OF AFFIRMANCE

Jose Oceguedo-Gil appeals from a district court order denying the postconviction petition for a writ of habeas corpus he filed on July 30, 2013, and the supplemental memorandum he filed on January 29, 2016. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Oceguedo-Gil claims (1) his guilty plea was not entered knowingly, voluntarily, or intelligently; (2) the district court abused its discretion by accepting his guilty plea to a fictional count and sentencing him based on palpable or highly suspect evidence; (3) the district court abused its discretion by refusing to rule on his motion to withdraw his guilty plea; and (4) the district attorney misled him by entering into the guilty plea agreement under false pretenses and then breaching the agreement. We decline to consider these claims because Oceguedo-Gil did not raise them in the habeas petition and supplemental memorandum he filed in the district court and he has not demonstrated good cause for his failure to do so here. See *McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

Next, Oceguedo-Gil claims the district court erred by rejecting his claims of ineffective assistance of counsel. To establish ineffective assistance of defense counsel, a petitioner 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, 997-88, 923 P.2d 1102, 1107 (1996). We review the district court's resolution of ineffective-assistance claims de novo, giving deference to the court's factual findings if they are supported by substantial evidence and not clearly wrong. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, Oceguedo-Gil claimed defense counsel was ineffective for failing to file a direct appeal. The district court conducted an evidentiary hearing on this claim and made the following findings: Defense counsel did not recall being asked to file a direct appeal when he met with Oceguedo-Gil before and immediately after sentencing. Oceguedo-Gil did not request an appeal or express significant dissatisfaction with his sentence when defense counsel met with him three days after sentencing. Even if Oceguedo-Gil's testimony was to be believed, merely asking defense counsel "what can I do" did not trigger an affirmative duty to file a direct 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 by rejecting this claim. See *Toston v. State*, 127 Nev. 971, 978, 267 P.3d

795, 780 (2011) (discussing the limited circumstances in which defense counsel has a constitutional duty to file a direct appeal).

Second, Oceguedo-Gil claimed defense counsel was ineffective for failing to formally file a presentence motion to withdraw the guilty plea. The district court found this claim was belied by the record, which showed defense counsel filed Oceguedo-Gil's pro se motion to withdraw his guilty plea in open court on June 20, 2012, the district court spoke to Oceguedo-Gil about the motion, and the district court denied the motion. 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 by rejecting this claim. *See 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 bare or belied by the record).


Third, Oceguedo-Gil claimed defense counsel was ineffective for failing to investigate the recordings of his jailhouse phone conversations with the victim. He argued the recordings were exculpatory because they demonstrate the victim did not want to testify against him and she was being forced to testify under the threat of deportation. The district court found this claim was a bare allegation; the victim consistently testified as to Oceguedo-Gil's guilt at the preliminary hearing, a *Petrocelli*¹ hearing, and sentencing; and, even after his alleged phone conversations with the victim, Oceguedo-Gil decided to plead guilty. We conclude the district court's factual findings are supported by substantial evidence and are not clearly


¹*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

wrong and the district court did not err by rejecting this claim. See *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225.

Finally, Oceguedo-Gil claims the district court erred by denying his petition because cumulative error deprived him of a fair criminal proceeding. However, Oceguedo-Gil failed to demonstrate any error, so there was nothing to cumulate.

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. William D. Kephart, District Judge
Benjamin Durham Law Firm
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk