

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DONALD RICHARD MCFADDEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72588

FILED

NOV 16 2017

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

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

Donald Richard McFadden appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus.¹ Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

McFadden argues the district court erred in denying the claims of ineffective assistance of counsel raised in his December 16, 2016, petition. 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, and resulting prejudice such that there is a reasonable probability, but for counsel's errors, the outcome of the proceedings would have been different. *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*). To demonstrate prejudice regarding the decision to enter a guilty plea, a petitioner must demonstrate a reasonable probability, but for counsel's errors, petitioner would not have

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

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*, 466 U.S. at 697.

First, McFadden argued his counsel was ineffective for failing to investigate his prior felonies to discover the majority of those felonies were nonviolent or drug offenses. McFadden also asserted his counsel should have argued adjudication as a habitual criminal was not appropriate. McFadden cannot demonstrate his counsel's performance was deficient because counsel informed the sentencing court that most of McFadden's convictions were nonviolent and involved drugs. Counsel urged the district court to decline to sentence McFadden under the habitual criminal enhancement for those reasons. The sentencing court acknowledged McFadden's criminal history contained "hardly any violence," but concluded a sentence under the habitual criminal enhancement was appropriate. McFadden failed to demonstrate a reasonable probability of a different outcome had counsel raised further arguments regarding his previous convictions as the habitual criminal statute makes no special allowance for nonviolent crimes; that is merely a consideration within the discretion of the district court. *See Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992). Therefore, we conclude the district court did not err by denying this claim.

Second, McFadden argued his counsel was ineffective for failing to challenge a portion of the presentence investigation report (PSI). McFadden failed to demonstrate his counsel's performance was deficient or resulting prejudice. Counsel advised the sentencing court of a number of errors contained within the PSI and urged the sentencing court to decline

to consider those portions of the PSI when imposing sentence. McFadden failed to demonstrate a reasonable probability of a different outcome at the sentencing hearing had counsel raised additional similar arguments. Therefore, we conclude the district court did not err by denying this claim.

Third, McFadden argued his counsel was ineffective for failing to object when the sentencing court stated McFadden was a sociopath and sentenced him based upon an assumption regarding his mental state. McFadden failed to demonstrate his counsel's performance was deficient or resulting prejudice. The sentencing court discussed McFadden's history of offenses and explained why this matter was different than most sentencing hearings involving drug offenses. The sentencing court concluded McFadden's inability to conform to society's standards showed him to be a sociopath, resulting in a sentence pursuant to the habitual criminal enhancement. Given the context of this statement and the circumstances in this case, McFadden failed to demonstrate an objectively reasonable counsel would have objected to the sentencing court's statement or asserted the sentencing court made improper assumptions when imposing sentence. *See Denson v. State*, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996) (explaining a sentencing court's consideration of a defendant's life and characteristics is essential when imposing sentence). McFadden also failed to demonstrate a reasonable probability of a different outcome had counsel raised objections of this nature during the sentencing hearing. Therefore, we conclude the district court did not err by denying this claim.

Fourth, McFadden argued his counsel coerced him into pleading guilty by telling him it was the best deal counsel could obtain due to a heavy caseload. McFadden also asserted his counsel improperly forced him to accept an agreement including possible sentencing as a habitual

criminal. McFadden failed to demonstrate his counsel's performance was deficient or resulting prejudice. McFadden acknowledged in the written plea agreement and at the plea canvass that he had not been coerced into entering his guilty plea. McFadden also acknowledged in the written plea agreement and at the plea canvass that he understood all of the terms contained within the plea agreement and his counsel had answered his questions regarding the terms of the agreement, including the possibility of adjudication as a habitual criminal if he failed to perform an interview with the Division of Probation and Parole or failed to appear at court hearings. Given these circumstances, McFadden failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability he would have refused to plead guilty and insisted on proceeding to trial had counsel performed different actions with respect to the plea agreement. Therefore, we conclude the district court did not err by denying this claim.

Fifth, McFadden argued his counsel was ineffective for failing to interview witnesses or consult with him. McFadden failed to demonstrate his counsel's performance was deficient or resulting prejudice. McFadden did not identify any witnesses counsel should have investigated or how further consultation would have benefited him. McFadden made only bare claims regarding these issues and such claims are insufficient to demonstrate a petitioner is entitled to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, we conclude the district court did not err by denying this claim.

Sixth, McFadden argued his counsel was ineffective for failing to discover he actually possessed a schedule II controlled substance. McFadden failed to demonstrate deficiency or prejudice for this claim

because he was found with methamphetamine, a Schedule I controlled substance. See NRS 453.146 (stating the State Board of Pharmacy has the duty to classify controlled substances); NAC 453.510(7) (classifying methamphetamine as a Schedule I controlled substance). Therefore, we conclude the district court did not err by denying this claim.

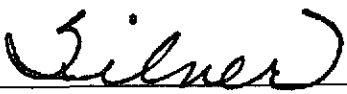
Seventh, McFadden argued his counsel was ineffective for failing to pursue a direct appeal despite McFadden's request for an appeal. McFadden asserted he asked his counsel to file an appeal after the sentencing hearing, counsel refused to pursue a direct appeal, and counsel advised McFadden to pursue a direct appeal in pro se. "[C]ounsel 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). When a petitioner has been deprived of the right to a direct appeal due to his counsel's deficient performance, "prejudice may be presumed." *Id.* at 976, 267 P.3d at 799. McFadden's allegation that he requested his counsel to pursue a direct appeal and counsel subsequently refused to do so, if true, would entitle McFadden to relief and is not belied by the record. Therefore, an evidentiary hearing is necessary to ascertain whether the discussion occurred as McFadden alleged. See *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Accordingly, we reverse the district court's denial of this claim and remand for an evidentiary hearing concerning this issue.

Next, McFadden argues his counsel failed to move for withdrawal of his guilty plea when the State misrepresented facts, counsel failed to ensure he received the appropriate credit for time served, the judgment of conviction was entered by the county clerk outside of his presence, his counsel failed to seek a separate hearing regarding challenges

to the PSI, counsel failed to view exculpatory evidence, counsel failed to seek independent testing of the methamphetamine, counsel should have moved for dismissal of the charges, counsel should have argued the Nevada Revised Statutes are invalid for lack of enacting clauses, the guilty plea agreement improperly failed to explain prison medical care or prison credits, and he was entitled to relief due to cumulative error.

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). A review of the record before this court reveals McFadden did not raise these claims in his petition before the district court. Because McFadden does not demonstrate cause for his failure to raise these claims in his petition before the district court, we decline to consider them in this appeal. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Robert W. Lane, District Judge
Donald Richard McFadden
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk