

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANGEL BERNE VILLICANA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73262

FILED

JUN 13 2018

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

ORDER OF AFFIRMANCE

Angel Berne Villicana appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Villicana argues the district court erred by denying his claims of ineffective assistance of counsel raised in his January 3, 2017, postconviction petition for a writ of habeas corpus. 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 pleaded guilty and would have

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

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, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). 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, Villicana argued his counsel was ineffective for causing him to lose his right to a preliminary hearing. Villicana failed to demonstrate his counsel's performance was deficient or resulting prejudice. The record demonstrates Villicana discussed his right to a preliminary hearing with his counsel. Villicana informed the justice court that his counsel explained his right, he understood his right to a preliminary hearing, and he wished to waive his right to a preliminary hearing. Given these circumstances, Villicana failed to demonstrate his counsel acted in an objectively unreasonable manner regarding the preliminary hearing waiver. Villicana failed to demonstrate a reasonable probability of a different outcome had counsel further explained his right to a preliminary hearing. Therefore, we conclude the district court did not err by denying this claim.

Second, Villicana argued his counsel was ineffective for causing him to lose his right to a speedy trial. Villicana failed to demonstrate his counsel's performance was deficient or resulting prejudice. Villicana made only a bare claim and did not explain how counsel caused Villicana to improperly lose his right to a speedy trial or how he was prejudiced by the

delay. A bare claim is insufficient to demonstrate Villicana is entitled to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984); *see also Furbay v. State*, 116 Nev. 481, 484-85, 998 P.2d 553, 555 (2000) (stating prejudice to the defendant is one of the factors courts must examine when determining whether the right to a speedy trial was violated). Therefore, we conclude the district court did not err by denying this claim.

Third, Villicana argued his counsel was ineffective for failing to pursue motions after Villicana returned from a competency evaluation. Villicana failed to demonstrate his counsel's performance was deficient or resulting prejudice. Villicana did not identify any motions counsel failed to pursue or explain if any of those motions had a reasonable probability of success. A bare claim is insufficient to demonstrate Villicana is entitled to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Villicana argued his counsel was ineffective for failing to provide him with discovery. Villicana failed to demonstrate his counsel's performance was deficient or resulting prejudice. Villicana stated in his petition that his counsel provided the discovery in counsel's possession to him a week prior to the scheduled start of trial. Given that circumstance, Villicana failed to demonstrate his counsel acted in an objectively unreasonable manner. To the extent Villicana asserted counsel should have sought additional discovery from the State, Villicana failed to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Fifth, Villicana argued his counsel was ineffective for promising he would receive a lenient sentence and for coercing him into pleading

guilty. Villicana failed to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he explained the potential penalties Villicana faced by entry of a guilty plea and did not promise any particular sentence. Counsel further testified he did not coerce or force Villicana to enter a guilty plea. The district court found counsel's testimony to be credible and Villicana failed to demonstrate this claim had merit. Substantial evidence supports that decision. Therefore, we conclude the district court did not err by denying this claim.

Sixth, Villicana argued his counsel was ineffective for discussing the guilty plea agreement with his mother. Villicana failed to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he discussed the plea offer with Villicana's mother, but did not reveal any of Villicana's statements regarding the case. The district court found counsel did not violate the attorney-client privilege by discussing the plea offer with Villicana's mother and substantial evidence supports that conclusion. Accordingly, Villicana failed to demonstrate his counsel's actions 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 declined to discuss the plea offer with his mother. Therefore, we conclude the district court did not err by denying this claim.

Seventh, Villicana argued his counsel was ineffective during the hearing regarding his presentence motion to withdraw guilty plea because counsel failed to object when a letter he wrote to his prior counsel regarding defense strategy was admitted in violation of attorney-client privilege. At the evidentiary hearing regarding his presentence motion to

withdraw guilty plea, Villicana waived the privilege regarding his communications with his former attorney. *See Molina v. State*, 120 Nev. 185, 193–94 & n.26, 87 P.3d 533, 539 & n.26 (2004) (explaining when a defendant claims ineffective assistance of counsel effected the validity of a guilty plea, such a claim “implicate[s] a waiver of the privilege against disclosure of the communications between attorney and client.”). Given Villicana’s waiver regarding his communications with his former attorney, he did not demonstrate counsel acted objectively unreasonable by not objecting to the admission of the letter or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Eighth, Villicana appeared to argue counsel was ineffective during the hearing regarding his presentence motion to withdraw guilty plea for failing to assert the letter to former counsel was not relevant because it was written before he was taken off his mental health medication and did not demonstrate whether he was competent. Villicana failed to demonstrate his counsel’s performance was deficient or resulting prejudice. In his petition, Villicana states that he does not possess the letter and is unsure of the date he wrote it, but it is possible he wrote it before he was taken off the medication. As Villicana merely speculates as to the date he wrote the letter, he did not have a factual basis to support this claim. A bare claim that lacks factual support is insufficient to demonstrate Villicana is entitled to relief. *See Hargrove*, 100 Nev. 502-03, 686 P.2d at 225.

In addition, at the evidentiary hearing regarding the motion to withdraw guilty plea, Villicana’s former counsel testified his interactions with Villicana caused him not to have any concerns regarding Villicana’s competency or Villicana’s ability to understand the guilty plea proceedings.

The district court found counsel to be credible, denied the motion to withdraw guilty plea, and this court affirmed that decision on direct appeal, *Villicana v. State*, Docket No. 69082 (Order of Affirmance, May 17, 2016). As the record established former counsel did not have concerns regarding Villicana's ability to enter a valid guilty plea, Villicana failed to demonstrate a reasonable probability of a different outcome of the proceedings had counsel objected to admission of the letter. Therefore, we conclude the district court did not err by denying this claim.

Next, Villicana argues the district court erred by failing to appoint postconviction counsel. The appointment of postconviction counsel was discretionary in this matter. *See* NRS 34.750(1). After a review of the record, we conclude the district court did not abuse its discretion in this regard as this matter was not sufficiently complex so as to warrant the appointment of postconviction counsel.² *See Renteria-Novoa v. State*, 133 Nev. ___, ___, 391 P.3d 760, 760-61 (2017).

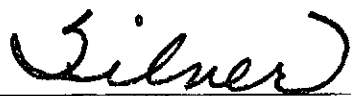
Next, Villicana argues the district court erred by permitting his mother to testify at the evidentiary hearing because she could not remember details of the events at issue. The record reveals Villicana called his mother to testify and, to the extent Villicana attempts to assert his mother was not a competent witness, the record demonstrates she had personal knowledge of the matter at issue because she testified at length regarding her discussions with Villicana's former counsel concerning Villicana's guilty

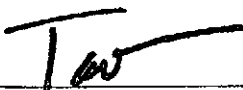
²Villicana also argues the district court erred by failing to canvass him pursuant to *Faretta v. California*, 422 U.S. 806 (1975). However, Villicana had no right to postconviction counsel, *see Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014), and because Villicana did not have a right to postconviction counsel, the district court was not required to advise him of the risks of proceeding without counsel.


plea agreement. See NRS 50.015; NRS 50.025(1)(a). Therefore, Villicana is not entitled to relief.

Next, Villicana argues the district court judge was biased against him because the judge knew one of Villicana's prior attorneys. A review of the record before this court reveals Villicana did not raise this issue before the district court and we decline to consider this issue in the first instance. See *McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Douglas W. Herndon, District Judge
Angel Berne Villicana
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk