

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JONATHAN ROSS MONCADA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74243-COA

FILED

NOV 07 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

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

Jonathan Ross Moncada appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Moncada argues the district court erred by denying the claims of ineffective assistance of counsel raised in his October 11, 2016, petition and later filed supplements. 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 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). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific allegations not belied by the record, and if true, would entitle him to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Moncada argued his counsel was ineffective for failing to hire an investigator to investigate the facts of the cases, explore possible defenses, and interview witnesses. Moncada also asserted counsel should have hired an investigator to discover mitigation information to present at the sentencing hearing. Moncada failed to demonstrate his counsel's performance was deficient or resulting prejudice. Moncada did not support these claims with specific facts and did not state what favorable evidence could have been uncovered through reasonably diligent investigation. Accordingly, Moncada failed to demonstrate his counsel's performance was deficient. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984); *see also 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). Moncada also failed to demonstrate a reasonable probability he would have

refused to plead guilty and insisted on proceeding to trial had counsel investigated facts, defenses, and witnesses or a reasonable probability of a different outcome at the sentencing hearing had counsel investigated mitigation evidence. Therefore, we conclude the district court did not err by denying these claims without conducting an evidentiary hearing.

Second, Moncada argued his counsel was ineffective for failing to retain an investigator to discover facts to support his request to disqualify the Nye County District Attorney's Office from this case. Moncada failed to demonstrate his counsel's performance was deficient or resulting prejudice. Prior to Moncada's sentencing, a Deputy Attorney General became involved with Moncada in a separate criminal matter. Moncada then moved to disqualify the Nye County District Attorney's Office, arguing that the entire office had a conflict of interest as it worked closely with the Deputy Attorney General. The trial-level court reviewed the motion, and concluded Moncada failed to demonstrate disqualification of the entire office was appropriate.

In his petition, Moncada did not state what additional evidence could have been uncovered regarding this issue through reasonably diligent investigation and, therefore, he failed to demonstrate his counsel's performance fell below an objective standard of reasonableness. See *Molina*, 120 Nev. at 192, 87 P.3d at 538. Given the record before this court, we conclude Moncada failed to demonstrate a reasonable probability of a different outcome had counsel further investigated this matter because he failed to demonstrate disqualification of the entire Nye County District Attorney's Office was necessary for the prosecution of this matter to be handled in a fair manner. See *State v. Eighth Jud. Dist. Ct. (Zogheib)*, 130 Nev. 158, 165, 321 P.3d 882, 886 (2014). Therefore, we conclude the district

court did not err by denying this claim without conducting an evidentiary hearing.

Third, Moncada argued one of his defense attorneys improperly represented him after discovering there was a conflict of interest. "Conflict of interest and divided loyalty situations can take many forms, and whether an actual conflict exists must be evaluated on the specific facts of each case. In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties." *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991)). A conflict of interest exists if "counsel 'actively represented conflicting interests'" and the "conflict of interest adversely affected [the defendant's] lawyer's performance." *Strickland*, 466 U.S. at 692 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350, 348 (1980)). Moncada failed to demonstrate he was entitled to relief. The record demonstrates one of Moncada's attorneys discovered he had a conflict prior to the preliminary hearing and then filed a document notifying the justice court of that issue. Six days later, the justice court entered an order appointing a different defense attorney to represent Moncada. Moncada does not demonstrate this short period of time caused his initial defense attorney to actively represent a conflicting interest or that it adversely affected the defense attorney's performance. Given the record before this court, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Moncada argued his counsel was ineffective for failing to discuss possible defenses with him prior to entry of his guilty plea. Moncada failed to demonstrate his counsel's performance was deficient or

resulting prejudice. In the written plea agreement, Moncada asserted he discussed the charges, possible defenses, and circumstances that might be in his favor with his counsel, but concluded a guilty plea was in his best interests. At the plea canvass, Moncada acknowledged he had discussed the written plea agreement with his counsel and counsel had answered all of his questions. Given the record before this court, we conclude Moncada failed to demonstrate his counsel acted below an objective standard of reasonableness or a reasonable probability he would have refused to plead guilty and insisted on going to trial had counsel had additional discussions with him regarding possible defenses. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fifth, Moncada argued his counsel was ineffective for failing to inform him of the range of punishment he faced under the habitual criminal enhancement. The district court denied this claim without conducting an evidentiary hearing. For a guilty plea to be valid, a defendant must understand the nature of the offense and the consequences he faces by entry of the plea. *McConnell v. State*, 125 Nev. 243, 250, 212 P.3d 307, 312 (2009). The record reveals the written plea agreement does not explain to Moncada the potential penalties he faced from the habitual criminal enhancement and the trial-level court also did not canvass Moncada concerning the habitual criminal enhancement. Moncada's allegation that his counsel did not inform him of the range of punishment he faced due to imposition of the habitual criminal enhancement, if true, would entitle him to relief and is not belied by the record. Therefore, an evidentiary hearing is necessary to ascertain whether counsel properly explained to Moncada prior to entry of


his guilty plea the potential consequences arising from imposition of the habitual criminal enhancement. Accordingly, we reverse the district court's denial of this claim and remand for an evidentiary hearing concerning this issue.


Next, Moncada argued his appellate counsel was ineffective. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Moncada argued his appellate counsel was ineffective for failing to discuss the direct appeal. Moncada failed to demonstrate his counsel's performance was deficient or resulting prejudice. Moncada asserted there were issues he wished for his counsel to raise on direct appeal, but Moncada did not address the merits of those claims or attempt to demonstrate any issue had a reasonable likelihood of success had it been raised on appeal. An unsupported claim is insufficient to demonstrate a petitioner is entitled to relief, *see Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225, and, accordingly, Moncada failed to meet his burden to demonstrate this claim had merit. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Having concluded Moncada is only entitled to the relief described herein, 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
David H. Neely, III
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk