

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID GABRIEL GOMEZ,
Appellant,
vs.
BRIAN WILLIAMS, WARDEN; AND
THE STATE OF NEVADA,
Respondents.

No. 72780-COA

FILED

NOV 16 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

David Gabriel Gomez appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on October 12, 2015. Ninth Judicial District Court, Douglas County; Nathan Tod Young, Judge.

Gomez claims the district court erred by denying his petition because 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, 997-88, 923 P.2d 1102, 1107 (1996).

The petitioner must demonstrate both components of the ineffective-assistance inquiry—deficiency and prejudice. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). We give deference to the district court's factual findings if they are supported by substantial evidence and are not clearly wrong, but we 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, Gomez claims the district court erred by rejecting his claim that counsel was ineffective for failing to investigate allegations that his DNA was found on the firearm. The district court conducted an evidentiary hearing and concluded counsel's performance was not deficient and, even if counsel's performance was deficient, there was no prejudice. We conclude Gomez failed to meet his burden to prove ineffective assistance of counsel and the district court did not err by rejecting this claim. See *Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004) (petitioner bears the burden of proving ineffective assistance); *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).

Second, Gomez claims the district court erred by rejecting his claim that counsel was ineffective for failing to file a pretrial suppression motion. The district court conducted an evidentiary hearing and found there was no evidence that counsel "had a basis upon which to file a motion to suppress in this case, nor that any such failure, if it existed, prejudiced [Gomez]." We conclude the district court's factual findings are supported by substantial evidence and are not clearly wrong, Gomez failed to meet his burden to prove ineffective assistance of counsel, and the district court did not err by rejecting this claim. See *Means*, 120 Nev. at 1012-13, 103 P.3d at 33.

Third, Gomez claims the district court erred by rejecting his claim that counsel was ineffective for failing to file a direct appeal. The district court conducted an evidentiary hearing and found there was no evidence that Gomez informed counsel he wanted to file a direct appeal or that he attempted to file an appeal on his own. We conclude the district


court's factual findings are supported by substantial evidence and are not clearly wrong,¹ Gomez failed to meet his burden to prove ineffective assistance of counsel, and the district court did not err by rejecting this claim. *See id.* at 978, 267 P.3d at 800 (“[Defense] counsel 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.”); *Means*, 120 Nev. at 1012-13, 103 P.3d at 33.

Fourth, Gomez claims the district court erred by rejecting his claim that the cumulative effect of counsel's errors violated his right to due process and a fair trial. However, even assuming multiple deficiencies in counsel's performance may be cumulated to find prejudice under the *Strickland* test, *see McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009), there was nothing to cumulate because Gomez failed to demonstrate any such deficiencies. Accordingly, the district court did not err by rejecting this claim.

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



_____, C.J.
Silver



_____, J.
Tao



_____, J.
Gibbons

¹The district court also found there was no evidence that a direct appeal would have been justified. However, “when the petitioner has been deprived of the right to appeal due to counsel's deficient performance . . . prejudice may be presumed.” *Toston v. State*, 127 Nev. 971, 976, 267 P.3d 795, 799 (2011).

cc: Hon. Nathan Tod Young, District Judge
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