


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE GARCIA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 74381-COA

**FILED**

DEC 04 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Jose Garcia appeals from an order of the district court denying a postconviction petition filed on July 19, 2017. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Garcia argues the district court erred by denying his claim counsel was ineffective for failing to object to the sentencing court's failure to recite its reasons for imposing the deadly weapon enhancement as required by NRS 193.165(1)(a)-(e). Garcia claims counsel was deficient and he was prejudiced by counsel's failure to object, because this court was only able to review his direct appeal under the plain error standard. *See Garcia v. State*, Docket No. 68924 (Order of Affirmance, June 22, 2016).


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*). 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).

Garcia failed to demonstrate he was prejudiced by counsel's failure to object. When orally denying the petition, the district court stated that had counsel objected, it would have fixed the error and stated it considered the factors outlined in NRS 193.165(1)(a)-(e). Even if the district court did not fix the error upon Garcia's objection, contrary to Garcia's assertion, the relief he would have been entitled to on direct appeal would not have been complete removal of the consecutive sentence. Rather, if successful on appeal, Garcia would have only been entitled to a new sentencing hearing on the consecutive sentence. Because Garcia did not allege the relevant information was not before the district court at the original sentencing hearing, he did not demonstrate a reasonable probability that he would have received a different sentence upon resentencing. Accordingly, we conclude the district court did not err by denying this claim, and we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Stefany Miley, District Judge  
Law Office of Nadine Morton  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk