

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JEFFERY H. WILSON, A/K/A JEFFREY
HOWARD WILSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72941-COA

FILED

JAN 17 2019

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

ORDER OF AFFIRMANCE

Jeffery H. Wilson 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; William D. Kephart, Judge.

Wilson was arrested in the shooting death of his mother and attempted murder of his father. Attorney Charles Cano was appointed to represent Wilson, who entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). Attorney Mace Yampolsky was appointed to represent Wilson in his attempts to withdraw his guilty plea² as well as on appeal. Wilson was unsuccessful in both endeavors.

Wilson filed his postconviction petition on December 10, 2014. Postconviction counsel was appointed, and the district court announced at

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

²An *Alford* plea is essentially a plea of nolo contendere and is treated as a guilty plea. See *State v. Gomes*, 112 Nev. 1473, 1479, 930 P.2d 701, 705 (1996).

the confirmation hearing that it was denying all of Wilson's claims except those alleging a conflict of interest and inadequate investigation. Counsel filed pleadings on October 5, 2016, and November 8, 2016, supplementing the surviving claims and adding an allegation that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963). After an evidentiary hearing on these three claims, the district court denied the petition in its entirety, and counsel filed the instant appeal. Wilson has since dismissed counsel and is proceeding in pro se on appeal.³

Wilson first contends he received ineffective assistance from postconviction counsel. Wilson was not entitled to the appointment of postconviction counsel⁴ and, thus, was not entitled to the effective assistance of postconviction counsel. See *Brown v. McDaniel*, 130 Nev. 565, 571, 331 P.3d 867, 871-72 (2014). Accordingly, any defect in postconviction counsel's representation would not be grounds for relief.

Wilson next contends the district court erred by denying his claims that trial-level counsel were ineffective. To demonstrate ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice

³See *Wilson v. State*, Docket No. 72941 (Order Granting Motion to Dismiss Counsel, Granting Motion to Strike Opening Brief and Directing Transmission of Record on Appeal, March 8, 2018).

⁴For this reason, we cannot conclude the district court violated Wilson's rights by limiting the scope of counsel's supplemental pleadings. Further, we note counsel added an additional ground for relief, which the district court addressed on the merits.

resulted in that there was a reasonable probability petitioner would not have entered a guilty plea and would have insisted on going to trial absent counsel's errors. *See 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 v. Washington*, 466 U.S. 668, 697 (1984).

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). For purposes of the deficiency prong, counsel is strongly presumed to have provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *Strickland*, 466 U.S. at 690. An evidentiary hearing is not warranted on a bare claim; rather, a petitioner must support claims with specific factual allegations that, if true and not repelled by the record, would entitle him to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). We give deference to the district court's factual findings that are supported by substantial evidence and not clearly wrong 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). This includes credibility determinations. *See Little v. Warden*, 117 Nev. 845, 854 34 P.3d 540, 546 (2001).

First, Wilson claimed Cano should have moved to suppress Wilson's statements to police on the ground they were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). Wilson failed to demonstrate deficiency or prejudice. Wilson was read his *Miranda* rights before he was questioned, and he identified no evidence that was obtained in violation of

those rights. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing on it.

Second, Wilson claimed Cano and Yampolsky should have sought competency evaluations. Wilson's bare claim failed to demonstrate deficiency or prejudice. Wilson did not allege he lacked sufficient present ability to consult with counsel with a reasonable degree of rational understanding or lacked a rational and factual understanding of the proceedings against him. *See Melchor-Gloria v. State*, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983) (setting out the competency standard). Further, Cano volunteered at the evidentiary hearing that he did have Wilson evaluated for competency, although Cano did not state what the result was. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing on it.⁵

Third, Wilson claimed Yampolsky should not have advised or encouraged the district court to deny Wilson's motion to withdraw his guilty plea. Wilson failed to demonstrate prejudice. The Nevada Supreme Court affirmed the district court's denial of the motion, concluding the record supported the district court's determination that there was no basis on

⁵The district court found this claim was barred by the law of the case because the Nevada Supreme Court affirmed Wilson's conviction on appeal. However, the supreme court specifically declined to address any ineffective-assistance-of-counsel claims on direct appeal. *See Wilson v. State*, Docket No. 63944 (Order of Affirmance, June 12, 2014). We therefore conclude the district court erred by applying the law-of-case doctrine. We nevertheless affirm the district court's decision for the reasons stated above. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding a correct result will not be reversed simply because it is based on the wrong reason).

which to withdraw the guilty plea. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing on it.

Fourth, Wilson raised several claims that Cano failed to conduct an adequate investigation. A petitioner claiming counsel did not conduct an adequate investigation must demonstrate what a more thorough investigation would have yielded and how it would have affected his decision to plead guilty. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Wilson failed to demonstrate prejudice. He failed to demonstrate by a preponderance of the evidence what the results of further investigation would have been. Moreover, the district court found Wilson's testimony that he would not have entered a guilty plea if Cano had performed further investigation to be not credible.

Wilson also failed to demonstrate Cano was deficient in failing to investigate the evidence. Wilson admitted that the following evidence was not provided to Cano, and Wilson did not allege objectively reasonable counsel would have independently discovered it: Wilson's father's statements to first responders, copies of 911 calls for this crime and an earlier incident elsewhere in the neighborhood, FBI reports, and evidence from the hotel where Wilson was staying at the time of the crimes. And Wilson failed to demonstrate by a preponderance of the evidence that Cano should have been aware of the remaining evidence that Wilson contends he should have investigated.⁶ Because Wilson failed to demonstrate deficiency

⁶This includes a list of names allegedly prepared by Wilson's girlfriend, ballistics evidence, Wilson's alibi, a pickup truck seen leaving the

and prejudice, we conclude the district court did not err by denying these claims.

Fifth, Wilson claimed Cano and Yampolsky suffered from actual conflicts of interest. Specifically, he claimed that, as a result of being on psychotropic medications in jail, he got into heated disputes with Cano, who in turn refused to investigate the case or seek a competency evaluation. Wilson also claimed Yampolsky was hostile when he rejected Wilson's alibi and did not seek a competency evaluation. Wilson failed to demonstrate deficiency or prejudice. Wilson's claims do not indicate any actual conflict, i.e. that either "attorney [was] placed in a situation conducive to divided loyalties." *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992). We therefore conclude the district court did not err by denying these claims.

Wilson next contends the district court erred by denying his claim that he received ineffective assistance from appellate counsel. To prove ineffective assistance of appellate counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that the omitted issue would have a reasonable probability of success on appeal. *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114.

Wilson claimed Yampolsky should not have conceded his guilt on appeal, especially in light of his actual innocence. Wilson failed to

area after the crime, a potential second shooter, the mental state of a neighbor, discord between the victims and another neighbor, the mechanical soundness of Wilson's van, and a nearby prowling incident occurring about 20 minutes earlier.

demonstrate deficiency or prejudice. Yampolsky did not concede Wilson's guilt but rather informed the court both he and Cano disagreed with Wilson's belief that the State could not have proven Wilson's guilt beyond a reasonable doubt. Further, because guilt is generally not a factor in reviewing whether a court should have granted a motion to withdraw a guilty plea, *Hargrove*, 100 Nev. at 503, 686 P.2d at 226, Wilson cannot demonstrate a reasonable probability of a different outcome on appeal had Yampolsky omitted his opinion on the State's ability to prove its case. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing on it.

Wilson next contends the district court erred by denying his claim that the sentencing court failed to make specific findings of fact to support the sentence imposed for a deadly weapons enhancement. Wilson waived this claim because he could have raised it on direct appeal but did not. *Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 150, 979 P.2d 222, 223-24 (1999). We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing on it. To the extent Wilson claims on appeal that Yampolsky was ineffective for failing to raise this claim on appeal, we note he did not argue this point to the district court, and we decline to consider it on appeal in the first instance. *Rimer v. State*, 131 Nev. 307, 328 n.3, 351 P.3d 697, 713 n.3 (2015).

Wilson next contends the district court erred by denying his claim that the State failed to turn over exculpatory evidence in violation of *Brady*, thereby rendering his plea invalid. "*Brady* and its progeny require

a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment.” *State v. Huebler*, 128 Nev. 192, 198, 275 P.3d 91, 95 (2012). Where a petitioner has pleaded guilty, he must demonstrate 1) the evidence was exculpatory, 2) it was withheld by the State, and 3) it was material, i.e. there was a reasonable probability/possibility that, had the State disclosed the evidence, petitioner would not have pleaded guilty but would have insisted on going to trial. *Id.* at 198, 203, 275 P.3d at 95, 98-99.

Wilson claimed the State failed to disclose all of the 911 calls for this and an earlier nearby incident, statements Wilson’s father made to first responders, an FBI report, and evidence obtained from the hotel at which Wilson was staying at the time of the crimes. Wilson failed to demonstrate the evidence was exculpatory. He also failed to demonstrate the FBI report and the evidence from his hotel ever existed and, accordingly, that they were withheld. Finally, we defer to the district court’s finding that Wilson was not credible when he testified he would have insisted on going to trial had the State disclosed the allegedly withheld evidence. Wilson thus failed to demonstrate the evidence was material. We therefore conclude the district court did not err by denying this claim.

Wilson next contends the district court erred by denying his presentence motion to withdraw his guilty plea and his claims that his guilty plea was invalid. Wilson challenged the validity of his guilty plea on direct appeal, and the Nevada Supreme Court concluded the district court properly denied Wilson’s presentence motion to withdraw his guilty plea. That ruling is the law of the case. *See Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). We therefore conclude the district court did

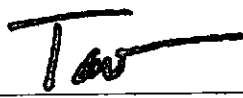
not err by denying these claims without first conducting an evidentiary hearing on them.

Finally, Wilson contends Cano failed to interview a particular 911 caller, show no domestic-violence emergency calls existed for conflicts between Wilson and his parents, and allow his father's statements to be placed on the record. As these arguments were not made before the district court, we decline to consider them in the first instance on appeal. See *Rimer*, 131 Nev. at 328 n.3, 351 P.3d at 713 n.3.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.⁷


_____, A.C.J.
Douglas


_____, J.
Tao


_____, J.
Gibbons

⁷We have reviewed all documents Wilson has filed in this matter, and we conclude no relief based upon those submissions is warranted. We received several sealed documents from the district court, and we considered them when resolving this appeal.

cc: Hon. William D. Kephart, District Judge
Jeffery H. Wilson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk