

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL JOSEPH DONOVAN,  
Appellant,  
vs.  
ISIDRO BACA, WARDEN; AND THE  
STATE OF NEVADA,  
Respondents.

No. 75142-COA

FILED

MAR 14 2019

ELISE BROWN  
CLERK OF JUDICIAL COURT  
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Michael Joseph Donovan appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Ninth Judicial District Court, Douglas County; Nathan Tod Young, Judge.

Donovan argues the district court erred by denying his claims of ineffective assistance of counsel. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate his 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, 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 v. Washington*, 466 U.S. 668, 697 (1984). We give deference to the 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).

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First, Donovan claimed counsel was ineffective for failing to file a pretrial petition for a writ of habeas corpus challenging the sufficiency of the evidence. He claimed had counsel challenged the sufficiency of the evidence he would not have pleaded guilty and would have insisted on going to trial. The district court held an evidentiary hearing on this claim and concluded Donovan failed to demonstrate counsel was deficient because counsel testified Donovan limited counsel's representation to finding a resolution that would not require the victims to testify. Had counsel filed a pretrial writ, the victims may have had to testify. Substantial evidence supports the decision of the district court, and we conclude the district court did not err by denying this claim.<sup>1</sup>

Second, Donovan claimed counsel was ineffective for advising him to plead guilty based on the fact he was facing numerous charges of possession of child pornography if he did not. Specifically, Donovan claimed counsel should have known Donovan only faced one charge of possession of child pornography based on the Nevada Supreme Court's decisions in *Wilson v. State*, 121 Nev. 345, 114 P.3d 285 (2005), and *Casteel v. State*, 122 Nev. 356, 362, 131P.3d 1, 5 (2006). We conclude Donovan failed to support this claim with specific facts that, if true, would entitle him to relief. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Donovan failed to demonstrate the child pornography was not possessed at different times and locations and, therefore, he could have only been convicted of one count of child pornography. See *Shue v. State*, 133 Nev. \_\_\_, \_\_\_, 407.P.3d 332, 337 (2017); *Castenada v. State*, 132 Nev. 434, 444, 373 P.3d 108, 115 (2016). We also conclude Donovan failed to demonstrate counsel was

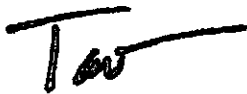
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<sup>1</sup>We note Donovan did not testify at the evidentiary hearing.


deficient. Counsel testified at the evidentiary hearing he was also worried about the other crimes Donovan was charged with or could be charged with, including burglary, lewdness with a child under the age of 14, and an additional charge of use of a minor as a subject of a sexual portrayal in a performance, and the potential the sentences for these charges could be run consecutive. Given the testimony at the evidentiary hearing, we conclude Donovan failed to demonstrate counsel's advice was unreasonable. Accordingly, we conclude the district court did not err by denying this claim.

On appeal, Donovan argues the evidence against him was insufficient to convict him and his sentence was excessive for his conduct. Donovan failed to raise these claims in his petition below, and we decline to consider these claims on appeal.<sup>2</sup> See *McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

ORDER the judgment of the district court AFFIRMED.

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

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

  
\_\_\_\_\_, J.  
Bulla

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<sup>2</sup>To the extent Donovan may have raised these claims in his petition below, we decline to consider them because Donovan did not provide this court with a copy of the petition filed below, and it is Donovan's responsibility to provide this court with an adequate record to review the claims raised on appeal. See NRAP 30(b)(2); *Thomas v. State*, 120 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4 (2004).

cc: Hon. Nathan Tod Young, District Judge  
Hamilton Law  
Attorney General/Carson City  
Douglas County District Attorney/Minden  
Douglas County Clerk