

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DONALD RICHARD MCFADDEN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 75599-COA

FILED

MAY 15 2019

EMILY H. BROWN  
CLERK OF APPEALS COURT  
BY *[Signature]*  
CHIEF CLERK

ORDER OF AFFIRMANCE

Donald Richard McFadden 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.

First, McFadden argues the district court erred by denying a claim of ineffective assistance of counsel raised in his December 16, 2016, petition. 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). 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).

McFadden argued his counsel was ineffective for failing to pursue a direct appeal despite McFadden's request for an appeal. "[T]rial 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." *Toston v. State*, 127 Nev. 971, 978, 267 P.3d 795, 800 (2011). The district court conducted an evidentiary hearing concerning this claim and McFadden's counsel testified at that hearing. Counsel testified McFadden did not inform him of a desire to pursue a direct appeal and that the circumstances in this matter did not indicate McFadden would have benefited from discussing a direct appeal. The district court found counsel's testimony to be credible. The district court concluded the testimony established counsel did not have a duty to file a notice of appeal, McFadden did not express the type of dissatisfaction which would warrant the filing of a notice of appeal, and McFadden was not improperly deprived of a direct appeal. Substantial evidence supports that decision. *See id.* at 980, 267 P.3d at 801. Therefore, we conclude the district court did not err by denying this claim.


Next, McFadden raises multiple claims that he contends he would have raised had the district court granted his appeal-deprivation claim. Specifically, McFadden argues his counsel was ineffective for allowing him to enter into plea negotiations, failing to ensure McFadden was aware of the potential penalties for a sentence under the habitual criminal enhancement, permitting the plea agreement to contain a failure-to-appear clause, and failing to make proper arguments during the sentencing hearing. McFadden also asserts the trial-level court failed to

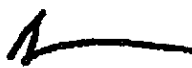
properly inform McFadden of the consequences he faced from the habitual criminal enhancement and abused its discretion by adjudicating him a habitual criminal. In addition, McFadden contends the written plea agreement was defective, the failure-to-appear clause was unconscionable, and his sentence amounts to cruel and unusual punishment.

A review of the record reveals McFadden did not raise these claims before the district court, and in an appeal involving a postconviction petition for a writ of habeas corpus, this court generally declines to consider issues which were not raised in the district court in the first instance. See *McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). McFadden contends he has good cause to raise these claims on appeal in the first instance because the district court did not order him to file a supplemental petition raising new claims. However, NRS 34.750(3) permits McFadden to file a supplemental petition within 30 days after the appointment of postconviction counsel, yet McFadden did not do so. As McFadden had the opportunity to file a supplemental petition, but he did not take advantage of that opportunity, he does not demonstrate good cause for his failure to raise these claims before the district court. Therefore, we decline to consider these claims in the first instance. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Robert W. Lane, District Judge  
David H. Neely, III  
Attorney General/Carson City  
Nye County District Attorney  
Nye County Clerk