

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT EDWARD STEWART,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 70935

**FILED**

APR 19 2017

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

*ORDER OF AFFIRMANCE*

Appellant Robert Stewart appeals from an order of the district court denying his January 5, 2016, postconviction petition for a writ of habeas corpus and his April 28, 2016, supplemental petition.<sup>1</sup> Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Stewart argues the district court erred by denying his claims of ineffective assistance of counsel. To prove ineffective assistance of

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<sup>1</sup>As noted by Stewart, the district court's order fails to set forth specific findings of fact and conclusions of law. See NRS 34.830(1). The State previously sought a motion for limited remand for the district court to enter a more comprehensive order. That motion was denied. See *Stewart v. State*, Docket No. 70935 (Order Denying Motion, January 12, 2017). Therefore, we are not considering the portion of the State's appendix that includes a more comprehensive district court order. We also note Stewart requested to proceed with the appeal based on the district court's summary order because of the short duration of his sentence and desire for a quick resolution of his appeal.

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). To warrant an evidentiary hearing, a petitioner must allege 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).

First, Stewart claimed counsel was ineffective for failing to file a direct appeal from his judgment of conviction. Stewart failed to demonstrate counsel was deficient because Stewart failed to demonstrate he asked counsel to appeal or he expressed dissatisfaction sufficient to trigger counsel's duty to file an appeal. *See Toston v. State*, 127 Nev. 971, 978, 267 P.3d 795, 800 (2011). While there is some evidence Stewart

attempted to contact counsel during the notice of appeal period, Stewart called the wrong number and never informed counsel he wanted to appeal. Further, Stewart's claim that it should be presumed those convicted of sexual offenses want to appeal is without merit. *Toston* requires an expression of dissatisfaction. *See id.* at 978-79, 267 P.3d at 800-01. Accordingly, we conclude the district court did not err by denying this claim without holding an evidentiary hearing.


Second, Stewart claimed counsel was ineffective for failing to correct errors in his presentence investigation report (PSI). Specifically, Stewart claims the PSI does not state the plea was entered pursuant to *Alford*<sup>2</sup> and it states he admitted to the underlying conduct. Stewart failed to demonstrate counsel was deficient or resulting prejudice because he failed to demonstrate there were errors in the PSI. While the PSI does not state Stewart entered his plea pursuant to *Alford*, he failed to demonstrate the PSI was required to contain this information. Further, even if this omission was error, one remedy for fixing errors in the PSI is to note the errors in the judgment of conviction. *See Sasser v. State*, 130 Nev. \_\_\_, \_\_\_, 324 P.3d 1221, 1223. The judgment of conviction states Stewart was convicted pursuant to *Alford*. As to Stewart's admission to the underlying conduct, it was not error to include information regarding


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<sup>2</sup>*North Carolina v. Alford*, 400 U.S. 25 (1970).

Stewart's statements to the police and the victim's grandfather in the offense synopsis. Therefore, we conclude the district court did not err by denying this claim without holding an evidentiary hearing.<sup>3</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

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<sup>3</sup>To the extent Stewart raised claims regarding the alleged errors in the PSI independently from his ineffective assistance of counsel claims, he is not entitled to relief. Errors in the PSI must be corrected at sentencing or on appeal, see *Stockmeier v. State, Bd. of Parole Comm'rs*, 127 Nev. 243, 250, 255 P.3d 209, 214 (2011). Further, as noted above, Stewart would not have been entitled to relief had the claims been raised at sentencing or on appeal.

cc: Hon. Michael Villani, District Judge  
Resch Law, PLLC d/b/a Conviction Solutions  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk