IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL PAUL EVANS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69644

ORDER OF AFFIRMANCE

Appellant Michael Paul Evans appeals from an order of the district court denying his April 16, 2014, postconviction petition for a writ of habeas corpus. First Judicial District Court, Carson City; James Todd Russell, Judge.

Evans argues the district court erred in 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 that 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, 987-88, 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).

First, Evans argued his counsel were ineffective for rushing him into accepting a plea offer to second-degree murder without permitting him time to consider whether a stipulation to a sentence of life with the possibility of parole in ten years was in his best interests. Evans failed to demonstrate his attorneys' performances were deficient or resulting prejudice.

At the evidentiary hearing, Evans' counsel testified they fully explained the plea offer to Evans and he had time to consider the offer. Evans' counsel both testified they advised Evans to accept the plea offer because they believed the State would produce overwhelming evidence of Evans' guilt for first-degree murder had Evans proceeded to trial. Evans' counsel also testified they advised Evans to accept the plea offer because, at that time, the State was considering seeking the death penalty and Evans would avoid the death penalty by accepting the plea offer. The district court concluded counsel acted in a reasonably diligent manner and substantial evidence supports the district court's conclusion.

Considering the potential penalties Evans faced had he rejected the plea offer and the significant evidence of his guilt, including his confession, Evans failed to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial had counsel performed different actions with respect to the plea offer. Therefore, we conclude the district court did not err in denying this claim.

Second, Evans argued his counsel were ineffective for failing to investigate mitigation evidence to present at the sentencing hearing. Evans failed to demonstrate his attorneys' performances were deficient or resulting prejudice. At the evidentiary hearing, counsel testified they worked with a mitigation specialist who investigated and obtained evidence in preparation for a potential death penalty hearing. Following Evans' guilty plea to second-degree murder, counsel filed a sentencing memorandum to provide the district court with the pertinent information regarding Evans' background for its consideration at the sentencing hearing. The district court concluded these were the actions of objectively reasonable counsel and substantial evidence supports that conclusion. Evans did not demonstrate counsel could have discovered additional favorable evidence through reasonably diligent investigation. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Further, as Evans received the sentence he stipulated to in the guilty plea agreement, he failed to demonstrate a reasonable probability of a different outcome had counsel investigated and presented additional mitigation evidence at the sentencing hearing. Therefore, we conclude the district court did not err in denying this claim.[1]

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[1]To the extent Evans raises an independent claim that his sentence is unconstitutionally excessive, he is not entitled to relief. This claim was not based upon an allegation that Evans' plea was involuntarily or unknowingly entered or that his plea was entered without the effective assistance of counsel, and therefore, was not within the scope of Evans' postconviction petition. *See* NRS 34.810(1)(a).

Third, Evans argued his counsel were ineffective for failing to pursue a direct appeal. Evans failed to demonstrate his attorneys' performances were deficient. "[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). At the evidentiary hearing, Evans' counsel testified they explained to Evans they had 30 days to file a notice of appeal, but Evans did not request to pursue a direct appeal. Evans also testified that he did not request his counsel to file a notice of appeal. The district court concluded Evans did not otherwise express the type of dissatisfaction with his conviction that would have required counsel to file a notice of appeal. *See id.* at 979, 267 P.3d at 801 (explaining the defendant has the burden to indicate his desire to pursue a direct appeal). Our review of the record reveals the district court's factual findings are supported by substantial evidence. Therefore, we conclude the district court did not err in denying this claim.

Fourth, Evans argues his counsel were ineffective for failing to inform him he could pursue a voluntary intoxication defense. Evans also appears to assert his plea should be set aside or he should be permitted to withdraw his guilty plea to correct a manifest injustice stemming from the disparity in sentences amongst the codefendants in this matter. On 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). A review of the record before this court reveals Evans did not raise these claims in his petition or supplemental

petition before the district court. Because Evans does not demonstrate cause for his failure to raise these claims before the district court, we decline to consider them in this appeal.

Having concluded Evans is not entitled to relief, we ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. James Todd Russell, District Judge
Karla K. Butko
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk