IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL MARIA FALUS, A/K/A MICHELLE FALUS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78974-COA

FILED

MAY 11 2020

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

ORDER OF AFFIRMANCE

Michael Maria Falus appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on January 28, 2019. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

First, Falus claimed that defense counsel was ineffective for threatening her with a life sentence if she did not plead guilty to second-degree murder. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must show (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) a reasonable probability, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial. *Kirksey v. State*, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996). The petitioner must demonstrate both components of the ineffective-assistance inquiry—deficiency and prejudice. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). We give deference to the district court's factual findings if they are supported by substantial evidence and are not clearly wrong, but we 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).

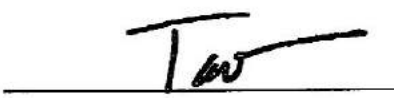
The district court found that Falus' claim consisted of a bare assertion that was belied by the record and the record demonstrated that she "signed a guilty plea agreement where she confirmed that she was entering into this agreement voluntarily and no one was coercing her." The district court's factual findings are supported by the record and are not clearly wrong. We note that counsel's candid advice about the possible outcome of a trial is not evidence of deficient performance, *see Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 69, 412 P.3d 56, 62 (2018) (noting that one of the roles of an attorney is to provide candid advice to his or her client), and we conclude the district court did not err by denying this claim.

Second, Falus claimed she needed the help of an attorney to properly investigate her harsh sentence and to prove that the victim's death was an accident. The appointment of counsel in this matter was discretionary. *See* NRS 34.750(1). When deciding whether to appoint counsel, the district court may consider factors including: whether the issues presented are difficult, whether the petitioner is unable to comprehend the proceedings, or whether counsel is necessary to proceed with discovery. *Id.* Because the district court granted Falus leave to proceed in forma pauperis and her petition was a first petition not subject to summary dismissal, *see* NRS 34.745(1), (4), Falus met the threshold requirements for the appointment of counsel. *See* NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 761 (2017). Here, the district court found the issue presented in Falus' petition was not difficult as it was a bare assertion that was belied by the record and there was no indication that Falus could not comprehend the proceedings. We conclude the district

court did not abuse its discretion by denying Falus' request for appointed postconviction counsel.

Having concluded Falus is not entitled to relief, we ORDER the judgment of the district court AFFIRMED.[1]

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. Michelle Leavitt, District Judge
Michael Maria Falus
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[1]To the extent Falus claims defense counsel was ineffective for telling her that she could not pursue a direct appeal, she did not raise this claim in her habeas petition and we decline to consider it for the first time on appeal. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004).