IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DANIEL ELIYAHSHUA KLEIN,
Appellant,
vs.
JAMES DZURENDA, DIRECTOR NDOC,
Respondent.

No. 79757-COA

FILED

OCT 09 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Daniel Eliyahshua Klein appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on June 26, 2019. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Klein claims the district court erred by denying his petition because he received ineffective assistance of counsel. To state a claim of ineffective assistance of defense counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate counsel's performance was deficient in that it fell below an objective standard of reasonableness and a reasonable probability, but for counsel's errors, he 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). Similarly, to establish ineffective assistance of appellate counsel, a petitioner must demonstrate counsel's performance was deficient because it fell below an objective standard of reasonableness, and resulting prejudice in that the omitted issue had a reasonable probability of success on appeal. *Id.* at 998, 923 P.2d at 1113-14.

The petitioner must show both components of the ineffective-assistance inquiry—deficiency and prejudice, *Strickland v. Washington*, 466 U.S. 668, 697 (1984), and the petitioner must demonstrate the underlying facts of his claim by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We review the district court's resolution of ineffective-assistance-of-counsel claims de novo, giving deference to the court's factual findings if they are supported by substantial evidence and not clearly wrong. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

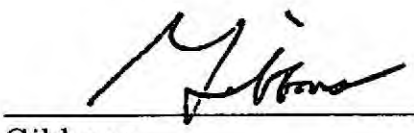
First, Klein claimed that defense counsel was ineffective for inducing him to enter a guilty plea despite "knowing about false drug tests. (See exhibits)." The exhibits he referenced were a series of news articles that indicated some of the drug tests used by the Las Vegas Metropolitan Police Department had given false positives when testing for the presence of controlled substances. The district court found that Klein did not claim that any of the drug tests used in his case gave a false positive, he did not have any basis to make such a claim, and therefore, his claim was a bare and naked allegation. We conclude the district court's findings are supported by the record and are not clearly wrong, Klein failed to demonstrate that counsel was ineffective, and the district court did not err by rejecting this claim. *See Rippo v. State*, 134 Nev. 411, 426, 423 P.3d 1084, 1100 (2018).

Second, Klein claimed that appellate counsel was ineffective for failing to challenge the amended indictment on the basis that it was not amended by the grand jury. The district court made the following findings. When Klein agreed to plead guilty to one count of category B trafficking, the State amended the indictment by dismissing two of the trafficking counts

and changing the remaining trafficking count to a category B trafficking count. The State's amendment was proper because the underlying charge was the same and Klein had notice of the lesser-included category B trafficking charge. And any argument that the State could not amend the indictment would have been futile. We conclude the district court's findings are supported by the record and are not clearly wrong, Klein failed to demonstrate that counsel was ineffective, and the district court did not err by rejecting his claim. *See* NRS 173.095(1); *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (counsel cannot be deemed ineffective for failing to raise futile claims).

Third, Klein claimed that defense counsel and appellate counsel were ineffective for failing to challenge the legality of his sentence on the basis that the amended indictment did not include a notice of habitual criminality and an independent notice of habitual criminality was not filed after the indictment was amended. The district court made the following findings. The original indictment included the State's notice of intent to seek habitual criminal punishment and listed five of Klein's prior felony convictions. Klein had notice of the State's intent to seek habitual criminal punishment by virtue of his guilty plea agreement in which he agreed to a small habitual criminal adjudication and a sentence of 6 to 20 years. And the notice Klein received of the State's intent to seek habitual criminal punishment was proper and did not render his sentence illegal. We conclude the district court's findings are supported by the record and are not clearly wrong, Klein failed to meet his burden to demonstrate that counsel was ineffective, and the district court did not err by rejecting his claim. *See* NRS 173.095(2); NRS 207.016(6); *Ennis*, 122 Nev. at 706, 137 P.3d at 1103.

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



_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Valerie Adair, District Judge
Daniel Eliyahshua Klein
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

---

[1]To the extent Klein challenges the amount of his presentence credit, we conclude his claim was waived because he did not raise it on direct appeal, *see Griffin v. State*, 122 Nev. 737, 744, 137 P.3d 1165, 1169 (2006); *Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999), and he did not present it as a claim of ineffective assistance of counsel in his postconviction habeas petition, *see* NRS 34.810(1)(a); *Griffin*, 122 Nev. at 745, 137 P.3d at 1170.

We also conclude the district court did not abuse its discretion by declining to appoint postconviction counsel. *See* NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 760-61 (2017).