

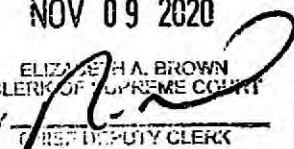
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRANDON SMITH,
Appellant,
vs.
BRIAN WILLIAMS, WARDEN,
Respondent.

No. 80302-COA

FILED

NOV 09 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Brandon Smith appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Smith argues the district court erred by denying the claims of ineffective assistance of counsel raised in his August 5, 2019, petition. To demonstrate ineffective assistance of defense counsel sufficient to invalidate a judgment of conviction based on an *Alford*¹ plea, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that, but for counsel's errors, there is a reasonable probability petitioner would not have accepted a plea offer and would have insisted on going to trial. *See 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, 687-88 (1984).

¹*North Carolina v. Alford*, 400 U.S. 25 (1970).

First, Smith argued his counsel was ineffective for failing to obtain a Walmart surveillance video and phone records. Smith appeared to assert that these items would have demonstrated that he was not the sole caregiver for the deceased child during the time when she was injured and she may have been injured by another person. However, the record revealed that Smith informed a detective that he was the sole person responsible for the child during the relevant time period. Moreover, multiple witnesses testified at the grand jury proceeding that Smith was solely responsible for the child during the relevant time period. In addition, Smith received a substantial benefit by acceptance of the plea deal as his charge was reduced from murder to charges of voluntary manslaughter and child abuse, neglect, or endangerment resulting in substantial bodily or mental harm. In light of the strong evidence that Smith was solely responsible for the child when she suffered the injuries that caused her death and the substantial benefit Smith received by entry of his plea, Smith failed to demonstrate a reasonable probability he would have refused to accept the plea deal and would have insisted on proceeding to trial had counsel obtained a Walmart surveillance video and phone records. Therefore, we conclude the district court did not err by denying this claim.

Second, Smith argues on appeal that his counsel was ineffective for misadvising him concerning the sentencing procedures, misinforming him regarding the statement made by the victim's sister, and failing to discuss the pursuit of a direct appeal with him. Smith did not raise these claims in his petition and we decline to consider them in the first instance

on appeal. See *McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

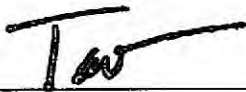
Third, Smith argued the State committed prosecutorial misconduct. However, this claim was not based on an allegation that Smith's plea was involuntarily or unknowingly entered or that his plea was entered without the effective assistance of counsel, and therefore, this claim was not appropriately raised in Smith's petition. See NRS 34.810(1)(a); *Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) ("[C]laims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings."), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 150, 979 P.2d 222, 223-24 (1999). Therefore, the district court properly concluded Smith was not entitled to relief based upon this claim.

Finally, Smith appears to argue the district court erred by denying his motion to appoint counsel. 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 Smith's petition was a first petition not subject to summary dismissal, see NRS 34.745(1), (4), Smith 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). However, the issues in this matter were not difficult, Smith was able to comprehend the proceedings, and discovery with the aid of counsel was not necessary. See

NRS 34.750(1); *Renteria-Novoa*, 133 Nev. at 76, 391 P.3d at 761. Therefore, the district court denied the motion to appoint counsel. The record supports the decision of the district court, and we conclude the district court did not abuse its discretion by denying the motion for the appointment of counsel. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michael Villani, District Judge
Brandon Smith
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk