

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEITH ANTHONY JOHNSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 80163-COA

**FILED**

MAR 05 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING*

Keith Anthony Johnson appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on May 6, 2019, and a supplemental petition filed on May 24, 2019. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

In his petition and supplement, Johnson raised numerous claims of ineffective assistance of counsel. To demonstrate ineffective assistance of defense counsel sufficient to invalidate a judgment of conviction based on a guilty 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 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, 687 (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). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Johnson claimed the justice and district courts lacked subject matter jurisdiction because he was served with an unfiled copy of the criminal complaint and counsel was ineffective for failing to argue the lack of jurisdiction. This claim did not implicate the jurisdiction of the justice or district courts, see Nev. Const. art. 6, § 6; NRS 171.010; *Landreth v. Malik*, 127 Nev. 175, 183, 251 P.3d 163, 168 (2011) (subject matter jurisdiction is the court's authority to render a judgment in a particular category of case), and counsel is not deficient for failing to file futile motions, see *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Johnson claimed counsel was ineffective for making statements about the case to him. Specifically, he claimed counsel was ineffective for telling him "he did not know what to do with this case," and it looked like the victim "was on something heavy." He also claimed an investigator told him this was no more than a "domestic case." Johnson does not explain how these comments were deficient. Further, he failed to allege a reasonable probability that he would not have pleaded guilty and would have gone to trial had counsel and the investigator not made these

statements. Therefore, Johnson's bare claim did not demonstrate he was entitled to relief. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Johnson claimed counsel was ineffective for failing to provide him with his discovery and conduct pretrial investigation. Johnson failed to allege there was a reasonable probability he would not have pleaded guilty and would have gone to trial had counsel acted differently. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fourth, Johnson claimed counsel was ineffective for telling him he would receive probation. Johnson was informed in the guilty plea agreement that "the question of whether I receive probation is in the discretion of the sentencing judge." By signing his name to the plea agreement he acknowledged he read and understood the plea agreement. Further, the district court specifically canvassed Johnson regarding probation and Johnson acknowledged that, "the question of sentencing is strictly up to the Court, and no one can promise you probation, leniency, or special treatment." Because Johnson acknowledged he was not promised probation in both the plea agreement and at the change of plea hearing, he failed to demonstrate he was promised probation or that he relied on that promise when deciding to plead guilty. Therefore, Johnson failed to demonstrate counsel was deficient or that there was a reasonable probability he would not have pleaded guilty and would have gone to trial had the alleged promise not been made. Therefore, we conclude the district

court did not err by denying this claim without first conducting an evidentiary hearing.

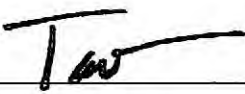
Fifth, Johnson claimed counsel was ineffective for failing to file a motion to withdraw his guilty plea after sentencing because he did not receive probation. Johnson failed to demonstrate he had the right to withdraw his guilty plea for not receiving probation, because his plea agreement was not a conditional plea agreement subject to the court accepting the recommended sentence. *See* NRS 174.035(4); *see also Harris v. State*, 130 Nev. 435, 448, 329 P.3d 619, 628 (2014) (holding that a postsentencing motion to withdraw guilty plea is not an available remedy). Therefore, Johnson failed to demonstrate counsel was deficient and we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Finally, Johnson claimed counsel was ineffective for failing to file an appeal from his judgment of conviction on his behalf. Johnson claimed he asked counsel to file an appeal and counsel failed to do so. "Trial 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). "The burden is on the client to indicate to his attorney that he wishes to pursue an appeal." *Davis v. State*, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999). "When a petitioner has been deprived of the right to appeal due to counsel's deficient performance, the second component (prejudice) may be presumed." *Toston*, 127 Nev. at 976, 267 P.3d at 799. Johnson's claim is not belied by the record and, if true, would entitle him to

relief. Therefore, we conclude the district court erred by denying this claim without first conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

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

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

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Jacqueline M. Bluth, District Judge  
Keith Anthony Johnson  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk