

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TENNILLE RAE WHITAKER,  
Appellant,  
vs.  
JERRY HOWELL, WARDEN  
FLORENCE MCCLURE WOMEN'S  
CORRECTIONAL CENTER,  
Respondent.

No. 83049-COA

**FILED**

**FEB 03 2022**

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

*ORDER OF AFFIRMANCE*

Tennille Rae Whitaker appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on July 20, 2020. Fourth Judicial District Court, Elko County; Kriston N. Hill, Judge.

Whitaker claims the district court erred by denying her claims that counsel was ineffective at sentencing without first conducting an evidentiary hearing. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687. We give deference to the district 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 her to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Whitaker claimed counsel was ineffective for failing to object to a petition that was signed by people living in Whitaker's community. Whitaker claimed the people were not victims and, therefore, the district court should not have considered the petition. At the sentencing hearing, the district court specifically stated it was not considering the petition because the people who signed it were not victims pursuant to statute. Because the district court stated it was not considering the petition, Whitaker failed to demonstrate counsel was deficient for failing to object or a reasonable probability of a different outcome had counsel objected. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Whitaker claimed counsel was ineffective for failing to present mitigating evidence. Whitaker claimed counsel should have presented evidence that painted the true picture of appellant, "the fact setting at hand," and her steps to improve herself and understand her mental health issues. However, Whitaker failed to allege how she was prejudiced by these omissions. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

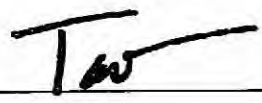
On appeal, Whitaker claims counsel was ineffective for failing to object to letters from T. Myers and T. Ballard because they were not victims pursuant to statute or the constitution and, therefore, the district court should not have considered the letters. Whitaker also claims counsel

was ineffective for failing to request a continuance when he did not receive the presentence investigation report until the day of sentencing and for failing to object to Marsy's Law and the sentencing court's community approach to sentencing. Further, she claims the sentencing court erred by failing to keep control of the courtroom during sentencing. These claims were not raised below, and we decline to consider them in the first instance on appeal. See *McNelson v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

Finally, Whitaker claims the district court erred by denying her petition because her claims were outside the scope of a petition challenging a judgment of conviction pursuant to a guilty plea where her claims challenged counsel's performance only at the sentencing hearing. At the time its order was filed, the district court did not have the benefit of the Nevada Supreme Court's opinion in *Gonzales v. State*, 137 Nev., Adv. Op. 40, 492 P.3d 556, 562 (2021), that held such claims were within the scope. Nevertheless, the district court also reached the merits of the claims. Therefore, Whitaker fails to demonstrate she is entitled to relief on this ground. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Kriston N. Hill, District Judge  
Karla K. Butko  
Attorney General/Carson City  
Elko County District Attorney  
Elko County Clerk