

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

OSCAR BENJAMIN LOYA,
Appellant,
vs.
WILLIAM HUTCHINGS WARDEN;
AND THE STATE OF NEVADA,
Respondents.

No. 83570-COA

FILED

APR 11 2022

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

ORDER OF AFFIRMANCE

Oscar Benjamin Loya appeals from orders of the district court denying a postconviction petition for a writ of habeas corpus and a motion for modification of sentence. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Postconviction petition for a writ of habeas corpus

Loya argues the district court erred by denying his April 1, 2021, petition. Loya also appears to assert that the district court erred by denying the petition without first conducting an evidentiary hearing. In his petition, Loya claimed his counsel was ineffective. To demonstrate ineffective assistance of 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*). To demonstrate prejudice regarding the decision to enter a guilty plea, a petitioner must show a reasonable probability that, but for counsel's errors, 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, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry—deficiency and prejudice—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 him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Loya claimed his counsel was ineffective for failing to object when a State’s witness, Robert Young, lied during his testimony. Loya did not state which portion of Young’s testimony he believed was not truthful. Moreover, Loya’s counsel cross-examined Young at trial concerning Young’s version of events, and Loya did not explain why counsel’s performance in this regard was not sufficient to challenge Young’s testimony. Accordingly, Loya failed to allege specific facts sufficient to demonstrate that his counsel’s performance fell below an objective standard of reasonableness. Loya also failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected to Young’s testimony. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Loya claimed that his counsel was ineffective for failing to provide him with the discovery materials or visit with him to prepare for trial. Loya did not explain the significance of the discovery materials or why he believed counsel should have provided them to him. Loya also did not explain why additional discussions with counsel were necessary. In

addition, Loya did not explain how any failure by counsel to provide him with access to the discovery materials and additional discussions with counsel bore upon his decision to enter a guilty plea to most of his charges or altered the outcome of the trial. Accordingly, Loya failed to allege specific facts sufficient to demonstrate that his counsel's performance fell below an objective standard of reasonableness. Loya also failed to allege specific facts sufficient to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial had counsel performed differently or a reasonable probability of a different outcome at trial. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Loya claimed that his counsel was ineffective for failing to advise him of the ramifications of a guilty plea and promising him that he would receive a lenient sentence if he entered a guilty plea. The written plea agreement, which Loya acknowledged having read and understood, informed Loya of the potential sentences he faced by entry of his guilty plea, including a sentence under the habitual criminal enhancement. Loya also acknowledged in the written plea agreement that he had not been promised or guaranteed a particular sentence by anyone and he understood that his ultimate sentence would be determined by the sentencing court. At the plea canvass, Loya informed the trial-level court that he read the written plea agreement and he reviewed the agreement and its terms with his counsel. At the plea canvass, Loya also asserted that no one had promised that he would receive a particular sentence. In light of the record concerning Loya's understanding of the plea agreement and the consequences he faced from entry of his guilty plea, he failed to demonstrate his counsel's performance fell below an objective standard of reasonableness. Loya also failed to

demonstrate a reasonable probability he would have refused to enter a guilty plea and would have insisted on proceeding to trial for the relevant charges had counsel done a more thorough job of explaining the plea agreement and potential consequences to him or discussed the plea agreement in a different manner. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Loya appeared to claim that his counsel was ineffective for failing to challenge the chain of custody for the drugs the police collected. Loya argued on direct appeal that the trial court erred by admitting the drug evidence due to a breach in the chain of custody. On direct appeal, this court concluded that Loya was not entitled to relief because “the State made a reasonable showing that there was no substitution, altering, or tampering with the evidence and that the evidence offered at trial was found at the scene.” *Loya v. State*, No. 79505, 2020 WL 7396924 (Nev. Ct. App. Dec. 16, 2020) (Order of Affirmance). In light of this court’s conclusion on direct appeal, Loya failed to demonstrate his counsel’s performance fell below an objective standard of reasonableness due to failing to object to admission of the drug evidence due to a breach of the chain of custody or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Fifth, Loya claimed that his counsel was ineffective for failing to call Skylar Woodall to testify at trial. Loya did not make specific factual allegations concerning Woodall’s testimony if that witness had been called to testify at trial. Accordingly, Loya failed to allege specific facts sufficient to demonstrate that his counsel’s performance fell below an objective

standard of reasonableness. Loya also failed to demonstrate a reasonable probability of a different outcome at trial had counsel called Woodall to testify at trial. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Next, Loya claimed the trial-level court erred because it did not grant his request for new counsel until after trial. Loya also appeared to assert that the sentencing court erred by adjudicating him a habitual criminal and imposing concurrent terms of 10 to 25 years in prison and that his sentence constituted cruel and unusual punishment. These claims could have been raised on direct appeal, and Loya did not demonstrate good cause for the failure to do so and actual prejudice. Therefore, he is not entitled to relief. *See* NRS 34.810(1)(b).

Next, Loya argues on appeal that his counsel was ineffective for failing to call his codefendant, Lisa Brown, as a witness at trial. Loya also argues the trial-level court erred by failing to conduct a hearing concerning the State's notice of its intent to seek adjudication as a habitual criminal and the trial-level court erred by entering an amended judgment of conviction to correct an error concerning his sentence. Loya did not raise these claims in his petition, and we decline to consider them on appeal in the first instance. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

Next, Loya appears to assert that the district court erred by declining to appoint postconviction 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.*; *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 761 (2017). The issues in this matter were not difficult, Loya was able to comprehend the proceedings, and discovery with the aid of counsel was not necessary. Therefore, we conclude the district court did not abuse its discretion by declining to appoint postconviction counsel.

Finally, Loya appears to argue that the district court erred by conducting a hearing outside his presence concerning his postconviction petition. A criminal defendant does not have an unlimited right to be present at every proceeding. *See Gallego v. State*, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 776 n.12, 263 P.3d 235, 253 n.12 (2011). A “defendant must show that he was prejudiced by the absence.” *Kirksey*, 112 Nev. at 1000, 923 P.2d at 1115. The record indicates the hearing at issue was not an evidentiary hearing, no testimony was presented, and the district court merely directed its law clerk to prepare an order denying the petition. *Cf. Gebers v. State*, 118 Nev. 500, 504, 50 P.3d 192, 194-95 (2002) (concluding a petitioner’s statutory rights were violated when she was not present at hearing where testimony and evidence were presented). Loya does not demonstrate he was prejudiced by his absence from the relevant hearing. Accordingly, Loya fails to demonstrate he is entitled to relief.

Motion for modification of sentence

Loya argues the district court erred by denying his April 1, 2021, motion. In his motion, Loya first asserted that the presentence investigation report contained errors. However, Loya did not identify any alleged errors. Accordingly, Loya failed to demonstrate the district court relied on mistaken assumptions regarding his criminal record that worked to his extreme detriment. Therefore, we conclude the district court did not

err by denying Loya's motion. *See Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

Second, Loya asserted that the Legislature recently amended NRS 207.010, and he requested retroactive application of those amendments to his sentence. Loya also claimed the sentencing court erred by failing to conduct a hearing to consider whether to adjudicate him as a habitual criminal. In addition, Loya asserted that his trial counsel was ineffective for failing to provide him with discovery materials. Loya's claims fell outside the narrow scope of claims permissible in a motion for modification of sentence. *See id.* Therefore, without considering the merits of these claims, we conclude the district court did not err by denying the motion. Accordingly, we

ORDER the judgments of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Susan Johnson, District Judge
Oscar Benjamin Loya
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk