

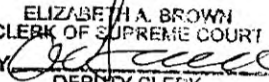
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CEASAR SANCHAZ VALENCIA, A/K/A
CEASAR SANCHEZ VALENCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83778-COA

FILED

SEP 09 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Cesar Sanchaz Valencia appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on May 28, 2020. Eighth Judicial District Court, Clark County; Carli Lynn Kierny, Judge.

Valencia argues the district court erred by denying his claims that counsel was ineffective 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 him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Valencia claimed counsel was ineffective for failing to interview his alibi witness. Valencia failed to support his claim with specific facts because he did not identify the witness or specify what she would have testified to. Thus, he failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at trial had counsel interviewed this witness. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.¹

Second, Valencia claimed counsel was ineffective for failing to interview a witness regarding whether that witness identified him as being the rider of the moped. This witness attempted to steal the moped, but that was after Valencia attempted to shoot at police officers and then fled the scene. Valencia did not indicate that the witness actually viewed the crimes for which Valencia was convicted or whether this witness did or could have identified Valencia as the perpetrator, especially where Valencia did not allege this person knew him prior to the crime. Thus, Valencia failed to support this claim with specific facts that, if true, would entitle him to relief. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Valencia claimed that counsel was ineffective for failing to make an opening statement. Valencia failed to support this claim with

¹On appeal, Valencia names the witness and what she would have testified to. Because Valencia did not include this information in his petition below, we decline to consider it on appeal in the first instance. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

specific facts that, if true, would entitle him to relief because he failed to allege or demonstrate a reasonable probability of a different outcome at trial had counsel made an opening statement. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fourth, Valencia claimed that counsel was ineffective for failing to object to the use of a prior judgment of conviction to adjudicate him a habitual criminal. Valencia asserted the prior conviction was invalid because he was not present when that judgment of conviction was amended. Valencia failed to demonstrate the prior conviction was invalid as the judgment of conviction was amended to fix a clerical error and Valencia did not demonstrate he was required to be present for the correction of the error. See NRS 176.565 (providing that clerical errors in judgments may be corrected “after such notice, *if any*, as the court orders” (emphasis added)); see also *United States v. Saenz*, 429 F. Supp. 2d 1109, 1114 (N.D. Iowa 2006) (indicating that a defendant’s presence is not required under the Due Process Clause or the applicable federal rule of criminal procedure for correction of a clerical error in a sentence); *Jones v. State*, 672 A.2d 554, 555 (Del. 1996) (explaining that the right to be present at the imposition of a sentence does not apply when a sentence is corrected to fix a clerical error). Further, Valencia failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel objected and been successful because the State presented more judgments of conviction than necessary to support the imposition of the small habitual criminal statute. Therefore,

we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.²

Next, Valencia argues the district court erred by denying his claims that his first counsel's conflict should have been imputed to his second counsel because they used to work together, the trial court should have appointed him substitute counsel, habitual criminal adjudication requires a hearing separate from sentencing, counsel was ineffective for failing to object to the State's argument that he had been dealing drugs, counsel was ineffective for arguing that it would be impossible to prove he is innocent, and co-counsel was biased against him and caused him harm because she was under investigation at the time of trial. These claims were not raised in Valencia's petition below³; therefore, we decline to consider them in the first instance on appeal. *See McNelton*, 115 Nev. at 416, 990 P.2d at 1276.


Finally, Valencia argues the district court erred by not appointing counsel to represent him in this matter. 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

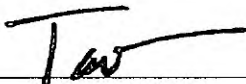
²For the same reasons, we conclude Valencia failed to demonstrate appellate counsel was ineffective for failing to raise this claim on appeal. *See Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

³In his petition below, Valencia claimed that counsel was ineffective for failing to seek a change of venue because co-counsel was under investigation. On appeal, Valencia changes the claim regarding the investigation of co-counsel to one of bias, which constitutes a new claim.

P.3d 760, 761 (2017). Because the district court granted Valencia leave to proceed in forma pauperis and his petition was a first petition not subject to summary dismissal, *see* NRS 34.745(1), (4), Valencia met the threshold requirements for the appointment of counsel. *See* NRS 34.750(1); *Renteria-Novoa*, 133 Nev. at 76, 391 P.3d at 761. However, the record reveals that the issues in this matter were not difficult, Valencia was able to comprehend the proceedings, and discovery with the aid of counsel was not necessary. Therefore, we conclude the district court did not err by failing to appoint counsel.⁴

Having concluded that Valencia was not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Carli Lynn Kierny, District Judge
Ceasar Sanchaz Valencia
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁴We conclude Valencia is not entitled to counsel on appeal.