

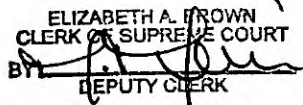
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT CRUISE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84750-COA

FILED

JAN 13 2023

ELIZABETH A. TROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Robert Cruise appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on December 30, 2020, and supplemental petitions filed on February 25, 2021, and November 14, 2021. Eighth Judicial District Court, Clark County; Tara D. Clark Newberry, Judge.

Cruise argues the district court erred by denying his claims of ineffective assistance of trial-level counsel without an evidentiary hearing. 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*); see also *Gonzales v. State*, 137 Nev. 398, 404-05, 492 P.3d 556, 562 (2021) (applying *Strickland's* test to claims of ineffective assistance of counsel at sentencing where a defendant has pleaded guilty). 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, Cruise argues the district court erred by denying his claim that counsel was ineffective for failing to continue his sentencing hearing until the resolution of Cruise's separate case. Cruise was arrested on new charges after the entry of his plea in this case. Cruise claims that counsel should have acted diligently in monitoring his separate case and been versed on any outstanding issues that would affect his sentence in this case.

The district court found that it did not rely on the details of Cruise's separate case in imposing his sentence except to the extent that it enabled the State to argue at sentencing in accordance with the plea agreement. At sentencing, the State submitted pictures depicting the severity of the victim's injuries and certified judgments of conviction for six of Cruise's prior cases for a total of 12 prior felony convictions. Cruise thus fails to demonstrate a reasonable probability of a different outcome had counsel continued his sentencing or performed differently with regard to his

separate case. Therefore, we conclude that Cruise fails to demonstrate the district court erred by denying this claim without conducting an evidentiary hearing.

Second, Cruise argues the district court erred by denying his claim that counsel was ineffective during sentencing. Cruise argues that counsel failed to argue on Cruise's behalf or present any mitigating factors at sentencing. Cruise claims that counsel should have met with him to obtain mitigation information.

The district court found that both Cruise and his counsel made arguments and presented information in mitigation at sentencing. These findings are supported by the record, and Cruise fails to identify what additional mitigating information counsel would have obtained had counsel met with Cruise. While Cruise argues that counsel should have communicated with Cruise's attorney in his separate case and made arguments mitigating his new charges, the district court did not consider the separate case and instead considered information that supported Cruise's sentence for crimes committed in this case. Cruise thus fails to demonstrate that counsel's performance fell below an objective standard of reasonableness and a reasonable probability of a different outcome had counsel performed differently at sentencing. Therefore, we conclude that Cruise fails to demonstrate the district court erred by denying this claim without conducting an evidentiary hearing.

Third, Cruise contends the district court erred by denying his claim that counsel was ineffective "for failing to withdraw his plea prior to sentencing." The record does not demonstrate that this claim was raised below. The district court's order indicates that Cruise claimed he "should have been permitted to withdraw his plea prior to sentencing." The district

court then denied the claim as outside the scope of claims permissible in a postconviction habeas petition arising from a guilty plea because Cruise failed to allege that his plea was entered without the effective assistance of counsel or that it was involuntary or unknowing. Cruise fails to provide his pleadings below for our review on appeal and thus fails to demonstrate he raised the argument below. *See Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) (“The burden to make a proper appellate record rests on appellant.”); *see also* NRAP 30(b)(3). Therefore, we decline to consider this new argument on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).¹

Finally, Cruise contends the district court erred by denying his claim that counsel was ineffective for failing to file a motion to waive Cruise’s appearance at the preliminary hearing. Cruise argues that counsel’s inaction rendered his plea involuntary and unknowing. As with the previous claim, the record does not demonstrate that this claim was raised below. The district court denied this claim as outside the scope of claims permissible in a postconviction habeas petition arising from a guilty plea because Cruise failed to allege that his plea was entered without the effective assistance of counsel or that it was involuntary or unknowing. Cruise fails to provide his pleadings below for our review on appeal and thus fails to demonstrate he raised the argument below. *See Greene*, 96 Nev. at

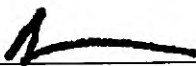
¹Cruise argues for the first time in his reply brief that NRS 34.810, which limits the scope of claims permissible in a postconviction habeas petition arising from a guilty plea, contradicts other statutes in NRS Chapter 34 and is unconstitutional. We decline to consider issues raised for the first time in a reply brief. *See LaChance v. State*, 130 Nev. 263, 277 n.7, 321 P.3d 919, 929 n.7 (2014); *see also* NRAP 28(c) (stating a reply brief “must be limited to answering any new matter set forth in the opposing brief”).

558, 612 P.2d at 688; *see also* NRAP 30(b)(3). Therefore, we decline to consider this new argument on appeal. *See McNelton*, 115 Nev. at 416, 990 P.2d at 1276.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Tara D. Clark Newberry, District Judge
Law Office of Betsy Allen
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk