


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANCISCO SUAREZ ARCIBAL,  
Appellant,  
vs.  
WILLIAMS, WARDEN, AND THE  
STATE OF NEVADA,  
Respondents.

No. 87751-COA

**FILED**

SEP 12 2024

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Francisco Suarez Arcibal appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on September 1, 2023. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

In his petition, Arcibal alleged claims of ineffective assistance of counsel. 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).

First, Arcibal alleged that counsel was ineffective for failing to investigate Arcibal's claim that he was not living in Nevada at the time of the offenses and for lying about conducting an investigation. In a motion for bail reduction filed by counsel before the entry of Arcibal's plea, Arcibal alleged that he had been "in Las Vegas for 3 years and ha[d] full time work as a mechanic." At the time the motion was filed, the 3-year period included the dates alleged in the second amended information, to which Arcibal pleaded guilty. In addition, the district court found Arcibal agreed to waive any defects in the guilty plea agreement. This finding is supported by the record. As part of his plea agreement, Arcibal agreed to plead guilty to the offenses "as more fully alleged in the [second amended information]" attached to the written plea agreement, which alleged Arcibal was in Clark County, Nevada at the time of the offenses. Arcibal does not allege that his plea was not entered knowingly, intelligently, or voluntarily, nor does he allege that counsel's alleged lack of investigation or lying about the investigation impacted his decision to plead guilty. For these reasons, Arcibal failed to demonstrate that counsel was deficient or a reasonable probability Arcibal would not have pleaded guilty and would have insisted on going to trial but for counsel's alleged errors. Therefore, we conclude the district court did not err by denying this claim.<sup>1</sup>

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<sup>1</sup>To the extent Arcibal argued that his equal protection rights were violated by counsel's failure to investigate Arcibal's claim that he was not living in Nevada at the time of the offenses, we conclude Arcibal is not entitled to relief on this claim for the reasons discussed above.

Second, Arcibal alleged that counsel was ineffective for allowing the submission of two presentence investigation reports (PSIs) that contained conflicting and inaccurate information, namely that he had burned his minor child. The district court found that the PSI had been corrected to omit the statement regarding the minor child and that this corrected version of the PSI was used at sentencing. These findings are supported by the record. During sentencing, counsel informed the court that the PSI writer drafted a revised PSI that omitted “a mistake in the summary of facts that indicated that Mr. Arcibal had burned his child and that was factually inaccurate based on all accounts.” And the sentencing court made no reference to Arcibal burning his child at sentencing. Accordingly, Arcibal failed to demonstrate that counsel was deficient or a reasonable probability of a different sentencing outcome but for counsel’s alleged errors. Therefore, we conclude the district court did not err by denying this claim.

Third, Arcibal alleged that counsel was ineffective for allowing the submission of PSIs that contained conflicting and inaccurate information, namely that there was a protective order in place when he was arrested. The sentencing court made no reference to a protective order at sentencing. Accordingly, Arcibal failed to demonstrate a reasonable probability of a different sentencing outcome but for counsel’s alleged errors. Therefore, we conclude the district court did not err by denying this claim.

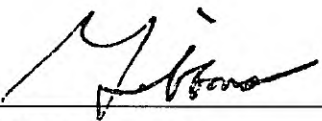
Arcibal also alleged in his petition that his due process rights were violated because the State was without jurisdiction to prosecute him because he was not a resident of Nevada during the dates alleged for the offenses and that his due process and equal protection rights were violated

because a “falsified PSI” was used. Both of these claims were waived because they could have been raised on direct appeal. *See Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 150, 979 P.2d 222, 223-24 (1999). Further, these claims did not challenge the validity of his guilty plea or allege that Arcibal entered his plea without the effective assistance of counsel. Accordingly, they are outside the scope of claims permissible in a postconviction petition for a writ of habeas corpus challenging a judgment of conviction based on a guilty plea. *See* NRS 34.810(1)(a). For these reasons, we conclude that the district court did not err by denying these claims.

Finally, Arcibal sought the appointment of 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). Because Arcibal appeared to be indigent and his petition was a first petition not subject to summary dismissal, *see* NRS 34.745(1), (3), Arcibal met the threshold requirements for the appointment of counsel, *see* NRS 34.750(1); *Renteria-Novoa*, 133 Nev. at 76, 391 P.3d at 760-61. However, the district court found that the issues in this matter were not difficult, Arcibal was able to comprehend the proceedings, and discovery with the aid of counsel was not necessary. For these reasons, the district court denied the motion to appoint counsel. The record supports the decision of the district court, and we conclude the

district court did not abuse its discretion by denying the motion for the appointment of counsel. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

  
\_\_\_\_\_, J.  
Westbrook

cc: Hon. Tierra Danielle Jones, District Judge  
Francisco Suarez Arcibal  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk