

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EDWARD JOSEPH HONABACH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 88004-COA

FILED

NOV 07 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Edward Joseph Honabach appeals from a district court order denying an amended postconviction petition for a writ of habeas corpus filed on April 28, 2022.¹ Eighth Judicial District Court, Clark County; Jennifer L. Schwartz, Judge.

In his amended petition, Honabach claimed appellate counsel was ineffective for withdrawing his direct appeal without his consent. The district court held an evidentiary hearing on the claim, in which only Honabach testified. The district court found that counsel withdrew the appeal with Honabach's consent and denied the petition. The district court's finding was based on representations counsel made in the notice of withdrawal of appeal filed with the Nevada Supreme Court and a letter counsel sent to Honabach.

On appeal, this court determined that the district court's finding of fact was not supported by substantial evidence. *See Honabach v.*

¹The notice of appeal states that Honabach is challenging a "judgment of conviction" entered on January 8, 2024. However, the district court entered an order denying Honabach's amended petition on January 8, 2024, and Honabach's arguments on appeal relate to that petition. Therefore, we construe Honabach's appeal as challenging the district court's January 8, 2024, order denying Honabach's amended petition.

24-42138

State, No. 85398-COA, 2023 WL 3911109, at *2-3 (Nev. Ct. App. June 8, 2023) (Order Affirming in Part, Reversing in Part, and Remanding). In particular, this court determined that (1) neither party called appellate counsel to testify at the evidentiary hearing, (2) the notice of withdrawal of appeal was not a sworn statement, (3) the letter to Honabach did not establish that Honabach gave counsel consent to withdraw his appeal, and (4) the district court did not make a credibility determination regarding Honabach's testimony. *See id.* Thus, this court reversed the district court's decision as to this claim and remanded the matter for a new evidentiary hearing. *See id.* at *3 & n.1. On remand, the district court conducted a new evidentiary hearing, in which only appellate counsel testified. Thereafter, the district court found that counsel withdrew the appeal with Honabach's consent and denied the petition. Honabach now contends that the district court erred by denying his claim of ineffective assistance of counsel.

To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Generally, both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, but in some instances, such as when the petitioner has been deprived of the right to appeal due to counsel's deficient performance, the second component (prejudice) may be presumed, *Lozada v. State*, 110 Nev. 349, 357, 871 P.2d 944, 949 (1994). The petitioner must demonstrate the underlying facts by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). 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).

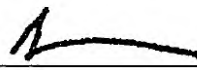
At the evidentiary hearing, appellate counsel testified that he met with Honabach in prison shortly after being appointed. During that meeting, counsel informed Honabach that he did not see any issues to appeal and that any claims regarding the guilty plea agreement or plea canvass would have to be raised in a postconviction habeas petition. Counsel testified that he and Honabach agreed that counsel would try to "stall" the direct appeal for as long as possible to give Honabach more time to file a postconviction habeas petition and that ultimately counsel would drop the appeal and seek habeas relief. Counsel also testified that Honabach orally confirmed that they would be proceeding with a postconviction habeas action instead of an appeal, that it was counsel's understanding that Honabach had consented to withdrawal of the appeal, and that Honabach never told counsel not to withdraw the appeal. Counsel further testified that he moved to withdraw from the case because a conflict of interest arose after Honabach claimed he did not agree to withdraw the appeal but that he filed Honabach's initial March 27, 2020, petition on Honabach's behalf to ensure different counsel could assist Honabach in pursuing postconviction habeas relief.

The record indicates that although Honabach appeared remotely for the second evidentiary hearing, defense counsel ultimately elected not to have Honabach testify and to instead rely on Honabach's prior testimony.² As a result, the district court did not have the opportunity at

²We note that Honabach does not argue that postconviction counsel erroneously waived his right to testify at the second evidentiary hearing or that the district court erred by declining to continue the second evidentiary hearing sua sponte. Thus, Honabach has waived any such challenges on appeal. See *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252

that hearing to weigh Honabach's credibility as contemplated by this court's prior order. Honabach testified at the first evidentiary hearing that he never consented to the withdrawal of his appeal. However, the district court found counsel's contrary testimony at the second evidentiary hearing credible, and this court will not "evaluate the credibility of witnesses because that is the responsibility of the trier of fact." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). In light of counsel's credible testimony, Honabach failed to demonstrate by a preponderance of the evidence that he did not consent to the withdrawal of his appeal. Therefore, Honabach failed to demonstrate counsel was deficient for withdrawing his appeal, and we conclude the district court did not err by denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


_____, J.
Bulla


_____, J.
Westbrook

P.3d 668, 672 n.3 (2011) (explaining that arguments not raised in an appellant's opening brief are deemed waived).

³The Honorable Michael Gibbons, Chief Judge, did not participate in the decision in this matter.

cc: Hon. Jennifer L. Schwartz, District Judge
Nevada State Public Defender's Office
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk