

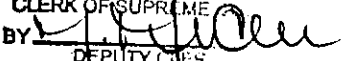
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MATTHEW TRAVIS HOUSTON,
Appellant,
vs.
CALVIN JOHNSON, WARDEN; AND
THE STATE OF NEVADA,
Respondents.

No. 86972-COA

FILED

FEB 03 2025

ELIZABETH A. BROS. CLERK OF SUPR. CT.
BY:  DEPUTY CLERK

No. 87443-COA

MATTHEW TRAVIS HOUSTON,
Appellant,
vs.
CALVIN JOHNSON, WARDEN; AND
THE STATE OF NEVADA,
Respondents.

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

Matthew Travis Houston appeals from district court orders denying a postconviction petition for a writ of habeas corpus filed on May 26, 2022, and a supplement filed on January 27, 2023.¹ Eighth Judicial District Court, Clark County; Jennifer L. Schwartz, Judge.

¹In Docket No. 86972, Houston timely filed a notice of appeal from the district court's August 3, 2023, order denying Houston's petition. This order contained only a summary disposition of Houston's petition and lacked the requisite findings of fact and conclusions of law. *See* NRS 34.830(1). On September 6, 2023, the district court entered a second order denying Houston's petition which complied with NRS 34.830(1). Houston filed a timely notice of appeal from that order in Docket No. 87443. The appeals were consolidated. *See* NRAP 3(b)(2).

In his petition and supplement, Houston alleged he received 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, the 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). A petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle the petitioner to relief. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Houston claimed counsel was ineffective for failing to file a direct appeal. “[C]ounsel has a constitutional duty to file a direct appeal in two circumstances: when requested to do so and when the defendant expresses dissatisfaction with his conviction.” *Toston v. State*, 127 Nev. 971, 978, 267 P.3d 795, 800 (2011). As to the second circumstance, the Nevada Supreme Court has held that counsel's duty is triggered “when the client's desire to challenge the conviction or sentence can be reasonably inferred

from the totality of the circumstances, focusing on the information that counsel knew or should have known at the time.” *Id.* at 979, 267 P.3d at 801.

Here, Houston did not allege that he asked counsel to file an appeal. He did allege, however, that counsel had an obligation to file a direct appeal because Houston was not satisfied with his sentence and conviction as he was not sentenced to probation as was initially agreed upon.

The guilty plea agreement provided that the State agreed to not oppose probation and stipulated to an underlying 2-to-5-year suspended sentence. If Houston completed and was honorably discharged from probation, he would have been allowed to withdraw his plea and plead guilty to a gross misdemeanor. After Houston entered his plea but before sentencing, Houston failed to appear for a hearing and a bench warrant was issued. At sentencing, the sentencing court determined the State was free to argue for any sentence because of the bench warrant. The State argued for, and the sentencing court imposed, a 2-to-8-year prison sentence. Before the court, and in his petition and supplement, Houston explained that he failed to appear for the hearing because he was in the hospital. In light of these facts and *Toston*, we conclude that Houston’s claim that counsel was ineffective for failing to file a direct appeal was not belied by the record and, if true, would entitle Houston to relief. *See Lozada v. State*, 110 Nev. 349, 357, 871 P.2d 944, 949 (1994), (providing that, when a petitioner has been deprived of the right to appeal due to counsel’s deficient performance, prejudice is presumed), *abrogated on other grounds by Ripppo v. State*, 134 Nev. 411, 423 P.3d 1084 (2018). Accordingly, we conclude Houston was entitled to an evidentiary hearing on this claim. *See Hargrove*, 100 Nev. at

502-03, 686 P.2d at 225. Therefore, we reverse the district court's decision as to this claim and remand this matter to the district court to conduct an evidentiary hearing on this claim.

Second, Houston claimed counsel was ineffective for failing to advise him of the deadline to file a direct appeal. When a defendant pleads guilty, counsel has a duty to inform or consult with the defendant concerning the right to a direct appeal "only when the defendant inquires about the right to appeal or in circumstances where the defendant may benefit from receiving advice about the right to a direct appeal, such as the existence of a direct appeal claim that has reasonable likelihood of success." *Toston*, 127 Nev. at 977, 267 P.3d at 799 (internal quotation marks omitted).

Here, Houston alleged he had to file his direct appeal pro se "after being hindered by numerous procedural errors and conflicts of interest as [a] result of being provided misinformation." Houston's pro se direct appeal was dismissed as untimely. *See Houston v. State*, No. 84281, 2022 WL 731981 (Nev. Mar. 10, 2022) (Order Dismissing Appeal). Although Houston did not allege what specific misinformation he received about his right to direct appeal, he alleged that misinformation resulted in his ultimately untimely pro se direct appeal. *See Toston*, 127 Nev. at 978, 267 P.3d at 800 ("[M]isinformation about the [defendant's] appeal rights may render the right to appeal and to counsel on appeal meaningless by deterring a client from requesting a direct appeal, inquiring into the procedures for a direct appeal, or filing an appeal."). Additionally, as discussed above, the sentencing court determined Houston failed to appear for a hearing, a determination Houston alleged should have been challenged because he was in the hospital, and he was ultimately sentenced to prison instead of being granted probation as was initially contemplated in the plea

agreement. Given these circumstances, we conclude that Houston alleged specific facts, not belied by the record, demonstrating that he “may [have] benefit[ed] from receiving advice about the right to a direct appeal.” *Id.* at 977, 267 P.3d at 799. Accordingly, we conclude Houston was entitled to an evidentiary hearing on this claim. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Therefore, we reverse the district court’s decision as to this claim and remand this matter to the district court to conduct an evidentiary hearing on this claim.

Third, Houston claimed counsel was ineffective at sentencing for implicitly conceding that Houston breached the plea agreement thus allowing the State to argue for a prison sentence. At the outset of the hearing, the sentencing court determined that the State was free to argue for any legal sentence as the court had previously issued a bench warrant based on Houston’s failure to appear at a prior hearing. Houston alleged counsel was ineffective for standing silent after the court’s determination and should have requested an evidentiary hearing on this issue. Houston argued that “he was likely in the hospital” at the time of the prior hearing and contended that “if counsel had contacted [him], they could have asked for a continuance until Houston was well again.”

At a hearing held after Houston was taken into custody on the bench warrant but prior to sentencing, Houston informed the court that he had missed the prior hearing because he was in the hospital. Nothing in the record indicates that the court did not credit Houston’s assertion as to his whereabouts during the hearing he missed. Because the sole basis Houston alleged in his petition for challenging the sentencing court’s determination that he breached the plea agreement had already been presented to the court, we conclude Houston’s failed to demonstrate that

counsel's inaction at the sentencing hearing was objectively unreasonable. Therefore, we conclude the district court did not err in denying this claim.

Fourth, Houston claimed counsel was ineffective for failing to pursue a guilty but mentally ill plea agreement with the State. Houston alleged counsel and the State knew of Houston's mental health issues and a plea of guilty but mentally ill "could have directly benefitted Houston during his time in custody." Houston's claim failed to allege how he qualified for a guilty but mentally ill plea. *See* NRS 174.035(5) (providing that a defendant has the burden of establishing his mental illness by a preponderance of the evidence). Further, Houston failed to allege that, but for counsel's failure to pursue a guilty but mentally ill plea agreement, Houston would have rejected the guilty plea agreement offered by the State and would have insisted on going to trial. In light of these circumstances, Houston failed to demonstrate deficient performance or prejudice. Therefore, we conclude the district court did not err in denying this claim.

Fifth, Houston claimed counsel was ineffective because counsel: (1) failed to advise Houston "concerning the plea, going to trial or preserving [Houston's] rights," parole eligibility, or "of an affirmative defense;" (2) represented Houston despite a conflict between Houston and counsel; (3) failed to investigate and communicate with Houston; (4) failed to file motions; and (5) was absent during "no contact order hearings." Houston's bare claims failed to allege specific facts demonstrating how counsel's alleged errors impacted Houston's decision to forgo trial and plead guilty. For these reasons, Houston failed to demonstrate a reasonable probability he 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 in denying these claims.

Sixth, Houston claimed counsel was ineffective because counsel promised Houston he would be released from the Clark County Detention Center after entering his plea so he could search for his service dogs. The district court found that Houston was released on his own recognizance as part of his plea agreement and, to the extent Houston argued counsel was ineffective for allowing Houston to be taken to the Las Vegas Detention Center, Houston's allegation was bare. These findings are supported by the record. Accordingly, Houston failed to demonstrate counsel was deficient or a reasonable probability of a different outcome but for counsel's alleged errors. Therefore, we conclude the district court did not err in denying this claim.

Seventh, Houston claimed counsel was ineffective for failing to request a continuance of the November 29, 2021, hearing. The district court found that counsel requested and was granted a continuance of the November 29, 2021, hearing. This finding is supported by the record. To the extent Houston alleged counsel should have pursued additional continuances but failed to do so, this allegation was bare. Accordingly, Houston failed to demonstrate counsel was deficient or a reasonable probability of a different outcome but for counsel's alleged errors. Therefore, we conclude the district court did not err in denying this claim.

Houston next alleged that his plea was not knowing and voluntary because he pleaded to a charge that was outside the scope of his actual conduct. The district court found that Houston's claim was belied by the record because he told the court during the plea canvass that he "absolutely" did the things the district court read to him from the charging document. This finding is supported by the record. Accordingly, Houston

failed to demonstrate his plea was not knowing and voluntary. Therefore, we conclude the district court did not err in denying this claim.

Houston also alleged (1) that “[t]he State interfered during critical stages of the proceedings, causing a separate malpractice proceeding”; (2) malicious prosecution; (3) a denial of Houston’s right to represent himself; and (4) an unlawful search and seizure. These claims did not challenge the validity of Houston’s guilty plea or allege that Houston 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 in denying these claims.

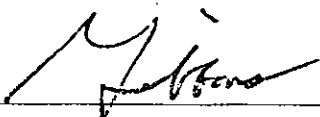
Finally, Houston’s petition appeared to allege that he was unable to receive the effective assistance of counsel or effectively represent himself due to his physical ailments and prison conditions. To the extent Houston’s claim challenged the conditions of his confinement, the claim was outside the scope of claims permissible in a postconviction petition for a writ of habeas corpus. *See Bowen v. Warden*, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984). To the extent Houston’s claim alleged errors by counsel, it was bare because Houston failed to allege how counsel’s performance fell below an objective standard of reasonableness or how any alleged errors by counsel impacted Houston’s decision to forgo trial and plead guilty. For these reasons, we conclude the district court did not err in denying these claims.

On appeal, Houston argues that he is entitled to relief because he is factually innocent. Houston did not raise this claim below, and we

decline to consider it on appeal in the first instance.² See *State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989). For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.³


_____, C.J.
Bulla


_____, J.
Gibbons


_____, J.
Westbrook

²We note that a petition to establish factual innocence pursuant to NRS 34.900-.990 must be made to "the district court in the county in which the person was convicted." NRS 34.960(1).

³While this matter was pending, Houston filed multiple documents and motions with this court. We have reviewed all of Houston's filings in this matter and conclude no relief based upon those submissions is warranted.

Insofar as Houston has raised other issues which are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.

cc: Hon. Jennifer L. Schwartz, District Judge
Matthew Travis Houston
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk