IN THE SUPREME COURT OF THE STATE OF NEVADA

THEODORE HILL,
Appellant,
vs.
NETHANJAH BREITENBACK, WARDEN; AND NORTHERN NEVADA TRANSITIONAL HOUSING,
Respondents.

No. 88463

FILED

JUN 17 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a postconviction petition for a writ of habeas corpus. Ninth Judicial District Court, Douglas County; Thomas W. Gregory, Judge. Appellant Theodore Hill argues the district court erred in dismissing the petition without conducting an evidentiary hearing.

Hill pleaded guilty to driving under the influence with a prior felony conviction and asserts that trial counsel was ineffective in their representation. To demonstrate ineffective assistance of counsel, a petitioner must show (1) counsel's performance fell below an objective standard of reasonableness (deficient performance) and (2) a reasonable probability of a different outcome but for counsel's deficient performance (prejudice). *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (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). Postconviction claims warrant an evidentiary hearing when the claims are supported by specific factual allegations that are not belied by the record and that would entitle the petitioner to relief if true. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). The petitioner bears the burden of proving the facts supporting the claims by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). We defer to the district court's factual findings, *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005); *Lara v. State*, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004), and review the application of law to those facts de novo, *Evans v. State*, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015).

Hill argues trial counsel should have challenged the use of a prior New York felony conviction for aggravated driving while intoxicated to enhance the Nevada DUI to a felony.[1] Because New York's penalties are harsher than those imposed by Nevada law for the same conduct, Hill asserts that the New York felony conviction does not punish the same or similar conduct as Nevada's DUI statute. Hill, however, has not demonstrated deficient performance or prejudice.

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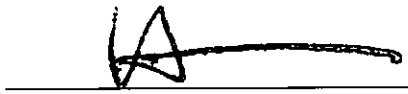
[1]To the extent Hill raises claims independently from the ineffective-assistance-of-counsel claim, we conclude such claims are waived because they were not raised on direct appeal. *See Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999).

Nevada law provides that a person who has previously been convicted of felony DUI in this state or "any other jurisdiction that prohibits the same or similar conduct," NRS 484C.410(1)(d), and subsequently commits another DUI, is guilty of a category B felony, NRS 484C.410(1), (2). The prohibited conduct does not have to be identical to fall within the meaning of "same or similar." *Marciniak v. State*, 112 Nev. 242, 243-44, 911 P.2d 1197, 1198 (1996). The conduct prohibited by New York's DWI statute, N.Y. Veh. & Traf. Law § 1192, is the same or similar to the conduct prohibited by Nevada's DUI statute, NRS 484C.110—driving while under the influence. And the conduct punished by New York's felony recidivism DWI statute, N.Y. Veh. & Traf. Law § 1193(1)(c), is the same or similar to the conduct punished by Nevada's felony recidivism DUI statute, NRS 484C.400—repeatedly driving while under the influence. *See Sindelar v. State,* 132 Nev. 683, 686, 382 P.3d 904, 906 (2016) (noting "the critical inquiry" regarding whether felony DUIs from other states can be used to enhance a Nevada DUI conviction to a felony is whether the statutes "punish the same conduct, i.e., repeat DUI offenses"). The fact that New York punishes DUI recidivism differently is of no consequence, as it "does not change the offending conduct." *Id.* at 687, 382 P.3d at 906. Thus, any challenge would have been futile. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("Trial counsel need not lodge futile objections to avoid ineffective assistance of counsel claims."). Because the trial-counsel claim thus lacks merit as a matter of law, we conclude that the district court did not err in dismissing the petition without conducting an evidentiary hearing.

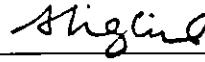
Having considered Hill's arguments and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Herndon

_____, J.
Bell



_____, J.
Stiglich

cc: Hon. Thomas W. Gregory, District Judge
Law Office of Maximilian A. Stovall / Minden
Attorney General/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk