

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL T. ECHEVARRIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67387

FILED

JUL 14 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

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

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

In his petition filed on September 28, 2010, appellant Michael Echevarria claimed he received ineffective assistance of counsel during plea negotiations and at his probation revocation hearing. To the extent Echevarria claimed that counsel was ineffective during plea negotiations, these claims were not timely raised. *See* NRS 34.726(1). These claims could have been raised in a timely post-conviction petition from Echevarria's original judgment of conviction² and the order revoking probation did not provide good cause for raising these claims in the instant

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude the record is sufficient for our review and briefing is unwarranted. *See Lockett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²Echevarria's original judgment of conviction was filed on April 28, 2006.

petition. *Sullivan v. State*, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004). Therefore, the district court did not err in denying these claims.

To the extent Echevarria argued he received ineffective assistance of counsel at the probation revocation hearing, his petition was timely filed.³ To prove ineffective assistance of counsel, a petitioner must demonstrate 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, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and 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 district 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, Echevarria claimed counsel was ineffective for failing to review and present to the district court evidence regarding why he absconded from probation. He also claimed counsel should have objected


³The Nevada Supreme Court has recognized that an ineffective-assistance-of-counsel claim will lie only where the defendant had a constitutional or statutory right to the appointment of counsel. See *McKague v. Warden*, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996). Here, the district court apparently determined Echevarria was entitled to the effective assistance of counsel because the district court addressed the merits of the claims. See *Gagnon v. Scarpelli*, 411 U.S. 778, 790-91 (1973).

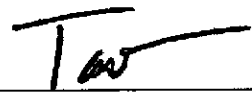
to statements made by a probation officer regarding charges in California and threats he made against his ex-girlfriend. Echevarria failed to demonstrate counsel was deficient or resulting prejudice. Counsel did tell the district court about Echevarria having to leave California because of his daughter's molestation. However, the district court did not find this to be a compelling reason to abscond from probation because Echevarria admitted he absconded less than a year into his probation and was missing for two years. Further, he did not have a good explanation as to why he left California, did not come back to Nevada, or did not report the molestation to his probation officer. Echevarria also admitted that he used controlled substances while he absconded. His admissions were more than enough to demonstrate his conduct was not as good as required by the conditions of probation. See *Lewis v. State*, 90 Nev. 436, 438, 529 P.2d 796, 797 (1974). Therefore, Echevarria failed to demonstrate a reasonable probability of a different outcome at the hearing had counsel further reviewed or presented the molestation information or objected to statements made by the probation officer. Accordingly, the district court did not err in denying this claim.

Second, Echevarria claimed counsel was ineffective for failing to file an appeal from the revocation proceedings on his behalf despite being requested to do so. We conclude the district court erred in denying the petition without conducting an evidentiary hearing on the appeal-deprivation claim. Counsel has a duty to file a notice of appeal when requested to do so and prejudice may be presumed. *Toston v. State*, 127 Nev. ___, ___, 267 P.3d 795, 799-801 (2011). Because Echevarria's claim, which was not belied by the record, would have entitled him to relief if true, *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984),

the district court should have held an evidentiary hearing on this claim. Accordingly, 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.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Douglas Smith, District Judge
Michael T. Echevarria
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk