

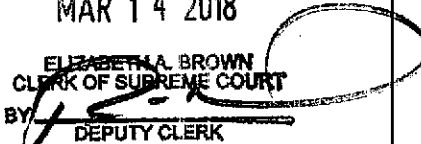
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ELVIN LEE FRED,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72521

FILED

MAR 14 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Elvin Lee Fred appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus and amending original judgment of conviction.¹ First Judicial District Court, Carson City; James Todd Russell, Judge.

Fred argues the district court erred in denying claims of ineffective assistance of counsel raised in his August 26, 2016, petition and supplement. 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, 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,

¹The district court amended the judgment of conviction to reflect 159 days of credit for time served and removed the \$20,000 fine. The parties do not challenge these amendments to the judgment of conviction.

18-900444


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).


First, Fred argued his counsel was ineffective for failing to object when the presentence investigation report (PSI) and the sentencing court characterized him as unemployed. Fred asserted he worked odd or side jobs and was therefore actually employed. Fred failed to demonstrate his counsel's performance was deficient or resulting prejudice. The district court found the PSI correctly noted Fred worked odd or side jobs, but did not have verifiable employment. The district court further found Fred's employment situation was discussed during the sentencing hearing, the sentencing court was aware Fred worked odd or side jobs when it imposed sentence, and knowledge of Fred's odd or side jobs did not affect the sentence imposed. Substantial evidence supports the district court's findings. Because the PSI and the information provided to the sentencing court accurately described Fred's employment status, Fred failed to demonstrate objectively reasonable counsel would have raised arguments regarding Fred's employment status. Fred also failed to demonstrate a reasonable probability of a different outcome at the sentencing hearing had counsel further discussed Fred's employment status. Therefore, we conclude the district court did not err by denying this claim.


Second, Fred argued his counsel was ineffective for failing to pursue a direct appeal. Fred failed to demonstrate he was improperly deprived of a direct appeal. "[T]rial counsel 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). At the evidentiary hearing, counsel testified Fred did not ask him to file a direct appeal. Fred testified he questioned counsel regarding the possibility of a direct appeal approximately four months after entry of the judgment of conviction and eventually understood he could challenge his conviction with a postconviction petition for a writ of habeas corpus. The district court concluded Fred did not request counsel to pursue a direct appeal and their discussions did not require counsel to pursue a direct appeal under the circumstances in this case. *See id.* at 980, 267 P.3d at 801 (including “whether the defendant indicated a desire to challenge his sentence within the period for filing an appeal” as a factor when considering the validity of an appeal-deprivation claim). The district court further concluded Fred did not otherwise express the type of dissatisfaction with his conviction that would have required counsel to file a notice of appeal. *See id.* at 979, 267 P.3d at 801. Our review of the record reveals the district court’s conclusions are supported by substantial evidence. Therefore, we conclude the district court did not err by denying this claim.

Having concluded Fred is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.

 , C.J.
Silver

 , J.
Tao

 , J.
Gibbons

cc: Hon. James Todd Russell, District Judge
State Public Defender/Carson City
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk