

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JASON E. STIDHAM,
Appellant,
vs.
RENEE BAKER, WARDEN; AND THE
STATE OF NEVADA,
Respondents.

No. 71167

FILED

JUN 15 2017

ESTHER A. BROWN
CLERK OF APPELLATE COURT
BY *Amulca*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Jason E. Stidham appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Lidia Stiglich, Judge.

Stidham argues the district court erred in denying claims of ineffective assistance of counsel raised in his August 19, 2014, 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*). To demonstrate prejudice regarding the decision to enter a guilty plea, a petitioner must demonstrate a reasonable probability, 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, 987-88, 923 P.2d 1102, 1107 (1996). 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 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, Stidham argued his counsel was ineffective for failing to file a notice of appeal, failing to inform him of his right to appeal, and for improperly stating to him that he was not permitted to appeal following a guilty plea. Stidham failed to demonstrate he was 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, Stidham's counsel testified he mailed a letter to Stidham and had a telephone conversation with Stidham where he explained Stidham's appellate rights. Counsel testified he would have pursued a direct appeal had Stidham asked him to do so. The district court concluded counsel was credible, Stidham's evidence attempting to demonstrate counsel had not explained a direct appeal was not credible, and Stidham's claim lacked merit. The district court further concluded Stidham 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 (explaining the defendant has the burden to indicate his desire to pursue a direct appeal). 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 in denying this claim.

Second, Stidham argued his counsel was ineffective for failing to investigate his mental health or seek a psychiatric evaluation. Stidham asserted he suffered from mental difficulties, used prescription medication, and attempted to commit suicide prior to entry of his guilty plea, and these issues may have caused him to be incompetent when he entered his guilty plea. Stidham failed to demonstrate his counsel's performance was deficient or resulting prejudice. Stidham did not provide evidence to support an assertion he was incompetent when he entered his plea because he failed to show he did not have the ability to consult with his attorney with a reasonable degree of rational understanding and that he did not have a rational and factual understanding of the proceedings against him when he entered his guilty plea. *See Melchor-Gloria v. State*, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983). Because Stidham failed to demonstrate he could have met the legal standard of incompetency, he did not demonstrate his counsel acted in an objectively unreasonable manner regarding this issue or a reasonable probability of a different outcome had counsel investigated his mental health or sought a psychiatric evaluation. Therefore, we conclude the district court did not err in denying this claim without considering it at the evidentiary hearing. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Third, Stidham argued his counsel was ineffective for failing to inform him the district court could impose consecutive sentences or a lengthier sentence than the parties stipulated to in the guilty plea agreement. Stidham failed to demonstrate his counsel's performance was deficient or resulting prejudice. In the written plea agreement and at the plea canvass, Stidham acknowledged he understood he could receive consecutive sentences and the district court was not bound by the parties'


sentencing stipulation when it pronounced sentence. Accordingly, this claim was belied by the record and the district court properly denied it without considering it at the evidentiary hearing. *See id.*


Fourth, Stidham argued his counsel was ineffective for failing to present mitigation evidence at the sentencing hearing concerning his mental state and his background. Stidham further asserted counsel should have presented character witnesses and explained to the sentencing court that Stidham had gone nine years without committing offenses. Stidham failed to demonstrate his counsel's performance was deficient or resulting prejudice.


At the sentencing hearing, counsel advised the sentencing court Stidham's problems stemmed from his substance abuse issues, but explained Stidham performed well when under supervision and he had not engaged in criminal activity for years prior to the events leading to these charges. Under these circumstances, Stidham failed to demonstrate his counsel's arguments at the sentencing hearing amounted to the actions of objectively unreasonable counsel. In addition, Stidham did not identify any character witnesses who would have provided favorable information, and a bare claim is insufficient to demonstrate he is entitled to relief. *See id.* Considering the sentencing arguments and the information before the sentencing court, including information demonstrating Stidham absconded from Nevada while he awaited sentencing in this matter and was charged with committing additional crimes during that time period, Stidham failed to demonstrate a reasonable probability of a different outcome had counsel performed different actions at the sentencing hearing. Therefore, we conclude the district court did not err in denying this claim without considering it at the evidentiary hearing. *See id.*

Fifth, Stidham argued his counsel was ineffective for failing to permit him to review the presentence investigation report (PSI) before the sentencing hearing. Stidham failed to demonstrate his counsel's performance was deficient or resulting prejudice. At the beginning of the sentencing hearing, counsel informed the district court the defense had just received the PSI, had not had time to review it, and requested additional time to review and discuss the PSI. The district court trailed the matter until later that day, and when the matter was recalled, counsel informed the district court the defense had been able to sufficiently review the PSI. Under these circumstances, Stidham failed to demonstrate counsel's actions were objectively unreasonable. Stidham also acknowledged the PSI did not contain any errors which worked to his detriment. As the PSI did not contain any prejudicial errors, Stidham failed to demonstrate a reasonable probability of a different outcome had counsel ensured Stidham had further time to review the PSI. Therefore, we conclude the district court did not err in denying this claim without considering it at the evidentiary hearing. *See id.*

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Chief Judge, Second Judicial District Court
Second Judicial District Court, Department Eight
Oldenburg Law Office
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk