

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GEORGE LOPEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78403-COA

FILED

APR 10 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

George Lopez appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; James M. Bixler, Senior Judge.

Lopez argues the district court erred by denying the claims of ineffective assistance of counsel raised in his October 9, 2018, petition. 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, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. To warrant an evidentiary hearing, petitioner must raise

claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Lopez argued his counsel was ineffective for failing to request a competency evaluation. Lopez asserted he should have been evaluated for competency due to issues stemming from his addiction to methamphetamine. Lopez made only a bare and unsupported claim that issues stemming from his methamphetamine addiction caused him to be incompetent. *See id.* Accordingly, Lopez failed to demonstrate that 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. *See Melchor-Gloria v. State*, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983) (citing *Dusky v. United States*, 362 U.S. 402, 402 (1960)). Thus, Lopez did not demonstrate that his counsel's performance fell below an objective standard of reasonableness or a reasonable probability that he would have been found incompetent had counsel requested a competency evaluation. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Lopez argued his counsel was ineffective for failing to explain to him the *Marcum*¹ notice. The record demonstrates Lopez received a *Marcum* notice and he did not explain how counsel's alleged failure to explain the notice to him impacted his decision to enter a guilty plea. Accordingly, Lopez failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable

¹*Sheriff v. Marcum*, 105 Nev. 824, 783 P.2d 1389 (1989).

probability that he would have refused to plead guilty and would have insisted on proceeding to trial had counsel explained the *Marcum* notice. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Lopez argued his counsel was ineffective for failing to argue that the sentencing court was biased against him. Lopez appeared to assert that the evidence demonstrating the sentencing court's bias was that he received a lengthier sentence than his female codefendant simply because he is a male. "[The] remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence." *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998). The sentencing court did not indicate it sentenced the codefendants based upon gender and Lopez did not demonstrate the sentencing court closed its mind to the presentation of all the evidence when imposing sentence or that the court sentenced him based upon any improper purpose.

Moreover, "sentencing is an individualized process; therefore, no rule of law requires a court to sentence codefendants to identical terms," *Nobles v. Warden*, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990), and Lopez failed to demonstrate it was improper that he received a lengthier sentence than his codefendant. Accordingly, Lopez failed to demonstrate his counsel's performance fell below an objectively reasonable standard or a reasonable probability of a different outcome had counsel asserted that the sentencing court was biased. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Lopez argued that his counsel was ineffective for failing to present witnesses and evidence concerning his methamphetamine addiction as mitigation evidence at sentencing. Lopez' issues with methamphetamine use were stated at the sentencing hearing. Lopez did not demonstrate his counsel acted in an unreasonable manner by not presenting additional information concerning Lopez' methamphetamine use. Lopez failed to demonstrate a reasonable probability of a different outcome had counsel presented additional information concerning Lopez' methamphetamine use. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Lopez argues that the district court erred by denying his claims of ineffective assistance of appellate counsel. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114. Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, Lopez argued his appellate counsel was ineffective for failing to argue on appeal that he should have undergone a competency evaluation due to his addiction to methamphetamine. As previously explained, Lopez failed to demonstrate that 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. See *Melchor-Gloria*, 99 Nev. at 179-80, 660 P.2d at 113. Thus, Lopez did not demonstrate that his counsel's performance fell below an objective standard of reasonableness or that this issue had a reasonable probability of success on appeal. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Lopez argued that his appellate counsel was ineffective for failing to assert on appeal that the State failed to provide him with a *Marcum* notice. As stated previously, the record demonstrated Lopez received a *Marcum* notice. In light of the record, Lopez failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or that the underlying issue had a reasonable probability of success on direct appeal. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Next, Lopez asserts the district court should have granted him leave to amend his petition. Lopez did not request leave to amend his petition, but he contends the district court should have directed him to amend his petition instead of entering an order denying relief. The district court has the discretion to allow a petitioner to file documents to supplement the initial petition, but the district court did not grant Lopez permission to file any additional documents, see NRS 34.750(5); *State v. Powell*, 122 Nev. 751, 758, 138 P.3d 453, 458 (2006), and Lopez does not demonstrate the district court abused its discretion in this regard.

Finally, Lopez contends the district court erred by denying his petition without appointing postconviction counsel. The appointment of counsel in this matter was discretionary. See NRS 34.750(1). A review of

the record reveals the issues in this matter were not difficult, Lopez was able to comprehend the proceedings, and discovery with the aid of counsel was not necessary. *See id.* Therefore, Lopez fails to demonstrate the district court abused its discretion by denying the petition without appointing postconviction counsel. *See Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 760-61 (2017). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Hon. James M. Bixler, Senior Judge
George Lopez
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk