IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LAKSMI NASHRINGA BRAITHWAITE, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 80418-COA
LAKSMI NASHRINGA BRAITHWAITE, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 80419-COA
LAKSMI NASHRINGA BRAITHWAITE, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 80420-COA
LAKSMI NASHRINGA BRAITHWAITE, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 80421-COA

FILED

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ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Laksmi Nashringa Braithwaite appeals from identical orders denying postconviction petitions for a writ of habeas corpus filed in district

court case numbers CR7005 (Docket No. 80418), PC7005 (Docket No. 80419) CR7050 (Docket No. 80420), and PC7050 (Docket No. 80421).[1] Docket Numbers 80418 and 80419 were consolidated on appeal. *See* NRAP 3(b). Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.

Braithwaite argues the district court erred by denying her claims of ineffective assistance of counsel without first conducting an evidentiary hearing. To demonstrate ineffective assistance of defense counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that, but for counsel's errors, there is a reasonable probability 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 v. Washington*, 466 U.S. 668, 687 (1984). We give deference to the 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). To warrant an evidentiary hearing, petitioner must raise claims supported by specific factual allegations that are not belied by the

[1]The petition filed in CR7005 was filed on June 6, 2013. Braithwaite did not provide this court with the petitions filed in PC7005, CR7050, and PC7050, but the district court found the petition in PC7005 was filed on June 6, 2013, and the petitions in CR7050 and PC7050 were filed on June 13, 2013.

record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Braithwaite claimed counsel was ineffective for failing to hire an investigator to investigate the facts in district court case number CR7005. Specifically, she claimed an investigator could have gone to the crime scene to determine whether the window and screen were actually damaged. If the window and screen were not damaged, then she would have had a defense to the charge of home invasion.

Braithwaite faced numerous other charges in addition to home invasion in CR7005, including burglary. Burglary was the same category of felony (category B) and had the same potential penalty as home invasion (one to ten years in prison). *Compare* 2013 Nev. Stat., ch. 488, § 1, at 2987 (former NRS 205.060(2)), *with* NRS 205.067. And whether the window was broken or not was not a defense to burglary. Moreover, Braithwaite was facing habitual criminal adjudication because of her 12 prior felony convictions. By pleading guilty, she avoided being adjudicated a habitual criminal. Therefore, Braithwaite failed to demonstrate a reasonable probability she would not have pleaded guilty and would have insisted on going to trial but for counsel's alleged deficiency. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Braithwaite claimed counsel was ineffective for failing to investigate because counsel did not interview any witnesses the State might have called or any exculpatory witnesses. Further, she claimed that an investigator could have investigated the other charges she was facing. A petitioner claiming counsel did not conduct an adequate investigation must

show how a better investigation would have made a more favorable outcome probable. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Braithwaite failed to allege what further investigation would have uncovered; therefore, she failed to demonstrate counsel was deficient or resulting prejudice. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Braithwaite claimed counsel was ineffective for failing to ensure she was competent at the time she entered her guilty pleas and for failing to inform her that she faced the consecutive sentences and could receive the maximum possible sentence. "The burden to make a proper appellate record rests on appellant." *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980); *see also* NRAP 30(b)(3). Braithwaite failed to provide this court with copies of the transcripts from her change of plea hearings. These records are necessary for this court's evaluation of Braithwaite's claims. Therefore, this court is unable to conclude the district court erred by denying these claims without first conducting an evidentiary hearing.

Fourth, Braithwaite claimed counsel was ineffective for failing to communicate with her after sentencing[2] and for failing to file a notice of appeal. Braithwaite claimed she tried numerous times to contact counsel by phone and letter to get him to appeal her convictions. She claimed counsel ignored her communications. "Trial 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."

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[2]Braithwaite was sentenced for both cases on the same day.

Toston v. State, 127 Nev. 971, 978, 267 P.3d 795, 800 (2011). "The burden is on the client to indicate to his attorney that he wishes to pursue an appeal." *Davis v. State*, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999). "[W]hen a petitioner has been deprived of the right to appeal due to counsel's deficient performance, the second component (prejudice) may be presumed." *Toston*, 127 Nev. at 976, 267 P.3d at 799. Here, Braithwaite claimed she attempted to contact counsel to file a direct appeal from her convictions. This claim was not belied by the record and, if true, would entitle her to relief. Therefore, we conclude the district court erred by denying this claim without first conducting an evidentiary hearing to determine whether Braithwaite attempted to contact counsel and whether counsel failed to respond to her requests.[3]

Finally, on appeal, Braithwaite argues counsel was ineffective for failing to provide her with discovery prior to her pleading guilty. The record before this court does not demonstrate this claim was raised below. As stated above, Braithwaite failed to provide this court with the petitions filed in PC7005, CR7050, and PC7050. Further, the district court's order

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[3]Braithwaite filed a pro se notice of appeal in CR7050 39 days after her judgment of conviction was filed. Her appeal was dismissed as untimely. *See Braithwaite v. State*, Docket No. 61459 (Order Dismissing Appeal, November 20, 2012).

The district court denied Braithwaite's appeal deprivation claim because Braithwaite did not raise this claim until she filed her response to the State's motion to dismiss. However, after her response was filed, counsel was appointed to represent her. Counsel properly raised this claim in the supplemental petition. *See* NRS 34.750(3). Therefore, the district court erred by denying this claim on this ground.

does not address this claim. Therefore, we decline to consider this claim on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999); *see also* NRAP 30(b)(3); *Greene*, 96 Nev. at 558, 612 P.2d at 688. Accordingly, we

ORDER the judgments of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court to hold an evidentiary hearing regarding Braithwaite's appeal deprivation claim.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Kimberly A. Wanker, District Judge
David H. Neely, III
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk