

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LUIS ORTEGA LOMELI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83020-COA

FILED

NOV 24 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *E. A. Brown*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Luis Ortega Lomeli appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Lomeli argues the district court erred by denying his claim of ineffective assistance of counsel raised in his July 13, 2018, petition. 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), 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 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).

Lomeli claimed that his trial-level counsel was ineffective for providing incorrect advice concerning the immigration consequences he would face from entry of a guilty plea. Lomeli contended counsel stated that he would not face any adverse effects to his immigration status if he were to plead guilty, because he was a legal resident.

The district court conducted an evidentiary hearing concerning this claim, and Lomeli's trial-level counsel testified at that hearing. Counsel stated she would not have advised Lomeli that his immigration status would be unaffected by a guilty plea. Rather, counsel testified she explained the notification contained within the written plea agreement that informed Lomeli he could potentially face adverse consequences to his immigration status due to entry of a guilty plea. Counsel further testified that if Lomeli had informed her that he was not a citizen of the United States, she would have advised him to discuss with an immigration attorney whether his guilty plea could cause him to suffer adverse consequences to his immigration status. Counsel stated that her case file would have contained a notation if Lomeli raised questions concerning his immigration status but the file did not contain such a notation. Lomeli also testified at the evidentiary hearing, but the district court concluded his testimony was not reliable. Substantial evidence supports the district court's findings, and this court will not "evaluate the credibility of witnesses because that is the responsibility of the trier of fact." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

Accordingly, Lomeli failed to demonstrate his counsel's performance fell below an objective standard of reasonableness. Lomeli also

failed to demonstrate a reasonable probability he would not have pleaded guilty and would have insisted on proceeding to trial had counsel discussed the potential immigration consequences he faced in a different manner. Therefore, we conclude the district court did not err by denying this claim.

Next, Lomeli argues on appeal that his trial-level counsel was ineffective for failing to inquire into his immigration status. Lomeli attempted to raise this claim before the district court in a brief submitted after the evidentiary hearing, but the district court did not permit him to do so. Because this claim was not properly raised in Lomeli's petition and considered by the district court, *see Barnhart v. State*, 122 Nev. 301, 303-04, 130 P.3d 650, 651-52 (2006) (stating that a district court is not obligated to permit a petitioner to raise issues that were not first raised in a petition or supplement and when the State has not had a proper opportunity to respond), we decline to consider this claim in the first instance on appeal. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Lynne K. Simons, District Judge
Alex B. Ghibaud, PC
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk