IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THOMAS LEHMAN CORNWELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82417-COA

FILED

DEC 16 2021

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

ORDER OF AFFIRMANCE

Thomas Lehman Cornwell appeals from an order of the district court granting in part and denying in part a postconviction petition for a writ of habeas corpus filed on November 20, 2019. First Judicial District Court, Carson City; James E. Wilson, Judge.

First, Cornwell claims the district court erred by denying his claim that his plea was not knowing and voluntary because he was coerced into pleading guilty. Specifically, he claimed he was coerced because he felt pressure to plead guilty in order to get out of jail so he could fight a civil forfeiture case against him. This claim was raised in Cornwell's presentence motion to withdraw guilty plea, and he could have raised the denial of this claim in a direct appeal.[1] By failing to do so, he waived his right to raise this claim. *See Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), *overruled on other grounds by Thomas v. State*, 115 Nev.

[1]As part of his postconviction petition, Cornwell claimed counsel was ineffective for failing to file an appeal after being asked to do so. The district court granted the appeal-deprivation claim, but Cornwell did not raise the denial of his presentence motion to withdraw in an appeal filed pursuant to NRAP 4(c). Instead, Cornwell and the State stipulated to resentence Cornwell to 18 months' probation with credit for time served.

148, 979 P.2d 222 (1999). Therefore, we conclude the district court did not err by denying this claim.

Next, Cornwell claims the district court erred by denying his claim that counsel was ineffective for failing to file a motion to suppress evidence found as a result of the search of his room. Cornwell claimed that, had counsel filed the motion, he would not have pleaded guilty and would have insisted on going to trial.

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).

At the evidentiary hearing on the instant petition, counsel testified that he discussed the possibility of filing a motion to suppress the evidence. Counsel told Cornwell that he would pursue the motion, but Cornwell decided he wanted to plead guilty instead. Therefore, Cornwell failed to demonstrate counsel was deficient for failing to file the motion to

suppress. Further, Cornwell failed to present any evidence at the evidentiary hearing to support his claim that a motion to suppress would have had a reasonable likelihood of success had counsel filed the motion. Therefore, Cornwell failed to demonstrate he was prejudiced by counsel's failure to file a motion to suppress. To the extent Cornwell's argument on appeal raises new argument and/or facts, we decline to consider it in the first instance. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999). Accordingly, we conclude the district court did not err by denying this claim, and we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

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