IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DANIEL CHARLES COOKE,
Appellant,
vs.
CHARLES DANIELS, DIRECTOR,
NEVADA DEPARTMENT OF
CORRECTIONS,
Respondent.

No. 83578-COA

FILED

AUG 05 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Daniel Charles Cooke appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; Mason E. Simons, Judge.

Cooke argues the district court erred by denying his April 9, 2018, petition 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, a 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, Cooke contended he asked his counsel to pursue a direct appeal but his counsel did not comply with that request. "[C]ounsel 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). Moreover, "prejudice is presumed" when counsel "fails to file a direct appeal after a defendant has requested or expressed a desire for a direct appeal." *Hathaway v. State*, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003). Cooke's allegations that he requested his counsel to pursue a direct appeal and that counsel subsequently did not pursue a direct appeal, if true, would entitle Cooke to relief. In addition, Cooke's claim was not belied by the record. Therefore, an evidentiary hearing was necessary to ascertain whether Cooke requested counsel to file a direct appeal. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Accordingly, we reverse the district court's denial of this claim and remand for an evidentiary hearing concerning this issue.

Second, Cooke claimed that his counsel was ineffective for failing to adequately investigate voluntary intoxication as a defense to the charge of attempted sexual assault of a child under the age of 14 years. Cooke was originally charged with sexual assault of a child under the age of 14 years, lewdness with a child under the age of 14 years, and abuse or neglect of a child. The single charge of attempted sexual assault of a child under the age of 14 years was the result of a plea bargain down from greater

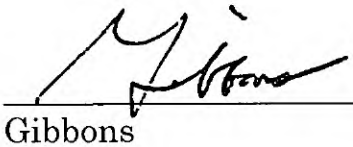
and more numerous offenses. Cooke failed to demonstrate that counsel was objectively unreasonable for not investigating a defense to the bargained-for charge.

Moreover, Cooke faced a sentence of life in prison with the possibility of parole after 35 years had he been convicted of sexual assault of a child under the age of 14 years, *see* NRS 200.366(3)(c), and a sentence of life in prison with the possibility of parole after 10 years had he been convicted of lewdness with a child under the age of 14 years, *see* NRS 201.230(2). The State agreed not to pursue these charges, as well as the charge of abuse or neglect of a child, in exchange for Cooke's guilty plea to attempted sexual assault of a child under the age of 16 years, which carries a maximum sentence of 8 to 20 years in prison. *See* NRS 193.130(1); NRS 193.153(1)(a)(1); NRS 200.366(3). Accordingly, Cooke received a substantial benefit by entry of his guilty plea. In light of the circumstances in this case, Cooke did not demonstrate a reasonable probability he would not have pleaded guilty and would have insisted on going to trial had counsel investigated a defense to his bargained-for charge. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

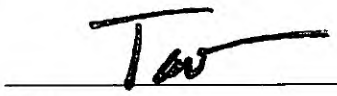
Third, Cooke claimed that his counsel was ineffective for failing to advise him of the minimum sentence he faced for attempted sexual assault of a child under the age of 16 years. The district court explained to Cooke the possible sentencing range he faced and specifically informed Cooke that he faced a minimum term of up to eight years in prison. Cooke acknowledged that he understood the sentencing range he faced, including the minimum term. Cooke also acknowledged that he discussed the potential penalties with his counsel and understood them. In light of the

circumstances in this case, Cooke did not demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability he would not have pleaded guilty and would have insisted on going to trial but for counsel's errors. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. Mason E. Simons, District Judge
Ben Gaumond Law Firm, PLLC
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk