

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RANDY LEE BARAO, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83633-COA

FILED

AUG 08 2022

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

ORDER OF AFFIRMANCE

Randy Lee Barao, Jr., appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus. First Judicial District Court, Carson City; James E. Wilson, Judge.

Barao argues that the district court erred by dismissing his August 27, 2020, petition. In his petition, Barao contended his trial-level counsel was ineffective. To demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *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 no contest plea, a petitioner must show a reasonable probability that, but for counsel's errors, petitioner would not have pleaded no contest and would have insisted on going to trial. *See 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—deficiency and prejudice—must be shown. *Strickland*, 466 U.S. at 687. We give deference to the district 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).

Barao appeared to claim that his trial-level counsel was ineffective for failing to show that the victim and her boyfriend committed perjury at the preliminary hearing. Barao asserted that the victim and her boyfriend fabricated the allegations against him and the State should not have permitted them to testify. At the preliminary hearing, the victim and her boyfriend testified concerning their version of events. Barao's trial-level counsel cross-examined them both concerning their direct testimony. In light of counsel's actions, Barao did not demonstrate that counsel's performance fell below an objective standard of reasonableness. Barao also failed to demonstrate that he would not have pleaded no contest and would have insisted on proceeding to trial had counsel posed different questions at the preliminary hearing or argued that the victim and her boyfriend committed perjury. Therefore, we conclude that the district court did not err by dismissing this claim.

Next, Barao argued that the State lacked evidence to convict him. Barao's claim was outside the scope of claims permissible in a postconviction petition for a writ of habeas corpus arising from a guilty plea. *See* NRS 34.810(1)(a); *Gonzales v. State*, 137 Nev., Adv. Op. 40, 492 P.3d 556, 562 (2021). Therefore, Barao was not entitled to relief based on this claim.

Next, Barao appears to argue on appeal that his conviction violated his right against double jeopardy. However, Barao did not raise this claim in his petition, and we decline to consider it on appeal in the first

instance. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

Finally, Barao argues that the district court judge should have been disqualified from this matter because that judge presided over Barao's family court proceedings. However, the "rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification." *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988). Because the trial-level judge's assignment to Barao's family court matters was insufficient to establish grounds for disqualification, Barao is not entitled to relief based on this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. James E. Wilson, District Judge
Randy Lee Barao, Jr.
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk