

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MALIK AVILA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84214-COA

FILED

OCT 07 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Malik Avila appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on October 26, 2020, and an amended petition filed on January 8, 2021. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

Avila argues the district court erred by denying his claims of ineffective assistance of trial-level counsel. 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*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 687, 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 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).

First, Avila claimed that his counsel was ineffective at sentencing for failing to present a psychological risk assessment. During the evidentiary hearing on Avila's petition, counsel testified that he did not pursue a risk assessment because Avila had told him early on in the case that he was the one who shot the victim and that he had engaged in other uncharged criminal conduct. Based on this information, counsel explained that if Avila was truthful with the evaluator, they would not use the assessment and, conversely, if Avila was not truthful, counsel could not ethically put the assessment before the court. A risk assessment was completed in support of Avila's petition wherein the evaluator determined Avila was a low to moderate risk to reoffend. The evaluator testified during the evidentiary hearing that she did not know of Avila's admissions to counsel, her evaluation was limited to the information she was provided, and a follow-up evaluation may be appropriate.

In light of the evidence presented at the evidentiary hearing, Avila failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different result at sentencing had counsel pursued a psychological risk assessment. Therefore, we conclude the district court did not err by denying this claim.

Second, Avila claimed that his counsel was ineffective for failing to file a direct appeal. Because Avila pleaded guilty pursuant to *North*

Carolina v. Alford, 400 U.S. 25 (1970), his counsel had 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). The district court found that counsel went over with Avila his right to appeal but that Avila never requested counsel to file an appeal. These findings are supported by substantial evidence in the record. Counsel testified that Avila was disappointed with his sentence and raised questions about a direct appeal and that counsel advised Avila about his appellate rights. Counsel memorialized the conversation in a letter to Avila, noting that Avila indicated he was “unlikely to appeal” and telling Avila not to hesitate to contact counsel if he had further questions. Counsel also testified that Avila did not contact him again about an appeal. Avila thus failed to demonstrate by a preponderance of the evidence that counsel improperly failed to file an appeal. Therefore, we conclude the district court did not err by denying this claim.

Finally, Avila contends that counsel violated Avila’s rights in the course of postconviction proceedings by disclosing confidential attorney-client communications and by failing to provide Avila with counsel’s notes. Avila does not allege any district court error in relation to these claims or state the relief he seeks for these claims.¹ These claims are thus not

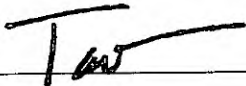
¹The only relief Avila seeks on appeal is a new sentencing hearing before a different sentencing judge.

cogently argued, and we decline to consider them on appeal. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. John Schlegelmilch, District Judge
Karla K. Butko
Attorney General/Carson City
Lyon County District Attorney
Third District Court Clerk