IN THE SUPREME COURT OF THE STATE OF NEVADA

CIRO CAMACHO, III,
Appellant,
vs.
WARDEN TIM GARRETT,
Respondent.

No. 84106

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Ninth Judicial District Court, Douglas County; Nathan Tod Young, Judge.

Appellant argues the district court erred in denying his claims of ineffective assistance of counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *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 guilty plea, a petitioner must demonstrate a reasonable probability that, but for counsel's errors, 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, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, 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).

Appellant argues trial counsel should have moved to suppress evidence and that the failure to do so affected his decision to enter a guilty plea. Appellant argues that searches of his cellphone pursuant to several search warrants were invalid because the police only had the passcode to unlock his phone for the limited purpose of checking his Instagram account. And he claims he did not consent to a search of the images on the phone, images which led the police to seek additional search warrants. We conclude appellant has not demonstrated deficient performance or prejudice. Trial counsel testified that she researched issues surrounding the search and discussed her research with appellant, but she did not think there was a valid basis to suppress the evidence and worried that trying to do so could hurt his bargaining position. The district court found this testimony credible.[1] Appellant has not identified any controlling authority that would have provided the basis for a successful motion to suppress the evidence that a reasonably objective attorney should have found. *See Strickland*, 466 U.S. at 690 (requiring a convicted defendant to "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment" and recognizing that the court then determines "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent

[1]The district court further found appellant's testimony not to be credible, including testimony that he was intimidated into giving the passcode during an allegedly unrecorded portion of the interrogation.

assistance"); *Kirksey v. State*, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996) (explaining that to show prejudice due to counsel's failure to file a motion to suppress evidence, the suppression claim must be meritorious and there must be a reasonable probability that the exclusion of the evidence would have changed the result of a trial); *see also Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (recognizing "[i]t is appellant's responsibility to present relevant authority and cogent argument"). Further, while there is an undeniable expectation of privacy in the contents of a cellphone, there is no clear merit to appellant's argument that the police could not use the passcode he voluntarily provided to them for data extraction pursuant to the multiple search warrants that followed. *See, e.g., People v. Davis*, 438 P.3d 266, 270-72 (Colo. 2019) (concluding there was no Fourth Amendment violation when the police used a passcode for a cellphone voluntarily provided by the defendant for the limited purpose of calling his girlfriend to execute a later search warrant for the contents of that phone). Thus, appellant has not demonstrated that a motion to suppress would have been meritorious in this case such that counsel was objectively unreasonable in not filing a motion.[2] *Strickland*, 466 U.S. at 687 (recognizing that deficient

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[2]Further problematic to this appeal, appellant did not provide this court a copy of his interview with the police where he provided his passcode, verbal consent to search his Instagram account, and written consent to search the "camera." This missing portion of the record is essential for a review of the factual underpinnings of his ineffective-assistance claim, namely that the police exceeded the consent given during the July interview or that he was intimidated into giving consent. NRAP 30(b)(3) requires an appellant to include in his appendix any portion of the record that is necessary for this court's determination of the issues raised on appeal, and NRAP 30(d) permits a party to request an order directing the district court clerk to transmit an exhibit that is incapable of being reproduced in the appendix. Without a complete record, appellant has not carried his burden

performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"). Under these facts, appellant also did not demonstrate a reasonable probability that he would not have entered a guilty plea and would have insisted on going to trial absent trial counsel's failure to file a motion to suppress the evidence. Additionally, although appellant received a significant sentence, appellant received a benefit by pleading guilty in that he avoided multiple additional child sexual assault charges in this case, another criminal case involving sexual abuse of children was not pursued, and there was an agreement not to refer child pornography charges for federal prosecution. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant argues that trial counsel should have challenged the validity of the indictment on the grounds that he did not receive notice of the grand jury proceedings, the grand jury was not sworn-in at the beginning of the recorded proceedings, and the indictment was based on illegally obtained evidence. Appellant has not demonstrated deficient performance or that he was prejudiced. The record indicates that notice of the grand jury proceedings was served on appellant. Although the transcript did not contain the oath, appellant has not demonstrated that the grand jurors did not take their oath pursuant to NRS 172.085. And

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of showing error on appeal. *See Riggins v. State*, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991) ("[T]he missing portions of the record are presumed to support the district court's decision, notwithstanding an appellant's bare allegations to the contrary."), *rev'd on other grounds*, 504 U.S. 127 (1992); *see also Cuzze v. Univ. and Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) ("When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision.").

finally, appellant has not demonstrated that illegally obtained evidence was presented to the grand jury. Accordingly, a challenge to the indictment on these grounds would have been futile. Trial counsel is not deficient for failing to file a futile motion, *see Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006), and appellant has not demonstrated that there was a reasonable probability that he would not have pleaded guilty but for trial counsel's failure to assert futile challenges to the indictment. Therefore, the district court did not err in denying this claim.

Next, appellant argues that his guilty plea was not entered knowingly and voluntarily because he was not allowed to review the State's evidence and trial counsel did not obtain all of the discovery, namely the search warrant returns and video of police accessing his phone. He also claims that trial counsel should have had his interview with the police transcribed. Appellant has not demonstrated trial counsel's performance was deficient or that he was prejudiced. Trial counsel testified that she looked at the discovery and reviewed it with appellant, but that he refused to review some of the evidence. The district court found trial counsel's testimony to be credible and determined appellant's testimony to the contrary was not credible. And appellant did not support his argument that trial counsel did not review all of the discovery available.[3] Appellant did not explain how the failure to transcribe his interview with the police influenced his decision to enter a guilty plea. Appellant further did not show that there was a reasonable probability that he would have insisted on going to trial but for trial counsel's handling of discovery. Appellant

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[3]The returns for the search warrants were filed in the criminal proceedings. He further has not shown there is any video of police accessing the phone.

likewise did not carry his burden of demonstrating that his guilty plea was not entered knowingly and voluntarily. *See Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). Therefore, the district court did not err in denying this claim.

Next, appellant argues the district court erred in rejecting his due process claims. These claims were outside the scope of a postconviction petition for a writ of habeas corpus challenging a conviction arising from a guilty plea. *See* NRS 34.810(1)(a). Contrary to appellant's arguments, there is no good cause exception to raise a claim outside the scope of NRS 34.810(1)(a). *See Gonzales v. State*, 137 Nev. 398, 402, 492 P.3d 556, 561 (2021) (recognizing that NRS 34.810(1)(a) limits a habeas petition to claims "involving the voluntariness of the plea itself and the effectiveness of counsel" (quoting *Kirksey*, 112 Nev. at 999, 923 P.2d at 1114)). This is so because constitutional errors that arise before entry of a guilty plea are ordinarily waived by entry of the guilty plea, *see Webb v. State*, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975), and appellant did not enter a conditional plea or expressly preserve any errors that occurred before entry of his guilty plea, *see* NRS 174.035(3).[4] Therefore, the district court did not err in denying these claims.

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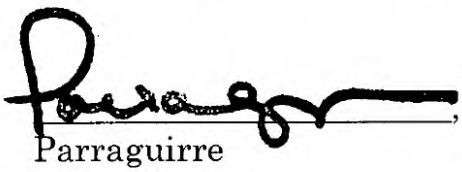
[4]To the extent that appellant argues for the first time on appeal that his appellate counsel was ineffective in not raising the due process claims on appeal, such arguments are improper. *See State v. Wade*, 105 Nev. 206, 209, n.3, 772 P.2d 1291, 1293 n.3 (1989) ("This court will not consider issues raised for the first time on appeal."). And even if appellant had properly raised this argument, appellant's arguments are deficient in that he did not address waiver and plain-error review that these claims would have been subject to in order to show appellate counsel was ineffective. *See Gonzales*, 137 Nev. at 402-03, 492 P.3d at 561-62 (discussing claims waived by entry of guilty plea); *Jeremias v. State*, 134 Nev. 46, 49-53, 412 P.3d 43, 47-50

Finally, appellant argues cumulative error. Assuming that multiple instances of deficient performance can be considered cumulatively for purposes of *Strickland*'s prejudice prong, *see McConnell v. State*, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009), there is nothing to cumulate in this case. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[5]



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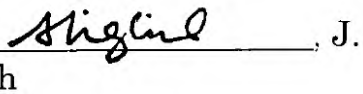

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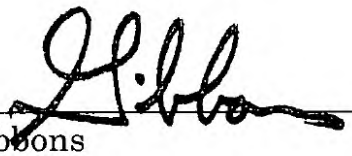

_____, Sr.J.
Gibbons

cc: Hon. Nathan Tod Young, District Judge
Resch Law, PLLC d/b/a Conviction Solutions
Attorney General/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk

(2018) (discussing plain-error review); *Maresca*, 103 Nev. at 673, 748 P.2d at 6 (recognizing appellant's burden to provide cogent argument).

[5]The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.