

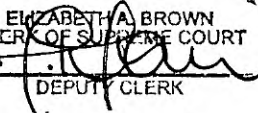
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSEPH JAVIER SOMBRIO,
Appellant,
vs.
CALVIN JOHNSON, WARDEN,
Respondent.

No. 86147-COA

FILED

AUG 07 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Joseph Javier Sombrio appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on September 14, 2022. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

First, Sombrio argues the district court erred by denying his claim of ineffective assistance of counsel. To demonstrate ineffective assistance of 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 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).

Sombrio claimed his trial-level counsel was ineffective for failing to advise him of the right to a direct appeal. Counsel has a duty to inform or consult with a defendant concerning the right to a direct appeal “in the guilty-plea context only when the defendant inquires about the right to appeal or in circumstances where the defendant may benefit from receiving advice about the right to a direct appeal.” *Toston v. State*, 127 Nev. 971, 977, 267 P.3d 795, 799 (2011). Sombrio did not claim he inquired about a direct appeal or that there were any circumstances in which he would have benefited from receiving advice regarding a direct appeal. Therefore, we conclude the district court did not err in denying this claim.

Second, Sombrio argues the district court erred by conducting a hearing in the habeas proceeding without him being present or without appointing counsel to represent him at the hearing. The record indicates the hearing at issue was not an evidentiary hearing, no testimony was presented, and the district court merely stated its findings on the record. Sombrio failed to demonstrate that he was prejudiced by his absence at the relevant hearings. *Cf. Gebers v. State*, 118 Nev. 500, 504, 50 P.3d 1092, 1094-95 (2002) (concluding a petitioner’s statutory rights were violated when she was not present at a hearing where testimony and evidence were presented). In addition, Sombrio did not seek the appointment of postconviction counsel before the district court. Therefore, we conclude Sombrio fails to demonstrate the district court erred.

Third, Sombrio argues the district court erred by ruling on his petition without first affording him the opportunity to reply to the State’s response in writing. Sombrio claims he did not receive the State’s response. Because the State did not move to dismiss his petition, Sombrio was not permitted to file any additional pleadings without further order from the

district court. *See* NRS 34.750(5). Therefore, we conclude Sombrio fails to demonstrate the district court erred.

Fourth, Sombrio argues the district court erred by not serving him with the amended district court order requiring a response from the State and by not informing him that a hearing had been ordered. A proof of service contained in the record indicates that Sombrio was served with the district court's order requiring a response from the State and setting a hearing. And documents filed by Sombrio subsequent to the entry of the district court's order demonstrate that he was aware the State was ordered to respond and that a hearing had been set. Therefore, we conclude Sombrio fails to demonstrate the district court erred.


Finally, Sombrio appears to argue there are errors in his presentence investigation report. Sombrio did not raise this claim below. Therefore, we decline to consider it for the first time on appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Eric Johnson, District Judge
Joseph Javier Sombrio
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk