IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DANIEL CHARLES COOKE,
Appellant,
vs.
TIM GARRETT, WARDEN; AND JAMES DZURENDA, DIRECTOR OF NEVADA DEPARMENT OF CORRECTIONS,
Respondents.

No. 86152-COA

FILED

JAN 31 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Daniel Charles Cooke appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 9, 2018. Fourth Judicial District Court, Elko County; Mason E. Simons, Judge.

Cooke argues the district court erred by denying his claim of ineffective assistance of 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*). 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

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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).

Cooke contended that counsel was ineffective for failing to file a direct appeal. "[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). "The burden is on the client to indicate to his attorney that he wishes to pursue an appeal." *Davis v. State*, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999). "[P]rejudice 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). The district court conducted an evidentiary hearing wherein Cooke and counsel testified.

Cooke claimed he made both oral and written requests to counsel to file a direct appeal. Cooke testified that he made statements at both the entry of his guilty plea and at his sentencing hearing indicating that he wanted to appeal and that he followed this up with a letter asking counsel to appeal. Counsel testified that he did not recall Cooke mentioning anything about wanting to appeal his sentence, he usually did not have discussions with clients in court after sentencing, and he did not recall receiving any letter. In addition, the State presented evidence that the office counsel worked in at the time did not have a copy of the letter in its file. Based on this evidence, the district court concluded that counsel never received any actual notice that Cooke wanted a direct appeal. This finding is supported by substantial evidence in the record. Accordingly, we conclude Cooke failed to demonstrate by a preponderance of the evidence that he requested that counsel pursue a direct appeal.

Cooke also claimed that counsel should have filed a direct appeal based on Cooke's expressed dissatisfaction with his sentence. Cooke testified that he was unhappy with the first plea offer, which would have required him to stipulate to no less than eight years in prison. Cooke agreed to the second offer that allowed him to argue for a lower minimum term. Counsel testified that Cooke was displeased with the possibility of an 8-to-20-year sentence during the plea negotiation process but proceeded with his plea anyway. Counsel explained that Cooke "didn't want it, but he didn't change his mind about going forward with the plea agreement either."

The district court found that Cooke did not express explicit dissatisfaction with the sentencing outcome. The district court also found that counsel was unlikely to find it necessary to consult with Cooke regarding a possible appeal because Cooke pleaded guilty, the sentence he received was within the bounds of the plea agreement, and the plea agreement waived Cooke's ability to appeal except for limited circumstances. These findings are supported by substantial evidence in the record. In light of these circumstances, we conclude that Cooke failed to demonstrate by a preponderance of the evidence that counsel had a duty to file a direct appeal based on Cooke's alleged dissatisfaction with his sentence. *See Toston*, 127 Nev. at 980, 267 P.3d at 801 (concluding the totality of the circumstances demonstrated the defendant's desire to appeal where the defendant made outbursts at his sentencing hearing, he did not receive the sentence he bargained for, and the sentencing judge observed that the defendant was upset and instructed counsel to decide the next steps).

For the foregoing reasons, we conclude Cooke failed to demonstrate the facts underlying his claim by a preponderance of the

evidence. Cooke thus failed to demonstrate counsel was deficient for failing to file a direct appeal. Therefore, we conclude the district court did not err by denying Cooke's appeal-deprivation claim, and we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

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