

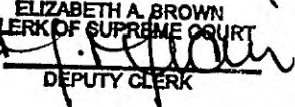
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JONATHON DEAN DEVENCENZI,  
Appellant,  
vs.  
RENEE BAKER, WARDEN,  
Respondent.

No. 86403-COA

**FILED**

**FEB 15 2024**

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Jonathon Dean Devencenzi appeals from orders of the district court dismissing in part and denying in part a postconviction petition for a writ of habeas corpus filed on December 2, 2019.<sup>1</sup> Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Devencenzi 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*). Generally, both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, but in some instances, such as

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<sup>1</sup>The district court determined that Devencenzi's petition was not procedurally barred despite being filed more than one year after entry of the judgment of conviction on November 28, 2018. The district court concluded there was good cause to excuse the procedural time bar. The State does not challenge this determination on appeal.

when the petitioner has been deprived of the right to appeal due to counsel's deficient performance, the second component (prejudice) may be presumed, *Lozada v. State*, 110 Nev. 349, 357, 871 P.2d 944, 949 (1994), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 426 n.18, 423 P.3d 1084, 1100 n.18 (2018). 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).

Devencenzi claimed counsel was ineffective for failing to file a direct appeal. In his petition, Devencenzi alleged that he "made it abundantly [sic] his desire to appeal his conviction" but counsel "failed to honor these wishes." "[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).

Devencenzi first alleged that counsel had a duty to file a direct appeal because Devencenzi requested one. The district court conducted an evidentiary hearing regarding Devencenzi's appeal deprivation claim. Devencenzi testified that he told counsel he wanted to appeal in court at the counsel table after his sentence was pronounced. Counsel testified that he never had a client instruct him to file an appeal while they were standing at the counsel table and explained that if Devencenzi said something about filing an appeal, he would have noted it and informed his office's appellate

division. The district court found counsel's testimony credible and implicitly found Devencenzi's testimony not credible. This court will not "evaluate the credibility of witnesses because that is the responsibility of the trier of fact." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). Therefore, we conclude that Devencenzi failed to demonstrate by a preponderance of the evidence that he requested that counsel pursue a direct appeal.

Devencenzi also alleged that counsel should have filed a direct appeal based on Devencenzi's expressed dissatisfaction with his sentence. "[C]ounsel has a duty to file a direct appeal when the client's desire to challenge the conviction or sentence can be reasonably inferred from the totality of the circumstances, focusing on the information that counsel knew or should have known at the time." *Toston*, 127 Nev. at 979, 267 P.3d at 801. When the defendant has pleaded guilty, relevant circumstances may include whether the defendant (1) received the sentence he bargained for; (2) reserved certain issues for appeal; (3) indicated a desire to challenge his sentence within the period for filing an appeal; and (4) sought relief from the plea before sentencing. *Id.* at 979-80, 267 P.3d at 801.

During the evidentiary hearing, Devencenzi testified that after sentencing, he was hysterical and crying. Counsel testified that he recalled that Devencenzi was emotional during sentencing and began to cry during his allocution but understood him to be upset about the circumstances, not about the sentence imposed. Counsel explained that he thought Devencenzi was pleased with the sentence. The district court found counsel's testimony to be credible.

The district court also found that Devencenzi did not express dissatisfaction with his plea and sentence despite the fact that he "may have

been disappointed with the reality of [them].” Finally, the district court found there was no basis for counsel to reasonably infer from the totality of the circumstances that he needed to file an appeal because Devencenzi (1) knew the sentence was mandatory and received the benefit of his plea agreement; (2) did not reserve issues for appeal; (3) did not exhibit courtroom demeanor that signaled a misunderstanding or grievance with his plea deal or express concerns about his sentence through motion or other forms of electronic communication; and (4) did not attempt to withdraw his plea presentence.

The district court’s findings are supported by substantial evidence in the record. In light of these circumstances, we conclude that Devencenzi failed to demonstrate by a preponderance of the evidence that counsel had a duty to file a direct appeal based on Devencenzi’s alleged dissatisfaction with his sentence. For the foregoing reasons, we conclude Devencenzi failed to demonstrate the facts underlying his claim by a preponderance of the evidence, and the district court did not err by denying this claim.<sup>2</sup>

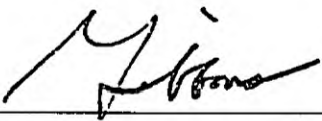
Devencenzi also argues the district court erred by dismissing his remaining claims of ineffective assistance of counsel without conducting an evidentiary hearing. Devencenzi fails to argue on appeal the specific

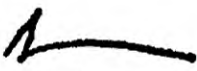
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<sup>2</sup>Devencenzi appears to challenge the constitutionality of his sentencing statute, NRS 200.366. To the extent he directly challenges the statute’s constitutionality, this claim was not raised below in the first instance, and we decline to consider it on appeal. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999). To the extent he argues, as he did below, that he could have demonstrated the prejudice typically required to prevail on a claim of ineffective assistance of counsel, we need not address this argument in light of our conclusion that counsel was not deficient for failing to file a direct appeal.

factual allegations he raised below that would have entitled him to an evidentiary hearing. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). We therefore decline to address this claim on appeal. See *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Bulla

  
\_\_\_\_\_, J.  
Westbrook

cc: Hon. David A. Hardy, District Judge  
Karla K. Butko  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk