

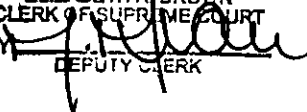
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRAMWELL RETANA,
Appellant,
vs.
NETHANJAH BREITENBACH,
WARDEN; AND THE STATE OF
NEVADA,
Respondents.

No. 88923-COA

FILED

MAY 06 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

Bramwell Retana appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on January 23, 2024. Eighth Judicial District Court, Clark County; Kathleen E. Delaney.

Retana argues the district court erred by denying his claims that counsel was ineffective. 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*). To demonstrate prejudice regarding the decision to enter a guilty plea, a petitioner must show a reasonable probability that, but for counsel's errors, the 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—deficiency and prejudice—must be shown. *Strickland*, 466 U.S. at 687. 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). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Retana claimed counsel was ineffective for failing to file a motion to suppress his statements to the police. The district court found Retana failed to support this claim with specific factual allegations because Retana did not allege how his statements to police were not knowing and voluntary. The record supports the decision of the district court. Thus, Retana failed to demonstrate counsel's performance was deficient or a reasonable probability he would not have pleaded guilty and would have insisted on going to trial had counsel filed the motion. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Retana claimed counsel was ineffective for failing to investigate the victims and their parents to determine whether they were in the country illegally and whether they applied for U-visas. He also claimed counsel should have investigated the dad of one of the victims because Retana believes the dad was litigious. Retana alleged that, had counsel investigated this information, counsel could have impeached the witnesses and shown they made up the charges. Given the evidence presented at the grand jury proceedings, including the similarities in the accusations by the victims and the number of victims, Retana failed to demonstrate a reasonable probability he would not have pleaded guilty and

would have insisted on going to trial had counsel investigated the victims. *Cf. Hill*, 474 U.S. at 59 (stating that, in guilty plea cases, whether a defendant is prejudiced by counsel's failure to investigate potentially exculpatory evidence "will depend on the likelihood that discovery of the evidence would have led counsel to change [the] recommendation as to the plea," which itself will depend in large part on "whether the evidence likely would have changed the outcome of a trial"). Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Retana claimed counsel was ineffective for failing to investigate his avoidant personality disorder. He argued counsel should have advised him that psychological disorders can cause false confessions or that the defense could hire an expert to evaluate him and testify on his behalf. Retana failed to allege or demonstrate he informed counsel that he suffered from avoidant personality disorder. *See Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based . . . on informed strategic choices made by the defendant and on information supplied by the defendant."). Further, Retana did not report his avoidant personality disorder during his presentence investigation interview or during his psychosexual evaluation. Thus, he failed to demonstrate counsel should have known of his avoidant personality disorder, investigated the disorder's potential to prompt false confessions, or hired an expert, and consequently he failed to demonstrate counsel's performance was deficient. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fourth, Retana claimed counsel was ineffective for failing to advise him about a possible change of venue based on pretrial publicity. Retana failed to demonstrate that such a motion would not have been futile. *See Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (holding counsel is not deficient for failing to make futile objections). A change of venue is not easily obtained and, to warrant a change of venue, a defendant must present evidence showing the extent of inflammatory pretrial publicity and that such publicity corrupted the trial. *See Sonner v. State*, 112 Nev. 1328, 1336, 930 P.2d 707, 712 (1996).

Here, Retana only alleged that the police put out information seeking further victims or information about the crimes. He failed to demonstrate that the pretrial publicity was inflammatory or that it could have corrupted the potential trial. Therefore, he failed to demonstrate counsel's performance was deficient or a reasonable probability he would not have pleaded guilty and would have insisted on going to trial had counsel informed him about a motion for a change of venue. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.¹

¹In his petition, Retana made a conclusory claim that his plea was not knowingly and voluntarily entered based on the aforementioned claims of ineffective assistance of his plea counsel. Given our conclusions, above, Retana failed to demonstrate his plea was not knowingly and voluntarily entered based on the ineffective assistance of counsel. *See* NRS 176.165 (providing a district court may permit a defendant to withdraw his guilty plea after sentencing where necessary "to correct a manifest injustice"); *Rubio v. State*, 124 Nev. 1032, 1039, 194 P.3d 1224, 1228 (2008) (stating a manifest injustice may be shown by demonstrating ineffective assistance of counsel); *see also Harris v. State*, 130 Nev. 435, 448, 329 P.3d 619, 628 (2014) (stating NRS 176.165 "sets forth the standard for reviewing a post-conviction claim challenging the validity of a guilty plea").

Fifth, Retana claimed counsel was ineffective for providing inculpatory evidence at sentencing. Retana argued counsel should not have presented the psychosexual evaluation at sentencing because it contained inculpatory information. Counsel chose to present the psychosexual evaluation and argued for a lower sentence based on the evaluation's conclusion that Retana was a low to moderate risk to reoffend. We can infer that counsel made a strategic decision to present this evaluation. See *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) ("*Strickland* specifically commands that a court must indulge the strong presumption that counsel made all significant decisions in the exercise of reasonable professional judgment." (internal quotation marks and alterations omitted)); *State v. Powell*, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006) ("Judicial review of an attorney's representation is highly deferential, and a claimant must overcome the presumption that a challenged action might be considered sound strategy."). Moreover, Retana did not identify what information in the psychosexual evaluation was inculpatory. Thus, Retana failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome had counsel not presented the psychosexual evaluation. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.


Sixth, Retana claimed counsel was ineffective for failing to file an appeal after being told to do so. "[T]rial counsel 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). "[W]hen the petitioner


has been deprived of the right to appeal due to counsel's deficient performance, the second component (prejudice) may be presumed." *Toston*, 127 Nev. at 976, 267 P.3d at 799. Retana's claim was not belied by the record and, if true, would entitle him to relief. Therefore, we conclude the district court erred by denying this claim without first conducting an evidentiary hearing.

Finally, Retana claimed the cumulative errors of counsel entitled him to relief. Even if multiple instances of deficient performance could be cumulated for purposes of demonstrating prejudice, *see McConnell v. State*, 125 Nev. 243, 259 & n.17, 212 P.3d 307, 318 & n.17 (2009), Retana failed to demonstrate multiple errors to cumulate, *see Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015) (stating a claim of cumulative error requires multiple errors to cumulate). Therefore, we conclude the district court did not err by denying this claim. Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.²


Bulla, C.J.


Gibbons, J.


Westbrook, J.

²On remand, the district court may reconsider its decision on whether to appoint counsel to represent Retana in these proceedings. *See* NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 760-61 (2017).

cc: Kathleen E. Delaney, District Judge
Bramwell Retana
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk