IN THE SUPREME COURT OF THE STATE OF NEVADA

DARRYL WENDELL CONE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51856

FILED

JUL 07 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant Darryl Wendell Cone's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

On September 12, 2005, the State charged Cone with theft, possession of a stolen vehicle, and possession of drug paraphernalia in a criminal complaint. Cone accepted a plea offer extended by the State and waived his right to a preliminary hearing. Cone withdrew from the plea offer at his arraignment and the State reinstated the original charges in an amended information. Cone accepted the State's renewed plea offer on the morning of his jury trial and entered a guilty plea.

On June 21, 2006, the district court convicted Cone, pursuant to his guilty plea, of one count of possession of a stolen vehicle. The district court sentenced Cone to serve a prison term of 36 to 120 months with credit for 160 days time served. The district court denied Cone's post-sentence motion to withdraw his guilty plea. Cone did not file a direct appeal.

On June 12, 2007, Cone filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a

response. The district court appointed counsel to represent Cone, and counsel supplemented Cone's petition. Thereafter, the district court conducted an evidentiary hearing and entered findings of fact, conclusions of law, and an order denying Cone's petition. This appeal followed.

Cone challenges the district court's ruling on his claims of ineffective assistance of counsel. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance was deficient, and that the petitioner was prejudiced by counsel's performance. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). To show prejudice, a petitioner who has entered a guilty plea must demonstrate "'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" Id. at 988, 923 P.2d at 1107 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)) (emphasis omitted). A petitioner must demonstrate the factual allegation underlying his ineffective assistance of counsel claim by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). The district court's factual findings regarding ineffective assistance of counsel are entitled to deference when reviewed on appeal. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Cone contends that defense counsel, Paul Wommer, provided ineffective assistance of counsel by coercing him to plead guilty with threats. He specifically claims that when he refused to sign the written plea agreement, defense counsel yelled,

> All right, you want to have some fun, huh! We are going to trial on everything. I'll set your trial date back 4 or 5 months and the District Attorney will file habitual. Hey! My brother, you

> are going to get life in prison and I'll make sure of that, my brother.

However, the district court found,

> As a matter of course, to encourage a defendant to accept an offer that is in his or her best interest to accept Mr. Wommer lays out the worst case scenario if convicted and then informs him or her how the offer could result in a greatly reduced sentence. Mr. Wommer did not tell Defendant that he would make certain he would get a life sentence.

The district court further found that Cone received effective assistance of counsel and that Cone's guilty plea was freely, voluntarily, and knowingly entered.

The record before this court supports the district court's findings. In the written plea agreement, Cone acknowledged that he agreed to plead guilty, signed the agreement voluntarily, was not acting under duress or coercion, and was satisfied with the services provided by defense counsel. During the district court's plea canvass, Cone stated that defense counsel explained the agreement to him, he read and signed the agreement, his guilty plea was freely and voluntarily entered, and no one made any threats or promises to get him to plead guilty. During the evidentiary hearing, Wommer testified that Cone rejected several plea offers, he did not threaten to "make sure Mr. Cone got life in prison," and he told Cone that

> by rejecting this offer [Cone was] making it impossible for me to do anything but see that [he got] life in prison, because in my estimation the defenses in his case were weak, and knowing his criminal history, which was extensive, and the State had, on numerous occasions, mentioned filing the habitual criminal against him, that if he were to be convicted and they filed the notice of intent to seek the habitual criminal there was a

> substantial likelihood that he was going to be doing a life conviction.

Under these circumstances, the district court's findings are supported by substantial evidence and are not clearly wrong as a matter of law. See Whitman v. Warden, 90 Nev. 434, 436, 529 P.2d 792, 793 (1974) ("A guilty plea is not coerced merely because motivated by a desire to avoid the possibility of a higher penalty."). Therefore, we conclude that Cone has failed to demonstrate error in this regard.

Cone also contends that defense counsel provided ineffective assistance of counsel by failing to investigate and develop information that might assist in his defense. He specifically claims that defense counsel "did not talk to anyone who worked with [him] who would have stated he was allowed to drive the car, and never appraised the car's value."

"An attorney must make reasonable investigations or a reasonable decision that particular investigations are unnecessary." State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458 (2006) (citing Strickland, 466 U.S. at 691). A petitioner asserting a claim that his counsel did not conduct a sufficient investigation bears the burden of showing that he would have benefited from a more thorough investigation. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

Here, the district court found,

> Mr. Wommer recalled that Defendant worked for the company that owned the vehicle he was charged with stealing, however, he was found in the vehicle a number of days after the vehicle should have been returned, and he didn't have authority to take the vehicle on whatever day he was found in it.

The record supports this finding. Given that his employer had not authorized him to drive the vehicle on the day that he was arrested, Cone has not shown that information that his employer allowed him to drive the

vehicle on other occasions would provide a valid defense to the charges of possession of a stolen vehicle and theft. Information regarding the value of the vehicle would not provide a valid defense to the charges of possession of a stolen vehicle and theft, it is only important for determining the appropriate punishment for these crimes. See NRS 205.0835; NRS 205.273. Cone has not claimed that an adequate investigation would have produced information to provide a valid defense against possession of drug paraphernalia. We note that Cone had four previous felony convictions and he avoided habitual criminal adjudication and punishment by pleading guilty to possession of a stolen vehicle, which, regardless of the vehicle's value, is a felony. Under these circumstances, we concluded that Cone has not demonstrated that but for counsel's failure to investigate he would not have pleaded guilty and would have insisted on going to trial. Therefore, we conclude that Cone has failed to demonstrate prejudice in this regard.

Having considered Cone's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.

Cherry

Saitta, J.

Saitta

Gibbons, J.

Gibbons

cc: Hon. Kenneth C. Cory, District Judge
Robert E. Glennen III
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk