IN THE SUPREME COURT OF THE STATE OF NEVADA

ZENDELL L. DESPENZA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53597

FILED

MAR 11 2010

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Appellant Zendell Despenza argues that the district court erred in denying his claims challenging the effectiveness of trial counsel[1] and the validity of his guilty plea without conducting an evidentiary hearing. When reviewing the district court's resolution of an ineffective-assistance claim, we give deference to the 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). We presume that the district court correctly assessed the validity of the plea and will not

[1]We note that Despenza was represented by Marc Picker through entry of his guilty plea and thereafter was represented by Lizzie Hatcher at sentencing, on direct appeal, and in the post-conviction proceedings. The petition challenged the effectiveness of Mr. Picker's representation.

reverse its decision absent an abuse of discretion. Molina v. State, 120 Nev. 185, 191, 87 P.3d 533, 538 (2004).

Despenza has not demonstrated that the district court erred in rejecting his claims that trial counsel provided ineffective assistance by misinforming appellant regarding his right to appeal and "doing very little throughout the proceedings." As to the first claim, Despenza timely filed an appeal from the judgment of conviction, Despenza v. State, Docket No. 50084 (Order of Affirmance, February 11, 2008), and therefore the claim is belied by the record, see Means v. State, 120 Nev. 1001, 1016, 103 P.3d 25, 35 (2004), and he cannot demonstrate prejudice, see Strickland v. Washington, 466 U.S. 668, 687 (1984) (setting forth two-part test—deficiency and prejudice—for evaluating ineffective-assistance claims); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996) (applying Strickland test where defendant pleaded guilty). As to the second claim, Despenza failed to support the claim with specific factual allegations that if true would entitle him to relief. See Means, 120 Nev. at 1016, 103 P.3d at 35. He identified no specific actions that counsel should have taken or the likely impact that those actions would have had on his decision to plead guilty. Cf. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (concluding that claim that witnesses could establish defendant's innocence was not supported by specific factual allegations when claim was not accompanied by witnesses' names or descriptions of their intended testimony). Despenza therefore failed to demonstrate deficient performance or prejudice.

Despenza has however demonstrated an abuse of discretion in the district court's denial on the bare record of his challenge to the plea on the ground that he was not informed of the lifetime supervision

requirement. This court has held that lifetime supervision is a direct consequence of which a defendant must be aware before entering a guilty plea. Palmer v. State, 118 Nev. 823, 830, 59 P.3d 1192, 1196-97 (2002). Here, the district court could determine that Despenza's claim was "belied" and therefore did not warrant an evidentiary hearing by reviewing the record "as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002); see also State v. Freese, 116 Nev. 1097, 1106, 13 P.3d 442, 448 (2000) (explaining that validity of plea is assessed based on totality of circumstances, as shown by record, which includes oral canvass and any written plea agreement). The record at that time included the guilty plea agreement and the oral plea canvass. While the guilty plea agreement was available to the district court, it appears that a transcript of the oral plea canvass has never been prepared. And the district court judge who considered the petition was not the judge who performed the oral plea canvass. It therefore appears that the district court relied solely on the written plea agreement in rejecting Despenza's claim. The plea agreement, however, does not belie Despenza's claim—it does not mention lifetime supervision. We therefore remand this matter for the district court to determine whether the record (including the oral plea canvass) belies Despenza's claim that he was not aware of the lifetime supervision requirement when he entered his plea. If the record does not belie this claim, then the district court must conduct an evidentiary hearing. See Palmer, 118 Nev. at 831, 59 P.3d at 1197.[2]

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[2]We note that, alternatively, the district court rejected the challenge to the guilty plea based on the law-of-the-case doctrine. It appears that determination was in error. This court did not address the merits of

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For the reasons stated herein, 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.[3]

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Lizzie R. Hatcher
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

. . . *continued*

Despenza's challenge to the validity of the plea in his prior appeal because Despenza failed to provide a transcript of the plea canvass and therefore this court could not review his challenge and because his claim regarding lifetime supervision was improperly raised for the first time on appeal. Despenza v. State, Docket No. 50084 (Order of Affirmance at 2, February 11, 2008). We therefore cannot affirm the district court's decision based on the law-of-the-case doctrine.

[3]This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.