

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN THORPE CHRISTIE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56430

FILED

JUN 08 2011

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 a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Appellant argues that the district court erred by denying four claims of ineffective assistance of counsel. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, 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 must be shown, Strickland v. Washington, 466 U.S. 668, 697 (1984), and 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 regarding ineffective assistance of counsel 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).

First, appellant claims that trial counsel was ineffective for failing to bring to the district court's attention that appellant had attempted to withdraw from the amended guilty plea agreement by crossing out his signature after the district court struck a provision, which stated that the State would drop the habitual criminal count, because it conflicted with the rest of the plea agreement. Appellant testified at the evidentiary hearing that he would not have signed the amended plea agreement had he known that he faced habitual criminal treatment, and that he only signed the plea agreement because the provision that the State would drop the habitual criminal count was still in the amended guilty plea agreement. He claims that counsel should have informed the district court that he wanted to withdraw his plea when the provision was stricken and he crossed his name out.

Appellant fails to demonstrate that counsel was deficient. The district court did not find appellant credible on this argument because appellant never manifested his dissatisfaction with the plea agreement even though he had ample opportunities to do so.¹ Prior to the district court striking the provision in the guilty plea agreement, appellant stated at the hearing that, "I want to leave the habitual in your discretion and not go to trial on those other charges." Later, when the change was made, appellant was specifically canvassed regarding the change. The district court asked appellant, "I've directed counsel, both counsel, to initial

¹Counsel testified at the evidentiary hearing that he did not remember appellant crossing his name out.

another change which was on page 4 which specifically talks about the fact that they will not be dismissing the habitual offender enhancement. Do you understand that?" Appellant responded in the affirmative. Appellant fails to demonstrate that he wanted to withdraw from the plea agreement, that counsel knew that he wanted to withdraw, or that counsel was ineffective for failing to alert the district court that appellant wanted to withdraw. We conclude that substantial evidence supports the decision of the district court, see Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994), and therefore, the district court did not err in denying this claim.

Second, appellant claims that counsel was ineffective for advising appellant to plead guilty rather than going to trial. Specifically, appellant claims that counsel should have advised him that the district court would impose the habitual criminal enhancement because the district court stated during two prior sentencing hearings involving appellant that she would adjudicate him a habitual criminal. Appellant fails to demonstrate that counsel was deficient. According to testimony by both counsel and appellant at the evidentiary hearing, counsel told appellant he might receive the habitual criminal enhancement but there was a chance it might not be imposed. Further, counsel informed appellant that if he went to trial and lost, he would be facing three convictions and three possible habitual criminal enhancements rather than the two he was facing by pleading guilty. Candid advice about the possible outcomes of pleading guilty or going to trial is not evidence of a deficient performance. Further, appellant was present at the prior sentencing hearings and knew that the district court judge had made

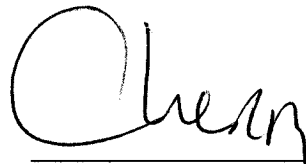
statements regarding the habitual criminal enhancement. Therefore, the district court did not err in denying this claim.

Third, appellant claims that counsel was ineffective for failing to object to the habitual criminal enhancement based on lack of notice. Specifically, appellant claims that he did not receive notice that the State intended to seek the habitual criminal enhancement until a few days prior to sentencing. Appellant fails to demonstrate that counsel was deficient. The State filed the notice of intent to seek the habitual criminal enhancement on January 22, 2008, twenty-three days prior to appellant's sentencing hearing. Contrary to appellant's assertions, all NRS 207.016 requires is that the notice of intent be filed and that the sentence cannot be imposed for fifteen days after the notice has been filed. NRS 207.016(2). Further, appellant had notice that the habitual criminal enhancement would be considered. He was informed in his original plea agreement that if he did not appear for his sentencing hearing on January 17, 2008, the State would then be allowed to seek the habitual criminal enhancement. Therefore, the district court did not err in denying this claim.

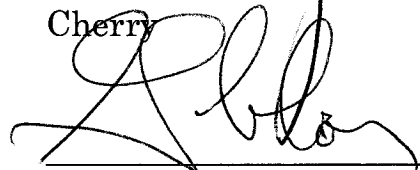
Finally, appellant claims that counsel was ineffective for failing to object to the habitual criminal enhancement because the amended guilty plea agreement only included two of the three possible penalties. Appellant fails to demonstrate that counsel was deficient or that he was prejudiced. While the amended guilty plea agreement did not include all of the potential penalties, appellant demonstrated that he knew what the penalties were because he recited them to the district court during the plea canvass, including the term of life with the possibility of parole. Thus, appellant had complete information as to all of the potential

penalties prior to the district court accepting the plea. Counsel is not required to make futile objections, Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978), and appellant fails to demonstrate a reasonable probability of a different outcome had counsel objected to the enhancement. Therefore, the district court did not err in denying this claim. Accordingly, we

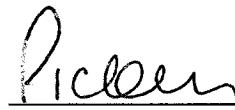
ORDER the judgment of the district court AFFIRMED.


_____, J.

Cherry


_____, J.

Gibbons


_____, J.

Pickering

cc: Hon. Connie J. Steinheimer, District Judge
Matthew P. Digesti
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk