

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT SYLVESTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57978

FILED

FEB 27 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Ingber*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from an order of the district court denying appellant Robert Sylvester's post-conviction petition for a writ of habeas corpus and a supplemental petition filed pursuant to the remedy provided in Lozada v. State, 110 Nev. 349, 359, 871 P.2d 944, 950 (1994). Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. Sylvester contends that the district court erred by denying his five direct appeal and post-conviction claims. We review Sylvester's direct appeal claims de novo and 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, Sylvester contends that his attorney was ineffective at sentencing for failing to review the ten certified copies of his previous felony convictions that were presented to the court in support of his habitual criminal enhancement. Sylvester has the burden of proving that

counsel's performance was deficient and resulted in prejudice. See Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004) (explaining the Strickland test for ineffective assistance of counsel); Strickland v. Washington, 466 U.S. 668, 687-94 (1984). According to the district court's findings of fact, the court reviewed all of the certified judgments of conviction and concluded that they met the requirements for enhancement. Furthermore, the district court found that, even if counsel had reviewed and been able to successfully challenge several of Sylvester's prior convictions, given the number of prior convictions, Sylvester did not demonstrate prejudice because he did not show that there is a reasonable probability that his sentence would have been different. The district court's findings are supported by substantial evidence and are not clearly erroneous, and the district court did not err as a matter of law. See Lader, 121 Nev. at 686, 120 P.3d at 1166. Therefore, we affirm the denial of this claim.

Second, Sylvester contends that he was denied his right to due process at sentencing because the district court considered materially untrue assumptions about his record. Our review of the transcript reveals that both Sylvester and his attorney corrected the statements made by the State during sentencing. Because Sylvester has not shown that the district court mistakenly relied on untrue statements in rendering its judgment, we conclude that Sylvester's due process rights were not violated. State v. District Court, 100 Nev. 90, 96-97, 677 P.2d 1044, 1048-49 (1984).

Third, Sylvester contends that his attorney was ineffective at sentencing for failing to correct the materially untrue assumptions about his record. As discussed above, both Sylvester and his attorney corrected the statements made by the State during sentencing and we therefore conclude that the district court did not err by finding that counsel's performance was not deficient. See Means, 120 Nev. at 1011, 103 P.3d at 32. Accordingly, we affirm the denial of this claim.

Fourth, Sylvester contends that the district court violated his plea agreement because he was not allowed to complete an inpatient drug treatment program before sentencing. Because Sylvester failed to object during sentencing we review for plain error. Sullivan v. State, 115 Nev. 383, 387-88 n.3, 990 P.2d 1258, 1260 n.3 (1999); Puckett v. United States, 556 U.S. ___, ___, 129 S. Ct. 1423, 1428-29 (2009). In conducting plain error review, we examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights, by causing actual prejudice or a miscarriage of justice. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Based on the record provided to this court we cannot determine that the error is plain because it is not "clear or obvious" which terms of the plea agreement were agreed to by the district court. Puckett, 556 U.S. at ___, 129 S. Ct. at 1429. Therefore, we cannot conclude that the district court committed plain error.

Fifth, Sylvester contends that counsel was ineffective at sentencing because he did not argue that the terms of the plea agreement were breached because Sylvester was not allowed to complete the last

three days of his inpatient drug treatment program before sentencing. Sylvester also claims that counsel was ineffective for not requesting a continuance so that he could complete the last three days of his inpatient program. The district court summarily denied these claims without an evidentiary hearing, finding that the State only agreed to defer sentencing for six months, there was nothing in the record to indicate that the State agreed to continue sentencing to ensure completion of the program, and that, even if counsel had requested to continue sentencing, it was not reasonably probable a continuance would have been granted.

Although the court's findings may be an accurate representation of the State's understanding of the plea agreement, because the terms of the plea as stated in the written plea agreement are ambiguous and there was no evidentiary hearing at which Sylvester and his counsel¹ testified, the record does not demonstrate Sylvester's understanding of the plea agreement at the time he entered the plea. See Sullivan v. State, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999) ("A plea agreement is construed according to what the defendant reasonably understood when he or she entered the plea."). The record also does not demonstrate the court's² understanding of the terms when it accepted

¹We note that Sylvester was represented by two Deputy Public Defenders; one before the Justice Court and during sentencing and another during arraignment and the entry of his guilty plea.

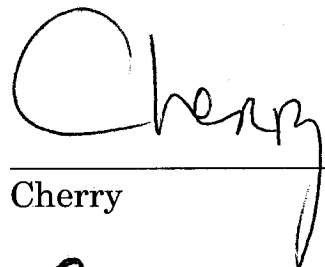
²We note that the judge who accepted Sylvester's plea and granted a continuance was different than the judge who presided over his sentencing hearing.

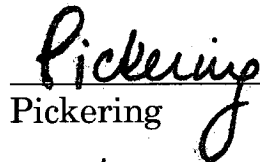
Sylvester's plea and granted a six-month continuance. If Sylvester's claim that the plea agreement included completion of the inpatient drug treatment program before sentencing is true, and that was the benefit for which Sylvester bargained, see e.g. Crawford v. State, 117 Nev. 718, 721-25, 30 P.3d 1123, 1125-26 (2001) (holding district court erred by denying presentence motion to withdraw guilty plea where plea conditioned on unfulfilled oral promise to remain out of custody until after Christmas), and the district court agreed to those terms, then counsel should have objected to the breach and requested a continuance to allow Sylvester to complete the inpatient program. Additionally, Sylvester would have been prejudiced by his counsel's conduct. Because these claims of ineffective assistance of counsel were not belied by the record and, if true, would have entitled Sylvester to relief in the form of being given an opportunity to withdraw his plea, see Doane v. State, 98 Nev. 75, 78, 639 P.2d 1175, (1982) ("Withdrawal of guilty pleas typically is allowed to restore the accused to a position he enjoyed prior to the breached agreement, because breach has denied him the benefit for which he bargained."), we conclude that the district court erred in denying these claims without conducting an evidentiary hearing, see Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, we reverse the denial of these claims and remand for the district court to conduct an evidentiary hearing to determine the terms of the plea agreement as understood by Sylvester, his counsel, and the court and to reconsider these claims in light of that determination. We express no opinion as to whether Sylvester can satisfy

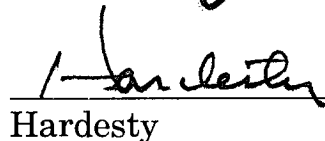
the requirements for ineffective assistance of counsel. See Means, 120 Nev. at 1011, 103 P.3d at 32.

We conclude that Sylvester is only entitled to the relief described herein, and 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.
Cherry


_____, J.
Pickering


_____, J.
Hardesty

cc: Hon. Michelle Leavitt, District Judge
Christopher R. Oram
Stein & Rojas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³This order constitutes our final resolution of this appeal; any appeal from the district court's decision on remand shall be docketed as a new a separate matter.