

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY VINCENT ABEYTA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 59446

FILED

APR 11 2012

TRACE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *A. Ingou*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

In his petition filed on June 16, 2011, appellant claimed that he received ineffective assistance of counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that 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, the outcome of the proceedings would have been different. 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 prove prejudice sufficient to invalidate the decision to enter a guilty plea, a petitioner must

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<sup>1</sup>This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

demonstrate 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, 466 U.S. at 697, 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). In determining the validity of a guilty plea, this court looks to the totality of the circumstances. State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000).

First, appellant claimed that trial counsel failed to file several motions and a pretrial petition for a writ of habeas corpus challenging the sufficiency of the evidence presented at the preliminary hearing. Specifically, appellant claimed that none of the witnesses testifying at the preliminary hearing saw a weapon being used to cut the victim's neck, there was no evidence of malice aforethought, and no evidence that the victim almost died. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. A magistrate's duty at the preliminary hearing is not to determine the guilt or innocence of the defendant but rather to determine whether probable cause has been presented that a crime was committed and that the defendant committed the crime; probable cause may be based on slight or marginal evidence. NRS 171.206; Parsons v. State, 116 Nev. 928, 933, 10 P.3d 836, 839 (2000). Appellant failed to demonstrate that the State did

not meet its burden of establishing probable cause to bind appellant over for trial. Therefore, we conclude that the district court did not err in denying this claim.<sup>2</sup>

Second, appellant claimed that trial counsel failed to challenge the validity of the intercepted phone calls made by appellant during his incarceration at the Clark County Detention Center. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to demonstrate that any challenge would have led to the phone calls being deemed inadmissible. Therefore, we conclude that the district court did not err in denying this claim.<sup>3</sup>

Third, appellant claimed that trial counsel failed to adequately communicate with appellant. Appellant failed to demonstrate that he was prejudiced as he failed to demonstrate that further communication with counsel would have had a reasonable probability of

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<sup>2</sup>To the extent that appellant claimed that counsel was ineffective for failing to seek a continuance of the preliminary hearing when the victim's statement to the police was not complete, appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Trial counsel cross-examined the victim at the preliminary hearing and appellant failed to demonstrate by a reasonable probability that possession of a complete police statement would have led to a different outcome in the proceedings.

<sup>3</sup>Conversely, appellant claimed that trial counsel should have attempted to introduce some of the phone calls to show that he had no intent to kill the victim. Appellant's protestations of innocence made during the phone calls would not have been admissible by themselves to prove he did not intend to kill the victim as they were inadmissible hearsay. NRS 51.035. Therefore, appellant failed to demonstrate that he was prejudiced by trial counsel's failure to seek introduction of these statements.

altering his decision to enter a guilty plea in the instant case. In exchange for his guilty plea to one count of attempted murder with the use of a deadly weapon, the State agreed not to pursue habitual criminal adjudication.<sup>4</sup> Therefore, we conclude that the district court did not err in denying this claim.<sup>5</sup>

Fourth, appellant claimed that trial counsel failed to show up to his preliminary hearing, arraignment, and a hearing on a motion in limine. Appellant failed to demonstrate that he was prejudiced. The record belies appellant's claim that his trial counsel was not present for his preliminary hearing. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had his trial counsel appeared at the other hearings. Therefore, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that trial counsel failed to investigate the case. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. Appellant failed to

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<sup>4</sup>The record indicates that appellant was eligible for large habitual criminal treatment based on his five prior felony convictions. NRS 207.010(1)(b).

<sup>5</sup>To the extent that appellant claimed that trial counsel failed to adequately communicate plea offers, as discussed during the evidentiary hearing, the plea offers were communicated to appellant, but appellant wanted to take additional time to consider. Appellant acknowledged that he was aware of the State's deadlines during the evidentiary hearing, but that he was unable to communicate with counsel on time because of the volume of documents to review, his desire to consult with his family, or the vagaries of the phone system. Appellant failed to demonstrate that his trial counsel was ineffective in this regard. See Missouri v. Frye, No. 10-444, 2012 WL 932020 (U.S. March 21, 2012).

identify what evidence a more complete investigation would have uncovered such that there was a reasonable probability of a different outcome in the proceedings. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that trial counsel coerced him into entering a guilty plea by informing him that he could get a life sentence when a life sentence was not mandatory in the instant case. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. During the evidentiary hearing, trial counsel and appellant acknowledged difficulties with their relationship. Trial counsel testified that the decision to enter a guilty plea was appellant's decision to make and that he conveyed the plea offers made by the State. On the morning of trial, a plea offer was made, and trial counsel testified that he had an opportunity to discuss the offer with appellant and discuss any questions. Appellant, by virtue of his five prior felony convictions, was eligible for large habitual criminal treatment and a potential sentence of life imprisonment. NRS 207.010(1)(b). Candid advice about the potential outcome of trial is not deficient. In entering his plea, appellant acknowledged that it was freely entered and not the product of threats or coercion. Therefore, we conclude that the district court did not err in denying this claim.

Seventh, appellant claimed that trial counsel failed to cross-examine a key witness. Appellant failed to provide specific facts in support of this claim, and thus, he failed to demonstrate that his trial counsel was ineffective in this regard.

Eighth, appellant claimed that trial counsel failed to investigate the presentence investigation report for inaccuracies and

challenge those inaccuracies. Appellant failed to demonstrate that trial counsel's performance was deficient or that he was prejudiced. Trial counsel testified that he reviewed the presentence report before sentencing. Appellant, himself, corrected one of the inaccuracies at the sentencing hearing, and appellant acknowledged his extensive criminal history at the sentencing hearing. Trial counsel testified that some of the alleged inaccuracies identified were factually correct and that he did not object to others as it would emphasize the criminal history. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had trial counsel done further investigation into the accuracy of the presentence investigation report. At the conclusion of the hearing, the district court observed that the alleged inaccuracies were actually factually correct or that trial counsel made a strategic decision not to challenge the inaccuracies and emphasize the lengthy criminal history. Therefore, we conclude that the district court did not err in denying this claim.

Ninth, appellant claimed that trial counsel failed to challenge the victim's statement at sentencing on the grounds that the State failed to file a written notice and the victim made statements alluding to a prior encounter fifteen years earlier. Appellant failed to demonstrate that there was a reasonable probability of a different outcome at sentencing had trial counsel objected. In fact, at sentencing, trial counsel indicated that he anticipated the victim would make a statement and was prepared. Trial counsel further objected to the victim's discussion of the fifteen-year-old event. Therefore, we conclude that the district court did not err in denying this claim.

Next, appellant claimed that the prosecutor committed misconduct, the district court erred in failing to conduct an evidentiary hearing on a motion to dismiss counsel, the sentence was cruel and unusual punishment, the State failed to file a notice that the victim would address the court at sentencing, the court was biased, and his housing assignment in prison prevented him from adequate access to the courts. These claims fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction based on a guilty plea. NRS 34.810(1)(a). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.  
Cherry

Pickering, J.  
Pickering

Hardesty, J.  
Hardesty

cc: Hon. Valerie Adair, District Judge  
Anthony Vincent Abeyta  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk