


IN THE SUPREME COURT OF THE STATE OF NEVADA

MARC MCCURDY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62608

FILED

JAN 16 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPT. 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.¹ Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Senior Judge.

In his petition filed on October 25, 2012, appellant claimed that trial counsel provided ineffective assistance. 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 demonstrate prejudice

¹This 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 *Luckett v. Warden*, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

regarding the decision to enter a guilty plea, a petitioner must demonstrate 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.

First, appellant claimed that counsel was ineffective under *Missouri v. Frye*, 566 U.S. ___, 132 S. Ct. 1399 (2012), and *Lafler v. Cooper*, 566 U.S. ___, 132 S. Ct. 1376 (2012), for failing to adequately advise him as to whether he should accept an initial plea offer. Appellant contended that counsel told him about the plea offer over the telephone rather than in person, and that she should have explained the facts of the case and the possible habitual criminal sentence that he could face if convicted. Appellant asserted that counsel's inadequate advice led to the State's rescission of that plea offer before he decided to accept it and resulted in his later acceptance of a less favorable plea offer. Appellant's own statements indicate that counsel did in fact convey the plea offer to appellant. *See Frye*, 566 U.S. at ___, 132 S. Ct. at 1408 (holding that counsel was ineffective for failing to communicate a formal plea offer to defendant). Appellant failed to demonstrate that, but for counsel's ineffective advice, he would have accepted the plea, the State would not have withdrawn it in light of intervening circumstances, and the district court would have accepted it. *See Lafler*, 566 U.S. at ___, 132 S. Ct. at 1385; *see also Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (noting that "bare" or "naked" claims are insufficient to grant relief). Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that counsel was ineffective for failing to adequately prepare for trial. He acknowledged that he was unsure of what investigation counsel performed, but claimed that counsel should have interviewed witnesses, obtained experts, and investigated the blood-alcohol test. Appellant failed to demonstrate deficiency or prejudice, as his claims were bare and unsupported by the record. *See Hargrove*, 100 Nev. at 502, 686 P.2d at 225. Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that counsel was ineffective for failing to provide him with the amended presentence investigation report or consult with him about it before sentencing. Appellant failed to demonstrate prejudice. Appellant failed to identify any specific errors in the presentence investigation report and thus failed to demonstrate a reasonable probability of a different outcome at sentencing but for counsel's alleged deficient performance. *See id.* Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that counsel failed to object to the State's violation of the plea agreement during sentencing when the State argued for a habitual criminal sentence. Appellant failed to demonstrate deficiency or prejudice. Appellant's claim that the State violated the plea agreement is belied by the record as the State did not argue for habitual criminal treatment but rather argued for the maximum sentence under the DUI statute, which the State was allowed to do under the terms of the plea agreement. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Thus, we conclude that the district court did not err in denying this claim.

Fifth, appellant claimed that counsel was ineffective for advising him not to file a direct appeal. Appellant failed to demonstrate

deficiency or prejudice. The record and appellant's own statements indicate that counsel advised him that a direct appeal would not be successful but that she would file an appeal if he wished her to do so. Thus, counsel did not deprive appellant of a direct appeal. Further, to the extent that appellant claimed that he did not seek to appeal based on his counsel's erroneous advice, appellant failed to demonstrate that either of the arguments he wished to raise on direct appeal—that his presentence investigation report contained errors and that the State violated the plea agreement—had any merit. *See Toston v. State*, 127 Nev. ___, ___, 267 P.3d 795, 799-800 (2011). Thus, we conclude that the district court did not err in denying this claim.

Finally, appellant appeared to claim that his plea was unknowingly and involuntarily entered because he did not read the agreement before entering his plea and he was not canvassed about it. This claim is belied by the record, as he was canvassed about the plea agreement and affirmatively stated that he had read and understood the plea agreement before he signed it. *See Hargrove*, 100 Nev. at 502, 686 P.2d at 225. Thus, we conclude that the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Cherry, J.
Cherry

cc: Chief Judge, Eighth Judicial District Court
Hon. Joseph T. Bonaventure, Senior Judge
Marc McCurdy
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk