

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARINO DESILVA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 64077

**FILED**

FEB 13 2014

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

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

In his petition filed on November 27, 2012, and the amended and supplemental petitions, appellant claimed that he received ineffective assistance of trial 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

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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).

*Strickland*). To demonstrate prejudice 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, 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 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).

First, appellant claimed that his trial counsel was ineffective for promising him a sentence of two to five years. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Counsel testified that he never promised appellant a sentence of two to five years, but that he may have mentioned this sentence in discussing the minimum sentence possible. Appellant was informed in the written guilty plea agreement and during the plea canvass that securities fraud carried a potential sentence of one to twenty years. Appellant acknowledged that he was not promised nor guaranteed a particular sentence in the written plea agreement and indicated that his guilty plea was not based upon a promise of leniency during the plea canvass. Therefore, we conclude that the district court did not err in denying this claim.

Second, appellant claimed that his trial counsel was ineffective for failing to investigate the facts supporting his defense. Appellant indicated that he and his wife provided counsel with documents indicating that he was a part of the music industry, contrary to the allegations of the State at the sentencing hearing, and that he did in fact license some recordings for the albums he claimed he was going to produce. Appellant stated at the evidentiary hearing that he believed this evidence would have influenced the sentence he received. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. The district court at the evidentiary hearing acknowledged that he understood appellant to be a part of the music industry. And appellant addressed some of the alleged inaccuracies himself at the sentencing hearing. However, being a part of the music industry did not mean that appellant had not committed securities fraud, and appellant failed to demonstrate a reasonable probability of a different outcome at sentencing had trial counsel objected to the State's arguments with further evidence of his music-industry history and the licensing agreements for the interviews.<sup>2</sup> Therefore, we conclude that the district court did not err in denying this claim.

Third, appellant claimed that he was not informed by his counsel about the right to appeal the conviction. Appellant failed to

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<sup>2</sup>To the extent that appellant claimed that his counsel should have objected to other facets of the State's argument at sentencing, appellant failed to demonstrate a reasonable probability of a different outcome at sentencing had trial counsel objected to the State's arguments.

demonstrate that his counsel's performance was deficient or that he was prejudiced. The written guilty plea agreement, which appellant acknowledged reading, understanding and signing, informed appellant of the limited right to appeal the conviction. *See Davis v. State*, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999). Therefore, we conclude that the district court did not err in denying this claim.

Fourth, appellant claimed that his trial counsel failed to explain the nature of the legal charges, the elements of the offenses, the potential terms of imprisonment, the waiver of the right to trial, and the State's burden of proof at trial. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. The written guilty plea agreement set forth the elements in the attached criminal information, the consequences, and the waiver of constitutional rights. The written guilty plea agreement further contained an acknowledgement from appellant that he had discussed with his counsel the elements of the charges, the possible defenses, the consequences, and the constitutional rights he was waiving. Appellant was also specifically canvassed about the potential consequences, his discussion of his constitutional rights with his counsel, and appellant made factual admissions supporting the charge of securities fraud. Therefore, we conclude that the district court did not err in denying this claim.<sup>3</sup>

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<sup>3</sup>We note that appellant provided no testimony at the evidentiary hearing regarding the alleged misinformation he received about the State's burden of proof at trial. Thus, appellant failed to carry his burden of demonstrating that his trial counsel's performance was deficient in this regard.

Fifth, appellant claimed that his counsel failed to explain the presentence investigation report and prepare him for the interview. Appellant failed to demonstrate that his counsel's performance was deficient or that he was prejudiced. Counsel testified that he explained the presentence-investigation-report process to him and went over the report with him before sentencing. Appellant failed to demonstrate that there was a reasonable probability of a different outcome had counsel provided more explanation. Therefore, we conclude that the district court did not err in denying this claim.

Sixth, appellant claimed that his trial counsel was ineffective for promising him own-recognizance release until sentencing when in fact release was not possible because of an I.C.E. hold. Appellant noted that the guilty plea negotiations, which the district court accepted, contained a term that the State would not oppose appellant being released on his own recognizance after pleading guilty upon surrender of his passport and payment of \$15,000 towards restitution. Appellant did surrender his passport and provided a payment of restitution on the day that he entered his plea. Despite the fact that the district court ordered him released on his own recognizance at the conclusion of the plea canvass, appellant was never released due to an I.C.E. hold.

First, we note that when pressed at the evidentiary hearing regarding the type of remedy sought in his petition, appellant indicated that his concern was regarding his sentence and not the validity of the plea. In view of the remedy sought, appellant failed to demonstrate that there was a reasonable probability of a different outcome at sentencing had trial counsel taken different or further action regarding the I.C.E.

hold. Notably, appellant received a substantial benefit by entry of his plea to one count of securities fraud as he was originally charged with twenty-one additional securities-fraud and theft counts, which exposed him to a far greater term in prison. Appellant did not demonstrate that there was a reasonable probability of a lesser sentence if he had remained free after sentencing.

Even assuming that appellant was challenging the validity of his decision to enter a guilty plea, appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced. While there appears to be some inconsistencies between counsel's testimony at the evidentiary hearing and the affidavit submitted by counsel prior to the evidentiary hearing, trial counsel's post-conviction testimony and statements indicate that he either contacted I.C.E. directly or relied upon the information provided by the Clark County Detention Center and the Attorney General's Office that a hold had not been placed.<sup>4</sup> At the time of counsel's conduct, either of these actions would have been objectively reasonable under the circumstances presented in this case. *See Cullen v. Pinholster*, 563 U.S. \_\_\_, \_\_\_, 131 S. Ct. 1388, 1403, 1407 (2011) (recognizing that counsel is strongly presumed to have rendered adequate assistance and a reviewing court must entertain the range of possible

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<sup>4</sup>Trial counsel averred the former in his affidavit and testified that he could not recall if he directly contacted I.C.E. at the evidentiary hearing. Trial counsel appeared to indicate that he had not contacted I.C.E. as he did not want to bring appellant's questionable immigration-status to the attention of I.C.E. with a direct inquiry.

reasons for counsel's action or inaction); *Harrington v. Richter*, 562 U.S. \_\_\_, \_\_\_, 131 S. Ct. 770, 790 (2011) (recognizing that the deficiency-inquiry is an objective one that focuses not on the subjective state of mind of counsel but the objective reasonableness of counsel's performance); *Strickland*, 466 U.S. at 690 (recognizing that deficient performance is evaluated as of the time of the conduct and that there is a wide range of professionally competent assistance). Further, appellant's own statements in his petition and at the hearing indicate that prior to entry of his plea he was aware of the possibility of an I.C.E. hold, but this possibility did not dissuade him from entry of his plea.<sup>5</sup> This term does not appear to have been a crucial and integral term in appellant's decision to enter a guilty plea as counsel testified that he did not recall appellant asking to withdraw his plea after he was not able to effectuate this term and appellant made no mention of withdrawing his plea at the sentencing hearing. The fact that he was not released on his own-recognizance appears to only have resonated with appellant after he was convicted and sentenced to a term of imprisonment. Under these facts and in light of the substantial benefit identified above, we conclude that appellant failed to demonstrate a reasonable probability that but for counsel's errors he would not have pleaded guilty and would have insisted on going to trial. Therefore, we conclude that the district court did not err in denying this claim.

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<sup>5</sup>The parties and the district court appeared to believe that no hold was entered as the district court ordered him released on his own-recognizance at the conclusion of the plea hearing.

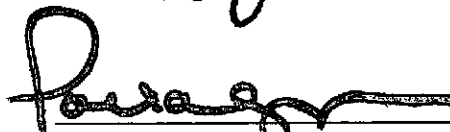
Finally, appellant claimed that his guilty plea was coerced. Appellant failed to carry his burden of demonstrating his plea was invalid. *See State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); *Bryant v. State*, 102 Nev. 268, 271, 721 P.2d 364, 367 (1986). In entering his plea, appellant affirmatively acknowledged that he was not forced to enter a plea and that he was entering his plea of his own free will. Therefore, we conclude that the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>6</sup>

  
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Pickering

J.

  
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Parraguirre

J.

  
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Saitta

J.

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<sup>6</sup>We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.



cc: Hon. David B. Barker, District Judge  
Marino Desilva  
Attorney General/Carson City  
Attorney General/Las Vegas  
Clark County District Attorney  
Eighth District Court Clerk