

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRANDON HICKS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 65111

FILED

JAN 21 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order denying a post-conviction petition for a writ of habeas corpus. First Judicial District Court, Carson City; James E. Wilson, Judge.

On appeal from the denial of his April 27, 2012, petition and his July 24, 2012, supplemental petition, appellant claims that the district court erred in denying his claims that his counsel was ineffective. 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*). 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 claims that trial counsel was ineffective for failing to object to a statement made by the district court at sentencing, and in the judgment of conviction, that the district court wanted appellant to serve at least 20 years before being paroled. Appellant fails to demonstrate that trial counsel was deficient or that he was prejudiced. First, the district court's statements made at the sentencing hearing were not improper. Second, the district court's recommendation in the judgment of conviction that appellant serve at least 20 years before being paroled was just that, a recommendation. It is not binding on the parole board and, therefore, did not violate the separation of powers doctrine as appellant contends. Further, nothing in NRS 176.105 prohibits the district court from adding information to the judgment of conviction. Therefore, the district court did not err in denying this claim.

Second, appellant claims that trial counsel was ineffective for failing to object that the district court relied on suspect evidence when sentencing appellant. Specifically, he claims that the district court relied on a report that was provided in another case that the district court had previously sentenced appellant in. Appellant fails to demonstrate that trial counsel was deficient or that he was prejudiced. The record indicates, and appellant concedes, that this report was not provided to the district court in the instant case. Further, the charge in this case, sexual assault, had a mandatory sentence of life in prison with a minimum of 10 years before eligibility for parole, which appellant received. Appellant's argument that the district court relied on this report to include the

recommendation regarding parole in the judgment of conviction is mere speculation, and the district court did not err in denying this claim.

Third, appellant claims that trial counsel was ineffective for failing to present mitigation evidence at the sentencing hearing. Appellant fails to demonstrate that trial counsel was deficient or that he was prejudiced. As stated previously, appellant was facing a mandatory sentence of life in prison and presenting mitigation evidence would not have affected the outcome of the proceedings. To the extent that appellant claims that trial counsel should have presented mitigation evidence to alter the district court's decision to add the recommendation regarding parole to the judgment of conviction, appellant fails to demonstrate that trial counsel should have known the district court would add that recommendation. *See Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). Therefore, the district court did not err in denying this claim.

Fourth, appellant claims that trial counsel was ineffective for failing to file a direct appeal on his behalf. He claims that counsel should have appealed because of the recommendation by the district court regarding parole eligibility in the judgment of conviction. He claims that this claim had a reasonable likelihood of success on appeal. Appellant fails to demonstrate that trial counsel was deficient or that he was prejudiced. Appellant was informed of his limited right to appeal in his guilty plea agreement and trial counsel sent him a letter a few days after sentencing which explained how and when to appeal. Appellant never


responded to the letter or expressed dissatisfaction regarding his sentence. Therefore, trial counsel had no duty to file a notice of appeal on appellant's behalf. *See Toston v. State*, 127 Nev. ___, ___, 267 P.3d 795, 800 (2011). Further, appellant did not request information regarding an appeal and, as stated previously, this claim did not have a reasonable probability of success on appeal. Accordingly, counsel had no duty to consult with appellant about an appeal. *See id.* at ___, 267 P.3d at 799. Thus, the district court did not err in denying this claim.

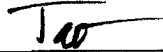
Finally, appellant claimed that his plea was not knowing or voluntary. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently. *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); *see also Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion. *Hubbard*, 110 Nev. at 675, 877 P.2d at 521. 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); *Bryant*, 102 Nev. at 271, 721 P.2d at 367.


Appellant fails to demonstrate that his plea was invalid. He was thoroughly canvassed by the district court regarding the consequences of the plea. Further, he was given two opportunities to withdraw his plea prior to sentencing. The first time occurred during the change of plea hearing when appellant refused to admit his guilt. The district court would have allowed him to withdraw then but appellant indicated he wanted to continue. The second time occurred at the sentencing hearing. The district court had previously forgotten to canvass appellant regarding

lifetime supervision and allowed him the opportunity to withdraw his plea. Appellant again chose to continue with sentencing. Therefore, given the totality of the circumstances, appellant fails to demonstrate that his plea was invalid, and the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. James E. Wilson, District Judge
Karla K. Butko
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk