

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICHARD DENSON,
Appellant,
vs.
D. W. NEVEN, WARDEN,
Respondent.

No. 65839

FILED

JUL 14 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT.
BY *J. Williams*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying, in part, a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; David B. Barker, Judge.

On appeal, appellant Richard Denson claims the district court erred in denying his ineffective assistance of counsel claims raised in his September 26, 2011, petition. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his 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, 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). To demonstrate

¹Denson filed post-conviction petitions in two separate cases, C257081 and C257359, raising similar claims. Denson pleaded guilty in both cases pursuant to a global plea agreement. The district court resolved both petitions in one order. This is the appeal from the order filed in C257081.

prejudice resulting from a deficient performance at sentencing, a petitioner must demonstrate 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 at 697. We give deference to the 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, Denson claims trial counsel were ineffective during the plea negotiation process because the process was rushed, happened in the courtroom, and occurred without one of Denson's counsel being present.² Denson fails to demonstrate that counsels' performance was deficient and resulted in prejudice. Based on the testimony at the evidentiary hearing, it was Denson who pushed for a plea bargain on the Friday before his trial in the instant case was supposed to start. Further, he specifically waived his counsel's presence for the instant case on the record and was canvassed by the district court regarding the waiver. Finally, Denson fails to allege he suffered any prejudice. He fails to demonstrate that but for the errors of counsel he would not have pleaded guilty and would have insisted on going to trial. Therefore, the district court did not err in denying this claim.

²Denson's trial counsel in the instant case was not present when he decided to plead guilty. Instead, his counsel from case number C257359 handled the plea for both cases.

To the extent Denson claims his plea was invalid because he did not understand he could be sentenced to consecutive terms, this claim is belied by the record. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing 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.

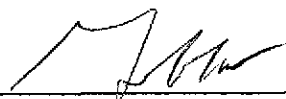
Denson's written guilty plea agreement informed him his sentences could be run consecutive. Further he was canvassed by the district court and acknowledged he understood he could be sentenced to a consecutive term. Finally, at the evidentiary hearing, Denson testified he understood he could get consecutive time but thought his sentences would be run concurrent because his offenses were nonviolent. A defendant's subjective belief as to a potential sentence is insufficient to invalidate a guilty plea as involuntary and unknowing. *Rouse v. State*, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975). Therefore, the district court did not err in denying this claim.

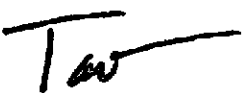
Next, Denson claims trial counsel was ineffective at sentencing because she failed to prepare. He claims trial counsel did not review his prior convictions and did not argue several of the convictions were old and stale and all of them were nonviolent. He also claimed trial counsel did not develop mitigation evidence including he had worked for

two years as a miner, had the support of his family, or had struggled to find work as a felon. Denson fails to demonstrate he was prejudiced by counsel's failure to prepare more for sentencing. Denson stipulated to treatment as a large habitual criminal. The only real issue at sentencing was whether this case should be run consecutive to his other case. The district court concluded, given Denson's overwhelming and expansive criminal record, he could not demonstrate a reasonable probability he would have received concurrent time rather than consecutive time had trial counsel presented additional mitigation evidence. Substantial evidence supports the decision of the district court. Denson had numerous prior convictions that spanned 24 years and 5 states. He also had 5 pending cases, three of which were dismissed pursuant to the negotiations and the State also agreed not to pursue other uncharged cases from 2009 and 2010. Further, Denson allegedly committed another crime while out on bail in the instant case. Therefore, the district court did not err in denying this claim.

Having reviewed the record and concluded that Denson is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. David B. Barker, District Judge
Dayvid J. Figler
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk