

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DOUGLAS HARRY WARENBACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66294

FILED

APR 14 2015

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

ORDER OF AFFIRMANCE

This is an 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; David B. Barker, Judge.

In his petition filed on May 12, 2014, appellant Douglas Warenback claimed that he received ineffective assistance of counsel. 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 that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v.*

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

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 v. Washington*, 466 U.S. 668, 697 (1984). 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, Warenback claimed that counsel was ineffective for failing to challenge the arrest warrant as invalid. He claimed that he did not make certain statements on voicemail as claimed by the police and some of the statements used were not from voicemail but were actually from text messages and were exculpatory. Warenback failed to demonstrate prejudice because he failed to demonstrate that this motion would have been successful, that the text messages were exculpatory, or that there was a reasonable probability he would not have pleaded guilty. Therefore, the district court did not err in denying this claim.

Second, Warenback claimed that counsel was ineffective for failing to convey his acceptance of a guilty plea agreement. This claim is belied by the record. Warenback had until a hearing held on May 29, 2013, to accept the plea. At that hearing, counsel, with Warenback sitting next to him, informed the district court and State that Warenback was rejecting the offer. Warenback did not speak up at this hearing or refute this statement. Therefore, the district court did not err in denying this claim.

Third, Warenback claimed that counsel was ineffective for stating that Warenback would waive all procedural defects when he pleaded to a fictitious charge. This claim is belied by the record. Warenback was thoroughly canvassed regarding the fictitious charge and counsel waived the procedural defects so that he could plead to the fictitious charge. Counsel did not waive any other procedural defects. Therefore, the district court did not err in denying this claim.

Fourth, Warenback claimed that counsel was ineffective for waiving, without Warenback's consent, his right to cross-examine the victim's mother at sentencing regarding the text messages he sent her and her statement that he had been previously convicted or committed other bad acts. Warenback failed to demonstrate that counsel was deficient or that he was prejudiced. With respect to the text messages, this testimony did not trigger the limited circumstances under which cross-examination should be permitted. *See Buschauer v. State*, 106 Nev. 890, 893-94, 804 P.2d 1046, 1048 (1990). With respect to the prior bad acts, Warenback failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel cross-examined the victim's mother regarding the prior bad acts. We note that the reference to these prior bad acts was only a small portion of her statement. Therefore, the district court did not err in denying this claim.

Fifth, Warenback claimed that counsel was ineffective for telling him that he would not be subject to lifetime supervision. This claim is without merit. Warenback is not subject to lifetime supervision. Therefore, the district court did not err in denying this claim.


Sixth, Warenback claimed that counsel was ineffective for failing to challenge the district court's statement that it would sentence Warenback pursuant to parole and probation's recommendation. Warenback claimed that the district court misstated the recommendation. This claim is belied by the record. The district court never stated it was going to sentence Warenback pursuant to parole and probation's recommendation. Therefore, the district court did not err in denying this claim.

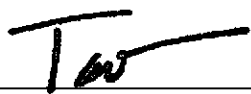
Seventh, Warenback claimed that counsel was ineffective for failing to provide him with a copy of the statements the victim made to police officers in California. Specifically, he claimed that because he was unable to read these statements, he was unable to develop empathy for the victim. The district court stated that one of the reasons he was sentencing Warenback harshly was because he did not appear to have empathy for the victim. Warenback failed to demonstrate that he was prejudiced because he failed to demonstrate a reasonable probability of a different outcome at sentencing had these statements been provided to him. Therefore, the district court did not err in denying this claim.

Finally, Warenback challenged Nevada's kidnapping laws and based on that challenge, he claimed that his conviction constituted cruel and unusual punishment. This claim fell outside the scope of claims available to be raised in a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction entered pursuant to a guilty plea. NRS 34.810(1)(a). Therefore, the district court did not err in denying this claim.

Having considered Warenback's contentions and concluded that he is not entitle to relief, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. David B. Barker, District Judge
Douglas Harry Warenback
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²We have reviewed all documents that Warenback has submitted 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 Warenback 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.