

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRET HENRY KELLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67278

FILED

JUN 17 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
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. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Appellant Bret Henry Keller argues the district court erred in denying the claims of ineffective assistance of counsel raised in his July 15, 2013, petition without conducting an evidentiary hearing. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate 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. 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). To warrant an evidentiary hearing, a petitioner must raise claims supported by

specific allegations that are not belied by the record, and if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Keller argues his counsel was ineffective for coercing him into pleading guilty by telling him the plea offer was a "take it or leave it" offer. Keller fails to demonstrate his counsel's performance was deficient or resulting prejudice. Keller acknowledged in the plea agreement and at the plea canvass that he did not act under duress or coercion. Moreover, Keller fails to demonstrate that counsel's description of the plea offer from the State constituted improper coercion. Keller fails to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on going to trial had counsel explained the plea offer using different terms. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, Keller argues his counsel was ineffective for failing to prepare for the sentencing hearing. Keller asserts counsel should have presented expert testimony regarding Keller's mental health or substance abuse issues and should have spent more time reviewing the presentence investigation report (PSI). Keller fails to demonstrate his counsel's performance was deficient or resulting prejudice. Keller did not demonstrate there were any mental health or substance abuse experts that would have testified in a favorable manner and bare claims, such as this one, are insufficient to demonstrate a petitioner is entitled to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Further, counsel at the sentencing hearing stated that he had reviewed

the PSI and requested a change to that document. Accordingly, Keller fails to demonstrate counsel's actions with respect to the PSI were objectively unreasonable. In addition, Keller does not explain how further review of the PSI would have resulted in a reasonable probability of a different outcome. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Third, Keller argues his counsel was ineffective for failing to present the testimony of his family members at the sentencing hearing. Keller asserts they would have informed the court that Keller planned to seek counseling, employment, rehabilitation, and move to Washington to facilitate those life changes. Keller fails to demonstrate his counsel's performance was deficient or resulting prejudice. At the sentencing hearing, counsel advised the court of Keller's initiation of counseling for domestic violence and alcohol issues. Keller fails to demonstrate it was objectively unreasonable for counsel not to have presented similar information through Keller's family members. Keller also fails to demonstrate a reasonable probability of a different outcome at sentencing had those issues been further discussed, given the violent nature of his crime and his lengthy criminal history involving domestic abuse. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Fourth, Keller argues his counsel was ineffective at the sentencing hearing for failing to object to improper victim impact testimony regarding prior domestic violence incidents. Keller fails to demonstrate resulting prejudice. The challenged victim impact testimony

was considered on direct appeal under a plain error standard and the Nevada Supreme Court concluded Keller was not prejudiced by the victim impact testimony. *Keller v. State*, Docket No. 59931 (Order of Affirmance, July 25, 2012). Given the parties' separate discussion of Keller's prior domestic abuse of the victim and the violent nature of the facts of the instant crime, Keller fails to demonstrate a reasonable probability of a different outcome had counsel objected at the sentencing hearing to the brief victim impact testimony regarding additional violent incidents. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

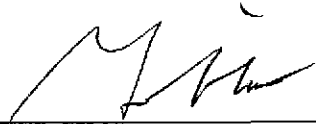
Fifth, Keller argues his counsel was ineffective for failing to argue his sentence of 8 to 20 years in prison was excessive. Keller fails to demonstrate his counsel's performance was deficient or resulting prejudice. Keller does not demonstrate the relevant sentencing statutes are unconstitutional. *See Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 248 (1996). Moreover, Keller's sentence of 8 to 20 years falls within the parameters of the relevant statutes. *See* NRS 193.330(1)(a)(1); NRS 200.030(4), (5). Keller fails to demonstrate a reasonable probability of a different outcome had counsel argued his sentence was impermissibly excessive. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

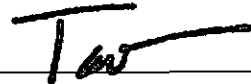
Finally, Keller argues his appellate counsel was ineffective for failing to argue on appeal that his plea was involuntary. This claim was not raised in the petition before the district court, and we decline to consider this claim in the first instance on appeal. *See Davis v. State*, 107

Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 1012-13, 103 P.2d 25, 33 (2004).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Jerome Polaha, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk