

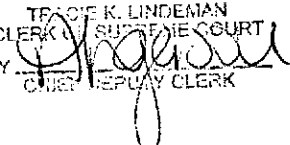
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HERON CRUZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68013

FILED

DEC 18 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

In his petition filed on January 13, 2015, appellant Heron Cruz claimed 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, 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). We give deference to

¹This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).

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, Cruz claimed counsel was ineffective for failing to relay "disclosures" to him. Cruz failed to demonstrate counsel was deficient because he failed to show what these disclosures were and his claim is merely speculative. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Further, he failed to demonstrate resulting prejudice because he failed to demonstrate there was a reasonable probability he would not have pleaded guilty had counsel relayed the disclosures to him. Therefore, the district court did not err in denying this claim.

Second, Cruz claimed counsel was ineffective at the hearing on his motion to withdraw his guilty plea. Specifically, he claimed counsel failed to present supportive authorities or argue there were legal grounds to withdraw the plea. Cruz failed to demonstrate counsel was deficient because he failed to demonstrate what authorities counsel should have presented or what legal grounds would have justified withdrawing the plea. *See id.* Therefore, the district court did not err in denying this claim.

Third, Cruz claimed counsel was ineffective at the hearing on his motion to suppress. Specifically, Cruz claimed counsel should have: questioned a detective; impeached a property report filled out prior to the search warrant being granted; measured the apartment to show that officers could not see the Patron tequila bottle in the bedroom; subpoenaed records from the squad car when he was questioned; subpoenaed Cruz's aunt to testify; subpoenaed an officer who would have testified about

Cruz's uncle's consent to search; questioned the interpreter why it took so long to explain a consent to search form; and argued it was irrelevant to ask about the blue pants with his name on them. Cruz failed to demonstrate counsel was deficient or resulting prejudice. Several of these claims were raised by counsel at the hearing. As to the claims not raised by counsel, Cruz failed to demonstrate these claims would have changed the outcome of the suppression hearing, and therefore, he failed to demonstrate a reasonable probability he would not have pleaded guilty. Accordingly, the district court did not err in denying these claims.

Next, Cruz claimed counsel was ineffective at sentencing. To prove ineffective assistance of counsel, a petitioner must demonstrate 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 at sentencing would have been different. *Strickland*, 466 U.S. at 687-88; *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*, 121 Nev. at 686, 120 P.3d at 1166.

First, Cruz claimed counsel was ineffective because he was unprepared for sentencing and should have subpoenaed Cruz's aunt and social worker. Cruz fails to demonstrate counsel was deficient or resulting prejudice. Counsel prepared a lengthy sentencing memorandum in this


case which detailed his early childhood history, the abuse he suffered, his juvenile history, and included a letter from his aunt. The district court was aware of his mental health history and his childhood history. Cruz failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel provided further information or presented his aunt and social worker at the hearing. Therefore, the district court did not err in denying this claim.


Second, Cruz claimed counsel was ineffective for failing to challenge the deadly weapon enhancement because he did not use the firearm in such a way that made the situation inherently dangerous. Cruz failed to demonstrate counsel was deficient or resulting prejudice. Cruz pleaded guilty to robbery with the use of a deadly weapon. Challenging the enhancement at sentencing would have been improper. Further, Cruz, by entry of his plea, admitted to using the firearm to rob a store clerk and two females outside the store. He also admitted to shooting the firearm several times into the air. Therefore, he failed to demonstrate a reasonable probability of a different outcome at trial had counsel made an argument regarding the deadly weapon enhancement. Accordingly, the district court did not err in denying this claim.

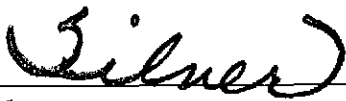
Finally, Cruz claimed counsel was ineffective for failing to correct the State's lack of proof regarding prior felonies. Specifically, Cruz claims the State incorrectly stated he had several felonies but Cruz only has one. Cruz fails to demonstrate counsel was deficient or resulting prejudice. The State did not argue Cruz had multiple felonies. Instead the State pointed out Cruz had an active warrant out in Texas for a robbery committed there. Further, Cruz failed to demonstrate a reasonable probability of a different outcome at sentencing because the

district court did not acknowledge the warrant and rested its sentencing decision on the facts of the case and Cruz's mental health issues. Therefore, the district court did not err in denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Susan Johnson, District Judge
Heron Cruz
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²We have reviewed all documents Cruz has submitted in this matter, and we conclude no relief based upon those submissions is warranted. To the extent Cruz has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we decline to consider them in the first instance.