


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENNETH ARTHUR HENDREN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67574

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. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

On appeal from the denial of his January 11, 2013, petition, appellant Kenneth Arthur Hendren first argues the district court erred by concluding he entered a knowing and voluntary guilty plea. Hendren asserts he entered his plea under duress from his counsel and he did not receive a benefit from entry of his plea. Hendren fails to meet his burden to demonstrate that he did not enter a knowing and voluntary plea. See *Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994); *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

Hendren was informed in the guilty plea agreement and at the plea canvass of the charges he faced, of the possible range of penalties, and of the rights he waived by entering a guilty plea. In addition, Hendren acknowledged in the plea agreement and at the plea canvass that he did not act under duress or due to threats. The district court concluded that the totality of the circumstances demonstrated Hendren's guilty plea was valid, see *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000),

and substantial evidence supports that conclusion. Therefore, the district court did not err in denying this claim.

Next, Hendren argues the district court erred in denying his claims of ineffective assistance of counsel 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 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). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific allegations 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, Hendren argues his counsel was ineffective for failing to move to suppress the shotgun discovered in his vehicle because the traffic stop may have been pretextual. Hendren fails to demonstrate his counsel's performance was deficient or resulting prejudice. The record before this court shows the police officer stopped Hendren's vehicle for the failure to illuminate his license plate. As the officer's decision to effectuate a traffic stop need only be supported by reasonable suspicion of illegal activity, *see State v. Rincon*, 122 Nev. 1170, 1173, 147 P.3d 233, 235 (2006), Hendren fails to demonstrate counsel was objectively unreasonable for failing to file a motion to suppress. Hendren also fails to demonstrate

a reasonable probability of a different outcome had counsel sought to suppress the shotgun evidence because he does not demonstrate the traffic stop was unlawful. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, Hendren argues his counsel was ineffective for advising Hendren to reject a plea offer. Hendren also argues his counsel improperly advised him to enter a guilty plea at a later time, which resulted in a longer sentence than he would have faced had he accepted the earlier offer. Hendren fails to demonstrate his counsel's performance was deficient or resulting prejudice. Hendren alleged in his petition counsel advised him that the initial plea offer was not favorable and that they should proceed to trial. Hendren fails to demonstrate this was the advice of objectively unreasonable counsel. The record further reveals Hendren later chose to plead guilty without conducting negotiations with the State and the district court canvassed Hendren personally regarding that decision. Therefore, Hendren fails to demonstrate a reasonable probability of a different outcome had counsel offered different advice regarding Hendren's choice to plead guilty. Moreover, Hendren fails to meet his burden to demonstrate that he was prejudiced by his counsel's performance, as he does not demonstrate counsel could have obtained any favorable concessions from the State or that the district court would have accepted those concessions, particularly given the evidence of his guilt and a lengthy criminal record. *See Lafler v. Cooper*, 566 U.S. ___, ___, 132 S. Ct. 1376, 1385 (2012); *Missouri v. Frye*, 566 U.S. ___, ___, 132 S. Ct. 1399, 1408-09. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Third, Hendren argues his counsel was ineffective for stating at the sentencing hearing that Hendren had two firearms when he actually only had one. Hendren fails to demonstrate he was prejudiced. At the sentencing hearing, counsel mistakenly stated Hendren possessed two firearms when he actually possessed only one. However, the additional information before the district court correctly explained Hendren only possessed one firearm. Moreover, it is clear from the record the district court sentenced Hendren based upon his lengthy criminal history and not based upon counsel's misstatement. Under these circumstances, Hendren fails to demonstrate a reasonable probability of a different outcome had counsel not made the misstatement. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.


Fourth, Hendren argues his counsel was ineffective for failing to file a presentence motion to withdraw his guilty plea. Hendren fails to demonstrate counsel's performance was deficient or resulting prejudice. As stated previously, the record demonstrates Hendren's guilty plea was valid. Hendren fails to demonstrate objectively reasonable counsel would have moved to withdraw Hendren's plea under these circumstances. Hendren fails to demonstrate a reasonable probability of a different outcome had counsel sought to withdraw his guilty plea. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

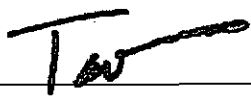
Next, Hendren argues his appellate counsel was ineffective for failing to properly argue the validity of his guilty plea in his briefs on direct appeal. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in


that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114. On direct appeal, the Nevada Supreme Court concluded a challenge to the validity of Hendren's guilty plea was not appropriately raised because he did not challenge it in the district court in the first instance. *Hendren v. State*, Docket No. 57893 (Order of Affirmance, January 12, 2012). Because this claim was not appropriately raised on direct appeal, Hendren fails to demonstrate a reasonable probability of success on appeal had appellate counsel raised different arguments. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Finally, Hendren argues that the cumulative errors of counsel amount to ineffective assistance of counsel and should warrant vacating the judgment of conviction. Appellant fails to demonstrate that any errors, even if considered cumulatively, amount to ineffective assistance of counsel. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Douglas Smith, District Judge
Law Office of Julian Gregory, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk