

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MONIQUE KARIEN BORK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68896

FILED

FEB 17 2016

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

ORDER OF AFFIRMANCE

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

Validity of guilty plea

In her petition filed May 5, 2015, appellant Monique Bork claimed her guilty plea was not entered knowingly, intelligently, or voluntarily because the district court failed to properly canvass her on the elements of the crime and her appellate rights and because her plea was coerced.

“To correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the plea.” NRS 176.165. “A manifest injustice occurs where a defendant makes a plea involuntarily or without knowledge of the consequences of the plea—or where the plea is entered without knowledge of the charge or

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).

that the sentence actually imposed could be imposed.” *State v. James*, 500 N.W.2d 345, 348 (Wis. Ct. App. 1993) (internal quotation marks omitted). “[We] will not overturn the district court’s determination on manifest injustice absent a clear showing of an abuse of discretion.” *Rubio v. State*, 124 Nev. 1032, 1039, 194 P.3d 1224, 1229 (2008) (internal quotation marks omitted).

The district court found Bork entered her plea freely, voluntarily, and knowingly and her claims to the contrary were belied by the record. The plea canvass demonstrates Bork was fully apprised of her rights, she was not coerced or threatened, and she was informed her rights to appeal would be limited by pleading guilty. And, in her written plea agreement, Bork acknowledged her rights to appeal would be limited by pleaded guilty and she asserted she was not acting under duress or coercion.

The record supports the district court’s findings and demonstrates Bork told the district court she read the information and understood the charge against her. We conclude the district court did not abuse its discretion in this regard. *See Molina v. State*, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004) (petitioner bears the burden of proving her plea is invalid).

Ineffective assistance of counsel

Bork raised several claims of ineffective assistance of counsel. To prove ineffective assistance of counsel, 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, the outcome of the proceedings would have been different. *Strickland v. Washington*,

466 U.S. 668, 687-88 (1984); *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (adopting the *Strickland* test). To demonstrate prejudice sufficient to invalidate a judgment of conviction based on a guilty plea, the petitioner must show that, but for trial 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*, 112 Nev. at 988, 923 P.2d at 1107. Both components of the inquiry—deficiency and prejudice—must be shown. *Strickland*, 466 U.S. 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, Bork claimed counsel was ineffective for failing to object at sentencing to a non-victim impact statement when the speaker was "looking directly at petitioner, putting on a theatrical performance, [and] verbally abusing petitioner." The district court found Bork failed to identify any legal basis for an objection, the Nevada Supreme Court determined the error in admitting the non-victim speaker's testimony did not result in prejudice, and Bork cannot establish prejudice.

Second, Bork claimed counsel was ineffective for failing to adequately review and investigate her case prior to the entry of her plea. She specifically claimed counsel should have consulted with medical experts to determine whether an earlier medical intervention would have changed the outcome. The district court found Bork failed to establish that any information obtained through such a consultation would have been helpful to her case or would have caused her to insist on going to trial.

Third, Bork claimed counsel was ineffective for failing to move to dismiss the child-abuse-and-neglect charge based on the statute of limitations. The district court found Bork could not show counsel acted unreasonably or she was prejudiced because the statutes of limitation provide an affirmative defense, the information alleged she lied to medical professionals about the nature of the victim's injuries, and the State would have been able to present evidence she committed the offense in a secretive manner that tolled the statute of limitations.

Fourth, Bork claimed counsel was ineffective for failing to secure a guaranteed probation negotiation. The district court found Bork failed to demonstrate prejudice because she agreed to plead guilty with the understanding that the State would be free to argue at sentencing and she failed to show that the State would have been willing to extend such a plea offer.

Fifth, Bork claimed counsel was ineffective for failing to contact her during the pendency of her direct appeal. The district court found Bork failed to demonstrate that counsel was in any way ineffective due to this alleged lack of communication.

Sixth, Bork claimed counsel was ineffective for denying her right to proceed with the preliminary hearing before agreeing to enter a guilty plea. The district court found Bork voluntarily waived her right to a preliminary hearing; she and counsel were able to negotiate the dismissal of a murder charge by agreeing to plead guilty before concluding the preliminary hearing; and, given the favorable negotiation, she cannot show counsel was ineffective or she would have insisted on going to trial.

The record demonstrates the district court's factual findings are supported by substantial evidence and are not clearly wrong, and we

conclude Bork failed to demonstrate she was prejudiced by counsel's representation. *See Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (petitioner bears the burden of proving ineffective assistance).

Improperly raised claims

Bork claimed her conviction violates double jeopardy, the district court sentenced her illegally based on a prejudicial atmosphere, the district court exhibited judicial bias by imposing a maximum sentence and denying her request for resentencing before a different judge, and the district court committed misconduct by allowing a non-victim to give a victim impact statement and by posting media links to her case on a Facebook page for an "electoral advantage."

The district court found none of these claims were properly raised in this petition because the underlying conviction was based on a guilty plea and they did not allege ineffective assistance of counsel or challenge the validity of the guilty plea. The district court further found the double jeopardy claim was waived because it was not raised on direct appeal and the remaining claims were barred by the doctrine of the law of the case. We conclude the district court did not err in this regard. *See* NRS 34.810(1)(a); *Franklin v. State*, 110 Nev. 750, 751-52, 877 P.2d 1058, 1059 (1994), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 150, 979 P.2d 222, 223-24 (1999); *Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).


Cumulative error


Bork claimed she is unlawfully imprisoned as a result of the cumulative effect of errors made by the district court, the State, and defense counsel. However, even assuming errors may be cumulated to


find unlawful imprisonment, Bork failed to demonstrate any error, so there was nothing to cumulate.

For the foregoing reasons, we conclude the district court did not err by denying Bork's request for counsel and by denying her habeas petition. See NRS 34.750(1); *McKague v. Whitley*, 112 Nev. 159, 163, 912 P.2d 255, 257 (1966). Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Stefany Miley, District Judge
Monique Karien Bork
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²We deny Bork's pro se motion for the appointment of counsel.