


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NORMAN SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70693

FILED

NOV 18 2016

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from the denial of a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Appellant Norman Smith argues the district court erred by denying his petition filed on January 5, 2016. In his petition, he claimed his plea was not entered knowingly and voluntarily because he did not understand sentencing was up to the district court and his counsel was ineffective for telling him he would get concurrent time and the district court would follow the recommendation of the parties.

A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently. *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also *Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). Further, this court will not reverse a district court's determination

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

concerning the validity of a plea absent a clear abuse of discretion. *Hubbard*, 110 Nev. at 675, 877 P.2d at 521. In determining the validity of a guilty plea, this court looks to the totality of the circumstances. *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); *Bryant*, 102 Nev. at 271, 721 P.2d at 367. 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 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).


Smith failed to demonstrate withdrawal of his plea was necessary to correct a manifest injustice. See NRS 176.165. Smith was informed in the guilty plea agreement that while the parties agreed to recommend a specific sentence, sentencing was up to the district court. Further, Smith was specifically canvassed regarding his understanding that sentencing was up to the district court. Smith was asked, "Do you understand that sentencing is strictly up to the Court so nobody can promise you probation, leniency, or special treatment?" He was also asked, "Do you also understand nobody can promise you a particular sentence; so even though this says stipulate four to ten, that's a


stipulation between you and the State and ultimately it is up to the judge." Smith indicated he understood. Therefore, based on the totality of the circumstances, Smith fails to demonstrate the district court abused its discretion by denying his claim that his plea was not entered knowingly and voluntarily.

Smith also fails to demonstrate the district court erred by denying his claim counsel was ineffective for telling him he would get concurrent time and the district court would go along with the recommendation. Candid advice about the possible outcome of a sentencing hearing is not evidence of deficient performance. Further, as discussed above, Smith was informed both in the guilty plea and during the guilty plea canvass, that sentencing was up to the district court and no one could promise him a particular sentence. Therefore, Smith fails to demonstrate a reasonable probability of a different outcome had counsel's advice been deficient. Accordingly, we conclude the district court did not err in denying the petition, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Norman Smith
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk