

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PAUL SANTIAGO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69091

FILED

DEC 30 2016

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

***ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING***

Appellant Paul Santiago appeals from an order of the district court denying his June 27, 2013, postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Santiago argues the district court erred in denying his claims of 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). To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual 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, Santiago argued his counsel was ineffective for failing to conduct independent investigation so as to discover important impeachment and exculpatory evidence at an earlier time.¹ Santiago also alleged counsel should have performed further actions to receive this information in time to properly prepare for trial.

Santiago argues this evidence was discovered shortly before trial was scheduled to begin, and he and counsel did not have sufficient time to review that evidence. Santiago asserted as a result, he was not able to enter a knowing guilty plea because counsel was not prepared for trial and he could not properly evaluate the evidence that would have been produced at trial. Santiago asserts that, had he understood the new evidence, he would not have entered a guilty plea and would have insisted on going to trial.²

¹Santiago alleges the evidence contained information regarding multiple false allegations made by the victim, including false allegations accusing others of committing sexual offenses against her. Santiago also alleges the evidence contained information from Santiago's place of employment, which was also where the victim resided, which would have demonstrated Santiago did not have sufficient time to commit the sexual offenses as the victim alleged.

²The State argues that any assertion Santiago's guilty plea was unknowingly entered is barred by the doctrine of claim preclusion because the district court previously determined his plea was valid. However, this claim is properly considered in this appeal because the Nevada Supreme Court reversed the district court's order denying postconviction relief and remanded for the appointment of counsel. *Santiago v. State*, Docket No. 54577 (Order of Reversal and Remand, June 11, 2014).

During a hearing five days before trial was scheduled to begin, defense counsel informed the district court that he had recently received evidence stemming from a civil lawsuit regarding this matter. Counsel asserted he had requested evidence obtained during the civil case approximately one year previously, but the attorneys involved in the civil matter had only recently provided that evidence to him. Counsel stated he had been prepared for trial to begin as scheduled prior to the disclosure of this evidence, however he needed additional time to review the new evidence. Given the late disclosure of this information, defense counsel and the State requested a lengthy continuance of the trial. Of note, counsel informed the district court that he could have been more diligent in obtaining these records and stated “[t]hese are civil records that I was unaware of.” Counsel further warned he was concerned he would provide ineffective assistance of counsel if forced to proceed to trial as scheduled due to the voluminous nature of the recently obtained evidence. The district court decided to delay the start of trial only two additional days, concluding that a total of seven days was sufficient for the parties to review the new evidence and be properly prepared for trial. Five days later, Santiago accepted a plea offer and entered a guilty plea to two counts of attempted sexual assault.

The district court did not conduct an evidentiary hearing regarding this claim. Rather, the district court’s order states its conclusion that Santiago’s defense counsel conducted a thorough investigation and discussed counsel’s investigation regarding additional evidence. The district court denied this claim on this basis. This was error, as the investigation referenced in the district court’s order did not encompass the entirety of the evidence at issue in this claim, particularly

in light of counsel's acknowledgment that he was unaware of this new evidence. Further, the record does not reveal the extent of defense counsel's investigation, why counsel had to rely upon the civil attorneys' disclosures to receive this information, or why counsel could not have discovered this evidence at an earlier time through his own independent investigation.

We note "defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *State v. Love*, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993) (internal quotation marks omitted). Given counsel's duty, Santiago's claim that his defense counsel failed to properly investigate so as to discover this evidence is a claim that was supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225.

Therefore, the district court must conduct an evidentiary hearing to ascertain the scope of defense counsel's pretrial investigation, whether counsel could have reasonably obtained this evidence through independent investigation, and whether he performed reasonably diligent actions to obtain this information from the civil attorneys.³ Further, the district court must also consider, in light of the evidence and testimony

³To the extent Santiago raised a separate claim that he should be permitted to withdraw his guilty plea because it was unknowingly entered due to a failure to review newly discovered evidence, the district court should consider whether the evidence produced at the evidentiary hearing demonstrates withdraw of Santiago's guilty plea is necessary to correct a manifest injustice. *See* NRS 176.165; *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000).

received at the evidentiary hearing regarding counsel's investigation, whether Santiago demonstrates a reasonable probability he would have refused to plead guilty and would have insisted on going to trial.⁴

Second, Santiago argued his counsel was ineffective for failing to ensure he understood the ramifications of his plea. Santiago asserted counsel failed to explain he could not withdraw his plea if the sentencing judge did not follow the agreed upon sentence recommendation. Santiago failed to demonstrate his counsel's performance was deficient or resulting prejudice. In the written plea agreement, Santiago acknowledged he had not been promised or guaranteed a particular sentence and that his sentence was to be determined by the district court within the statutory limits. At the plea canvass, the district court explained that while the parties had agreed upon a sentence, the district court would ultimately decide the appropriate sentence and Santiago asserted he understood. In addition, at the plea canvass Santiago's counsel asserted he had explained to Santiago the district court had the authority to decide the ultimate sentence imposed. Under these circumstances, Santiago did not demonstrate counsel failed to explain the ramifications of his guilty plea or a reasonable probability of a different outcome had counsel further

⁴We note Santiago was initially charged with two counts of sexual assault of a minor under the age of 14 and one count of lewdness with a child under 14 years of age. We further note Santiago also agreed to plead guilty to open or gross lewdness in a separate criminal case as part of the plea agreement, but the record before this court does not contain information regarding the scope of the plea negotiations for that separate case. The penalties Santiago faced in both cases had he rejected the plea offer should be considered when the district court decides whether Santiago demonstrates prejudice stemming from this claim.

explained the ramifications to him. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Third, Santiago argued his counsel was ineffective for failing to make his guilty plea conditional upon the agreed upon sentence of probation. Santiago failed to demonstrate he was prejudiced by counsel's performance. Entry of a conditional plea generally requires consent of both the court and the district attorney. *See* NRS 174.035(3). Santiago did not allege that counsel could have persuaded both the court and the district attorney to consent to a conditional plea. Santiago's failure to assert counsel could have persuaded the district court to accept a conditional plea is of particular importance in this case because the sentencing court exercised its discretion to deny the parties' sentencing recommendation for probation. *See Missouri v. Frye*, 566 U.S. ___, ___, 132 S. Ct. 1399, 1409 (2012) ("Defendants must also demonstrate a reasonable probability the plea would have been entered without . . . the trial court refusing to accept it, if they had the authority to exercise that discretion under state law."). Accordingly, Santiago fails to meet his burden to demonstrate prejudice stemming from any failure of counsel to ensure his plea was conditional upon the agreed upon sentence of probation. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Fourth, Santiago argued his counsel was ineffective for failing to ensure Santiago entered an *Alford*⁵ plea. Santiago failed to demonstrate his counsel's performance was deficient or resulting

⁵*North Carolina v. Alford*, 400 U.S. 25 (1970).

prejudice. Because an *Alford* plea is equivalent to a guilty plea insofar as how the court treats a defendant, *State v. Lewis*, 124 Nev. 132, 134 n.1, 178 P.3d 146, 147 n.1 (2008), Santiago did not demonstrate that failure to ensure the plea was entered pursuant to *Alford* was objectively unreasonable or that any such failure altered the outcome of the proceedings. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Fifth, Santiago argued his counsel was ineffective for failing to correct the presentence investigation report (PSI) and the psychosexual examination report. Santiago asserted those reports improperly made it appear as if there was overwhelming evidence of Santiago's guilt, which resulted in a lengthier sentence than was warranted. Santiago failed to demonstrate his counsel's performance was deficient or resulting prejudice. During the sentencing hearing, the district court acknowledged that the PSI made it appear as if there was significant evidence of Santiago's guilt. However, the State then informed the district court that it had entered into the plea deal because it had concerns the evidence produced at trial would not have been as strong as the PSI made it appear to be. Given the State's acknowledgment regarding the PSI and the evidence that could be produced at trial, Santiago failed to demonstrate it was objectively unreasonable for counsel to decline to reiterate this information. And because the district court was informed by the State of issues involving the strength of the evidence against Santiago, Santiago failed to demonstrate a reasonable probability of a different outcome had counsel made similar arguments. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Sixth, Santiago argued his counsel was ineffective for misrepresenting his ability to have this case transferred to a different district court judge. Santiago asserted counsel induced him to agree to the plea deal by informing him he would seek a different sentencing judge if the judge would not follow the agreed upon sentence. Santiago failed to demonstrate resulting prejudice. Counsel filed a motion requesting transfer to a different district court judge and that motion was denied. Even assuming counsel informed Santiago this case would be transferred to a different judge, Santiago fails to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on going to trial, particularly in light of the charges he faced had he rejected the State's plea offer. Therefore, the district court did not err in denying this claim.

Seventh, Santiago argued his counsel was ineffective for failing to file a motion arguing the case should have been dismissed due to preindictment delay. Santiago asserts the State improperly waited almost three years following the alleged incident until it filed the initial charges. Santiago failed to demonstrate his counsel's performance was deficient or resulting prejudice.

A criminal defendant alleging he suffered from an improper preindictment delay must demonstrate that actual, nonspeculative prejudice resulted from the delay or that the State intentionally delayed the initiation of the prosecution to gain a tactical advantage. *See Wyman v. State*, 125 Nev. 592, 600-01, 217 P.3d 572, 578 (2009); *see also United States v. Gouveia*, 467 U.S. 180, 192 (1984) (explaining that the defendant has the burden to prove that the delay in bringing an indictment "was a deliberate device to gain an advantage over him and that it caused him

actual prejudice in presenting his defense.”). Santiago made no argument as to how he suffered prejudice from the delay.

In addition, Santiago asserted the delay was caused by a detective, who admitted the delay occurred because he forgot to submit the paperwork to test DNA evidence and because he did not have enough time to work on this case. This information demonstrates the State did not intentionally delay prosecution of this matter in order to gain a tactical advantage over Santiago. Under these circumstances, Santiago failed to demonstrate objectively reasonable counsel would have sought dismissal of this matter due to preindictment delay or a reasonable probability of a different outcome had counsel done so. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.


Next, Santiago argues the district court erred in denying his claim of ineffective assistance of appellate counsel. 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 v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697.

Santiago argued his appellate counsel was ineffective for failing to challenge the voluntariness of his guilty plea. Santiago cannot demonstrate either deficiency or prejudice for this claim because counsel raised this claim on direct appeal, but the Nevada Supreme Court declined to consider it. *Santiago v. State*, Docket No. 63518 (Order of Affirmance, May 13, 2014). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

We conclude Santiago is only entitled to the relief stated herein, and we


ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Silver

TAO, J., dissenting:

Santiago's counsel received a large batch of previously unavailable records only days before trial, and asked for the trial to be continued, a request that the district court denied. After reviewing the records for five days, Santiago entered a guilty plea following a thorough and detailed canvass by the district court. Under these circumstances, Santiago has not demonstrated even colorably either that counsel did less than he could under the circumstances, or that Santiago would rationally have chosen to proceed to trial instead. I therefore respectfully dissent and would simply affirm.


_____, J.
Tao

cc: Hon. Kathleen E. Delaney, District Judge
McGillivray Law
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk