

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRANDON RAY MCNEIL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71057

FILED

AUG 15 2017

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

ORDER OF AFFIRMANCE

Brandon Ray McNeil appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

McNeil argues the district court erred in denying his claims of ineffective assistance of counsel raised in his May 6, 2016, petition. 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, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). To demonstrate prejudice regarding the decision to enter a guilty plea, a petitioner must demonstrate a reasonable probability, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.

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

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*, 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).

First, McNeil argued his counsel was ineffective for failing to move to dismiss the charges based upon an illegal arrest. McNeil acknowledged counsel moved to suppress his confession based in part upon an illegal arrest, but asserted counsel should have also moved to dismiss all of the charges against him. McNeil failed to demonstrate counsel's performance was deficient or resulting prejudice.

Counsel filed a motion to suppress McNeil's confession, based in part upon an assertion officers illegally arrested McNeil in his home without a warrant. The trial court conducted a suppression hearing and concluded the warrantless arrest was illegal, but declined to suppress McNeil's confession because McNeil knowingly waived his rights and voluntarily talked with the police officers following his arrest and transportation to a police station. *See New York v. Harris*, 495 U.S. 14, 21 (1990) (explaining when there is probable cause to arrest a suspect, an improper warrantless arrest in the home does not require suppression of later statements made outside of the home).

The remedy for an improper warrantless arrest is exclusion of evidence obtained as a result of such an arrest, not an outright dismissal of all charges. *See Edwards v. State*, 107 Nev. 150, 154, 808 P.2d 528, 530 (1991). Because the exclusionary rule was the proper remedy for McNeil's warrantless arrest, counsel's decision to seek suppression of McNeil's confession following the arrest was an action of an objectively reasonable defense attorney. Given the trial court's denial of his motion to suppress and the exclusionary-rule remedy for an improper arrest, McNeil failed to

demonstrate a reasonable probability of a different outcome had counsel sought dismissal of his charges based upon an illegal arrest. Therefore, we conclude the district court did not err in denying this claim.


Second, McNeil argued his counsel was ineffective for failing to fully litigate a motion to dismiss the charges due to interception of privileged communications between counsel and McNeil. McNeil appeared to assert counsel should have advised him not to enter a guilty plea until the trial court ruled on the motion to dismiss. McNeil failed to demonstrate his counsel's performance was deficient or resulting prejudice.


McNeil's counsel filed a motion to dismiss the charges against McNeil, asserting the Clark County Detention Center had improperly recorded phone calls between McNeil and counsel. However, before the trial court reached a decision regarding the motion, McNeil accepted a plea offer from the State and entered a guilty plea. In the written plea agreement, McNeil asserted he had discussed any possible defenses, defense strategies, and favorable circumstances with his counsel, and concluded accepting the plea bargain was in his best interest. Moreover, at the sentencing hearing, McNeil acknowledged he understood the motion would not be considered due to entry of his guilty plea. Further, in his petition, McNeil stated he informed his counsel he wished to pursue the motion to dismiss, but counsel advised him to accept the plea offer out of concern he would receive a lengthier sentence had he rejected the plea offer and proceeded to trial. Considering the record before this court and the circumstances McNeil asserted in his petition, McNeil failed to demonstrate his counsel's advice amounted to the advice of an objectively unreasonable counsel.

Further, in his petition McNeil raised bare allegations asserting he was prejudiced when the State intercepted attorney-client

communications. McNeil did not provide any detail regarding the allegedly intercepted attorney-client communications and he did not explain the nature of any prejudice he may have suffered due to the alleged interception of these communications. Such unsupported allegations were insufficient to demonstrate McNeil was entitled to relief. *See Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984). Under the circumstances in this case, we conclude McNeil failed to demonstrate the motion to dismiss had a reasonable likelihood of success. *See United States v. Singer*, 785 F.2d 228, 234 (8th Cir. 1986) (explaining identification of a Sixth Amendment violation, such as interception of attorney-client communications, does not warrant dismissal of criminal charges absent a showing of prejudice.). Therefore, we conclude the district court did not err in denying this claim.

Having concluded McNeil is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

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

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. Ten
Brandon Ray McNeil
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk