IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DANIEL ANDRADE-MENDOZA,
Appellant,
vs.
GREG SMITH, WARDEN; AND THE STATE OF NEVADA,
Respondents.

No. 72380

ORDER OF AFFIRMANCE

Daniel Andrade-Mendoza appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on May 6, 2010, and supplemental petition filed on August 2, 2016.[1] First Judicial District Court, Carson City; James E. Wilson, Judge.

Andrade-Mendoza contends the district court erred in denying several claims of ineffective assistance of trial and appellate counsel. To demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *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*); *see also Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (applying *Strickland* to claims of ineffective assistance of appellate counsel). Both components of the inquiry must be shown, *Strickland*, 466

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

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). For purposes of the deficiency prong, counsel is strongly presumed to have provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *Strickland*, 466 U.S. at 690. Counsel need not raise futile arguments to avoid claims of ineffective assistance of counsel. *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

First, Andrade-Mendoza claimed counsel were ineffective because the memorandum of plea negotiation did not advise him he was eligible for probation pursuant to NRS 453.3405(2), presumably rendering the plea invalid. Probation was not a possibility for Andrade-Mendoza unless the district court, upon an appropriate motion, found he rendered substantial assistance to law enforcement. *See* NRS 453.3405(2). Andrade-Mendoza did not contend such a finding had been made at the time the plea memorandum was drafted and signed.[2] He thus failed to demonstrate counsel were ineffective for not amending the plea memorandum or challenging its validity.

Second, Andrade-Mendoza claimed counsel failed to challenge the constitutionality of NRS 453.3405. Andrade-Mendoza did not identify a specific constitutional violation, but his reference to "a balancing test" suggested the Due Process Clause. *See Snow v. State*, 105 Nev. 521, 524, 779 P.2d 96, 98 (1989) (applying the *Mathews v. Eldridge*, 424 U.S. 319

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[2]The district court later found that he did not provide substantial assistance, a finding that was upheld on direct appeal. *See Andrade-Mendoza v. State*, Docket No. 53382 (Order of Affirmance, September 4, 2009).

(1986), balancing test for alleged due process violations). However, "an accused has no protected due process right to a discretionary sentence reduction for offering 'substantial assistance.'" *Matos v. State*, 110 Nev. 834, 838, 878 P.2d 288, 290 (1994). Andrade-Mendoza failed to demonstrate counsel were ineffective in failing to raise this futile claim.

Third, Andrade-Mendoza claimed counsel failed to challenge the district court's jurisdiction over his case where the amended information was not first presented to the justice court to find probable cause. The district court may amend an information at any time before a finding of guilt so long as "no additional or different offense is charged and . . . substantial rights of the defendant are not prejudiced." NRS 173.075(1). Here, no additional or different offense was charged, and Andrade-Mendoza did not allege his substantial rights were prejudiced. Therefore, counsel were not ineffective for failing to raise this futile challenge.

Fourth, Andrade-Mendoza argued for the first time at the evidentiary hearing on the instant petition that trial counsel was ineffective for not calling a police detective to testify about a meeting he had with Andrade-Mendoza that resulted in the arrest of a shooting suspect. This argument was not raised in appellant's petition or supplement and was not properly before the district court below. *See Barnhart v. State*, 122 Nev. 301, 303-04, 130 P.3d 650, 651-52 (2006). We therefore decline to consider those arguments on appeal. *McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). Nevertheless, we would note the detective testified at the evidentiary hearing he never met with Andrade-Mendoza and no arrest was ever made in the shooting Andrade-Mendoza referenced.

Andrade-Mendoza also raised the substantive claims underlying the first four ineffective-assistance-of-counsel claims addressed

above. To the extent they were not outside the scope of postconviction petitions for a writ of habeas corpus arising out of a guilty plea, *see* NRS 34.810(1)(a), we conclude they lacked merit for the reasons stated above.

Andrade-Mendoza next argued the State breached the guilty plea agreement by arguing against substantial assistance at the sentencing hearing. This claim could have been raised on direct appeal and was thus waived. *See Franklin v. State*, 110 Nev. 750, 877 P.2d 1058 (1994), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999). To the extent Andrade-Mendoza attempted to expand the claim at the evidentiary hearing to argue counsel was ineffective for not challenging the State's alleged breach, this argument was not properly before the district court, *see Barnhart*, 122 Nev. at 303-04, 130 P.3d at 651-52, and we need not consider it on appeal, *see McNelton*, 115 Nev. at 416, 990 P.2d at 1276 (1999).

Moreover, as a separate and independent ground to deny relief, substantial evidence supports the district court's conclusion that the State's offer to stand silent should Andrade-Mendoza offer substantial assistance was not part of the plea agreement. It was not mentioned in the memorandum of plea negotiation or at Andrade-Mendoza's plea colloquy. Further, Andrade-Mendoza testified at the evidentiary hearing that, at the time of his guilty plea, he was unaware of any agreement that the State would stand silent.

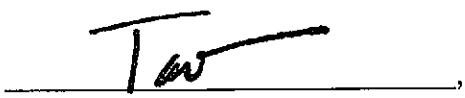
Finally, Andrade-Mendoza argues on appeal he should be granted a new sentencing hearing based on his substantial compliance, and he complains about the performance of post-conviction counsel below. As noted above, the Nevada Supreme Court held Andrade-Mendoza did not provide substantial assistance, *see supra* note 2, and that holding is the law

of the case. *Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). Further, Andrade-Mendoza had no right to the effective assistance of counsel below. *See Crump v. Warden*, 113 Nev. 293, 303 n.5, 934 P.2d 247, 253 n.5 (1997).

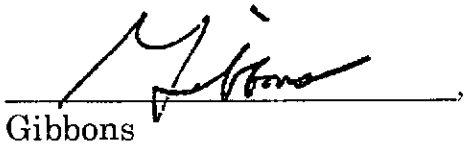
We conclude the district court did not err in denying Andrade-Mendoza's petition, and we

ORDER the judgment of the district court AFFIRMED.[3]

_____, C.J.
Silver



_____, J.
Tao



_____, J.
Gibbons

cc: Hon. James E. Wilson, District Judge
Daniel Andrade-Mendoza
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk

[3]Andrade-Mendoza's request to stay proceedings is denied. *See* NRAP 27(a)(1).