

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EARL THOMAS CLARKSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73608

FILED

APR 11 2018

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

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

Earl Thomas Clarkson appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus and a motion to correct an illegal sentence. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Clarkson argues the district court erred by denying his August 17, 2015, petition and supplements without conducting an evidentiary hearing. In his petition, Clarkson claimed his counsel was ineffective. 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. *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). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific allegations 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, Clarkson argued his counsel was ineffective for permitting Clarkson to enter a guilty plea to attempted violation of lifetime supervision when his conduct did not constitute a crime. Clarkson's claim was based upon the Nevada Supreme Court's decision in *McNeil v. State*, 132 Nev. ___, ___, 375 P.3d 1022, 1026-27 (2016), where the court concluded the only lawful conditions of lifetime supervision are those expressly enumerated in the supervision statute, NRS 213.1243, and defendants cannot be convicted of a violation of lifetime supervision when the condition alleged to have been violated was not contained within NRS 213.1243.

Here, the information alleged Clarkson attempted to violate the conditions of his lifetime supervision by using methamphetamine, but NRS 213.1243 did not contain a provision specifically prohibiting persons on lifetime supervision from using methamphetamine or controlled substances. Clarkson therefore argued, in accordance with the *McNeil* decision, his counsel was ineffective for failing to assert he could not be convicted for an alleged violation of lifetime supervision because his conduct was not prohibited under NRS 213.1243.

The district court denied Clarkson's claim without conducting an evidentiary hearing, concluding Clarkson's reliance upon *McNeil* was

misplaced because the Nevada Supreme Court did not issue its decision in that matter until after Clarkson had entered his guilty plea. We conclude the district court erred in doing so.

While a new rule of law generally only applies prospectively, when “a decision merely interprets and clarifies an existing rule . . . and does not announce an altogether new rule of law, the court’s interpretation is merely a restatement of existing law,” *Colwell v. State*, 118 Nev. 807, 819, 59 P.3d 463, 472 (2002), and a clarification of existing law generally applies to existing cases, *Clem v. State*, 119 Nev. 615, 623, 81 P.3d 521, 527 (2003) (explaining “due process requires availability of habeas relief when a state’s highest court interprets for the first time and clarifies the provisions of a state criminal statute to exclude a defendant’s acts from the statute’s reach at the time the defendant’s conviction became final.”).

The *McNeil* decision discussed NRS 213.1243 and reviewed the application of that statute regarding alleged violations of lifetime supervision, concluding the plain language of NRS 213.1243 did not delegate authority to the parole board to impose additional lifetime supervision conditions that are not enumerated in the statute. 132 Nev. ___, ___, 375 P.3d 1022, 1025. Because the *McNeil* decision discussed and applied NRS 213.1243 as it existed when Clarkson entered his guilty plea, a claim similar to that raised in *McNeil* would have been available to Clarkson’s counsel in this matter. Therefore, the district court erred by concluding Clarkson’s counsel acted reasonably in failing to argue Clarkson’s conduct did not violate NRS 213.1243.

The record demonstrates Clarkson was initially charged with two offenses, violation of lifetime supervision and under the influence of a controlled substance, and he later agreed to plead guilty to attempted

violation of lifetime supervision. However, the record does not contain sufficient information relating to the nature of Clarkson's plea deal, whether the State agreed to not pursue any additional or more significant charges in exchange for Clarkson's guilty plea, what advice Clarkson's counsel offered regarding the plea negotiations, or information regarding decisions Clarkson's counsel made with respect to challenging Clarkson's potential criminal liability.

Recognizing counsel's advice with respect to the plea negotiations may have been reasonable under the circumstances in this case, *see Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time"), we reverse the district court's decision to deny this claim and direct the district court to conduct an evidentiary hearing concerning this issue. Following the evidentiary hearing, the district court shall decide, in light of the *McNeil* decision, whether Clarkson demonstrated his counsel's conduct amounted to ineffective assistance of counsel.

Second, Clarkson argued his counsel was ineffective for failing to thoroughly review the facts of the case and guilty plea agreement with him. Clarkson asserts counsel's failure to ensure Clarkson understood these matters is of particular importance in light of Clarkson's mental health issues and use of medication to help with his mental health issues. Clarkson failed to demonstrate his counsel's performance was deficient or resulting prejudice. In the written plea agreement, Clarkson acknowledged he discussed the plea agreement with his counsel and counsel answered all of his questions regarding the agreement. Clarkson further acknowledged

he discussed the charges with his counsel, understood the nature of those charges, and discussed any possible defenses and defense strategies with counsel. Clarkson also asserted he was not under the influence of any controlled substance or drug that impaired his ability to comprehend or understand the plea agreement. Given those circumstances, Clarkson failed to demonstrate his counsel improperly failed to review the case or plea agreement with him. Clarkson also failed to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial had counsel further reviewed the facts of the case or plea agreement with him. Therefore, we conclude the district court did not err by denying this claim.

Third, Clarkson argued his counsel was ineffective during the probation revocation hearing because counsel did not consult with him regarding the violation report, discuss legal options, and did not investigate witnesses or evidence to show he did not commit the alleged violation. Clarkson also asserted his counsel improperly advised him to stipulate to the violation.

Clarkson failed to demonstrate that he was entitled to the effective assistance of counsel at the revocation hearing. The Nevada Supreme Court has recognized an ineffective-assistance-of-counsel claim will lie only where the defendant has a constitutional or statutory right to the appointment of counsel. *See McKague v. Warden*, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996). There is no absolute right to counsel at a probation revocation hearing. *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). The need for counsel at a probation revocation proceeding is made on a case-by-case basis. *Id.*; *see also Fairchild v. Warden*, 89 Nev. 524, 525, 516 P.2d 106, 107 (1973) (adopting the approach set forth in *Gagnon*).

Counsel is required if the probationer makes a colorable claim (1) that he did not commit the alleged violations or (2) that there are justifying or mitigating circumstances which make revocation inappropriate and these circumstances are difficult or complex to develop or present. *Gagnon*, 411 U.S. at 790. Therefore, Clarkson must demonstrate that he had a right to counsel at his probation revocation hearing before he can assert a claim of ineffective assistance of counsel at that proceeding.


At the probation revocation hearing, Clarkson personally acknowledged there were controlled substances, knives, and a pornographic movie in his home. Clarkson offered as mitigation evidence an assertion he did not know those items were in his home, and Clarkson does demonstrate there were any mitigation circumstances in this matter that were difficult or complex to develop or present. Under these circumstances, Clarkson failed to demonstrate he had the right to counsel for the probation revocation proceedings. As Clarkson failed to demonstrate he had the right to counsel for those proceedings, he did not demonstrate the district court erred in concluding he was not entitled to relief based upon a claim of ineffective assistance of counsel at the probation revocation hearing. See *McKague*, 112 Nev. at 164-65, 912, P.2d at 258.

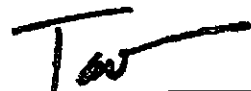
Next, Clarkson argues the district court erred in denying his April 7, 2017, motion to correct an illegal sentence. In his motion, Clarkson claimed his conviction for attempted violation of lifetime supervision was illegal because his conduct did not constitute a crime. A motion to correct an illegal sentence may only challenge the facial legality of the sentence: either the district court was without jurisdiction to impose a sentence or the sentence was imposed in excess of the statutory maximum. *Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). "A motion to correct an


illegal sentence 'presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence.' *Id.* (quoting *Allen v. United States*, 495 A.2d 1145, 1149 (D.C. 1985)).

Clarkson's claim fell outside the narrow scope of claims permissible in a motion to modify or correct an illegal sentence. *See id.* Therefore, without considering the merit of Clarkson's claim, we conclude the district court did not err by denying the motion. Accordingly, 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.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Michael Villani, District Judge
Gregory & Waldo, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk