

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KUPAA KEA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73016

FILED

APR 11 2018

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

ORDER OF AFFIRMANCE

Kupaa Kea appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on February 14, 2014, and supplemental petition filed on June 22, 2016. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Kea first contends the district court erred by denying his claim that counsel was ineffective. 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*). To prove prejudice to invalidate the decision to enter a guilty plea, a petitioner must demonstrate there was a reasonable probability that, 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). A petitioner must demonstrate both prejudice and deficiency. *Strickland*, 466 U.S. at 697.

The district court held an evidentiary hearing on Kea's petition. There, Kea had the burden of demonstrating the facts underlying his claims by a preponderance of the evidence. *See Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Where a petitioner alleges counsel was ineffective for failing to investigate, he must demonstrate what a more thorough investigation would have revealed. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). We give deference to the district court's factual findings—including credibility determinations—that are supported by substantial evidence and not clearly wrong 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); *Little v. Warden*, 117 Nev. 845, 854, 34 P.3d 540, 546 (2001).

First, Kea argued counsel should have challenged his certification as an adult. Kea declined to present any evidence in support of his claim and thus failed to demonstrate deficiency or prejudice. We therefore conclude the district court did not err by denying this claim.

Second, Kea argued counsel should have challenged his competency because she knew Kea was taking prescribed psychiatric medication. Kea failed to demonstrate deficiency or prejudice. Taking medication for mental illness does not alone indicate counsel should have suspected her client lacked "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [or] a rational as well as factual understanding of the proceedings against him." *Melchor-Gloria v. State*, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983) (quoting *Dusky v. United States*, 362 U.S. 402 (1960)). The district court found counsel was credible when she testified at the evidentiary hearing that Kea appeared to be fully aware of the nature of the charges and was able to assist in his

defense. This finding is supported by Kea's conduct at his guilty plea hearing. We therefore conclude the district court did not err by denying this claim.

Third, Kea argued counsel should have filed a motion to suppress his statements to police as they were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). Even assuming, without deciding, the interviewing detective failed to cease questioning Kea after he clearly and unequivocally invoked his right to have counsel present, *see Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), Kea failed to demonstrate deficiency or prejudice. The district court found counsel's testimony that Kea was focused on pleading guilty to be credible and found Kea's testimony that he would not have pleaded guilty to be incredible.¹ Kea did not confess to shooting the victims, and even if Kea's statements were suppressed, two friends of Kea's told officers they saw Kea shoot the victims. This strong eyewitness testimony supports the district court's findings. We therefore cannot conclude the district court erred by denying this claim.

Fourth, Kea argued counsel should have investigated or informed him of the lack of ballistics evidence connecting him to the crimes. Kea failed to demonstrate prejudice.² Kea does not indicate what further

¹The district court also found counsel testified she did not file a motion to suppress because it would have led the State to withdrawing the plea offer. This finding is not supported by the record. Rather, counsel testified she did not file the motion because Kea "made it very clear very quickly that he did not want to contest the evidence."

²The district court's finding that counsel testified she discussed the lack of evidence with Kea is belied by the record. Counsel answered, "No. There was no need to," when asked whether she went over with Kea the ballistics evidence the police had.

investigation would have revealed. Further, the district court found Kea's testimony that he would not have pleaded guilty had he known of the lack of ballistics evidence to be incredible. In light of the eyewitness testimony discussed above, we cannot conclude the district court erred by denying this claim.

Fifth, Kea argued counsel coerced him into entering a guilty plea because she advised him to sign an ambiguous guilty-plea memorandum, promised he would receive concurrent sentences of 2 to 15 years, and said he would likely receive probation. Kea failed to demonstrate deficiency or prejudice. Notably, none of Kea's specific allegations suggested coercion. Further, Kea testified at the evidentiary hearing that counsel explained concurrent versus consecutive sentences, and he has not demonstrated counsel was objectively unreasonable in believing or communicating her belief that Kea had a good chance at probation. Kea acknowledged by signing his guilty plea memorandum that sentencing was up to the court and counsel had not promised him a specific sentence. Finally, he acknowledged verbally to the district court that canvassed him that he understood whether he received concurrent or consecutive sentences and whether he was placed on probation were entirely in the discretion of the sentencing judge and no one had promised Kea anything in return for his plea. We therefore conclude the district court did not err by denying this claim.

Sixth, Kea argued counsel should have objected to the admission of hearsay evidence at his sentencing hearing. Specifically, Kea contended the characterization of the shooting as an "ambush" negatively influenced the sentencing judge. Kea failed to demonstrate deficiency. The rules against hearsay do not apply to sentencing hearings. NRS

47.020(3)(c); *see also Thomas v. State*, 122 Nev. 1361, 1367, 148 P.3d 727, 732 (2006) (holding the Confrontation Clause does not apply at sentencing hearings). Kea thus failed to demonstrate counsel was objectively unreasonable in not objecting to the statements. We therefore conclude the district court did not err by denying this claim.

Seventh, Kea argued counsel should have called character witnesses in mitigation at his sentencing hearing. Kea failed to demonstrate deficiency or prejudice. Kea contended the witnesses would have testified to his dysfunctional family and childhood trauma. However, those topics were already covered in the psychological evaluation counsel submitted for sentencing. Kea presented no evidence as to what the witnesses would have said and thus failed to demonstrate a reasonable probability of a different outcome at sentencing. We therefore conclude the district court did not err by denying this claim.

Eighth, Kea argued counsel should not have waived his preliminary hearing, because it deprived him of his right to cross-examine witnesses and allowed him to be convicted on the basis of hearsay. Kea failed to demonstrate deficiency or prejudice. Counsel is strongly presumed to have provided adequate assistance and exercised reasonable professional judgment in all significant decisions. *Strickland*, 466 U.S. at 690. Kea did not question counsel at the evidentiary hearing about the waiver and thus failed to overcome the presumption of reasonable judgment. Further, Kea was convicted based on his guilty plea, and he acknowledged both in his written plea agreement and at his plea canvass that he was waiving his right to cross-examine the witnesses against him. We therefore conclude the district court did not err by denying this claim.

Ninth, Kea argued counsel should have moved to suppress the drugs found in Kea's vehicle because the seizure and search of his vehicle were in violation of the Fourth Amendment. Kea failed to demonstrate deficiency or prejudice. Even had officers lacked probable cause to seize Kea's vehicle, *see State v. Lloyd*, 129 Nev. 739, 744, 312 P.3d 467, 470 (2013), the subsequent search was conducted pursuant to a search warrant. Kea offered no evidence at the evidentiary hearing that the search warrant was invalid. Accordingly, Kea did not show counsel was objectively unreasonable in not moving to suppress the drug evidence or a reasonable probability of success had counsel filed such a motion. *See Kirksey*, 112 Nev. at 990, 923 P.2d at 1109. We therefore conclude the district court did not err by denying this claim.

Tenth, Kea argued counsel should have investigated the facts underlying the charged gang enhancements. Kea failed to demonstrate prejudice. A petitioner claiming counsel did not conduct an adequate investigation bears the burden of showing he would have benefitted from a more thorough investigation. *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Kea presented no evidence at the evidentiary hearing of what a more thorough investigation would have revealed. We therefore conclude the district court did not err by denying this claim.

Kea also contends the district court erred in denying his claims that appellate counsel was ineffective. 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 the omitted issue would have had a reasonable probability of success on appeal. *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114.

Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697.

First, Kea argued counsel should have raised the issues underlying the claims of ineffective assistance of trial counsel. For the reasons discussed above, we conclude Kea failed to demonstrate deficiency or prejudice. We therefore conclude the district court did not err by denying this claim.

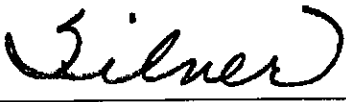
Second, Kea argued counsel did not discuss or otherwise consult with him regarding additional grounds to include in the appeal. Kea failed to demonstrate deficiency or prejudice. As stated above, counsel was not ineffective for failing to raise any of the substantive claims underlying Kea's ineffective-assistance-of-trial-counsel claims. Further, a defendant has no constitutional right to dictate what issues will be raised on appeal. *Jones v. Barnes*, 463 U.S. 745 (1983). Kea's reliance on *Toston v. State* is misplaced as that case imposed a duty only "to inform a client who has pleaded guilty about a direct appeal and consult with the client about the procedures for and advantages and disadvantages of an appeal." 127 Nev. 971, 977, 267 P.3d 795, 799-800 (2011). It did not impose a duty to consult with clients about which claims to raise. We therefore conclude the district court did not err by denying this claim.

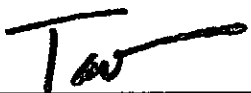
Third, Kea argued counsel refused to file an appeal, prepared a motion to withdraw when he inquired about an appeal, and misinformed him of his right to appeal. Kea also argued this constituted an actual conflict of interest such that counsel should not have filed the appeal. Kea failed to demonstrate there was a conflict because counsel's actions do not suggest she was "placed in a situation conducive to divided loyalties." *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (quoting *Smith v.*

Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991)). Further, Kea failed to demonstrate prejudice because counsel timely filed an appeal on his behalf and he did not demonstrate a reasonable probability of success on appeal had he had different counsel. We therefore conclude the district court did not err by denying this claim.

Kea also contends his presentence investigation report did not contain the psychological evaluation counsel had procured and the district court had insufficient evidence to accept his guilty plea and imposed an unlawful sentence. To the extent Kea raises these either independently or as claims of ineffective assistance of appellate counsel, he has failed to support them with relevant authority and cogent argument, and we need not consider them. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Scott N. Freeman, District Judge
Oldenburg Law Office
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk