

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ELLIOTT DEW, SR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72710

FILED

MAR 14 2018

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

ORDER OF AFFIRMANCE

Elliott Dew, Sr. appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Dew argues the district court erred by denying his March 3, 2015, petition and supplements. 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.

First, Dew argued his counsel was ineffective for informing him he would be accepted and placed into the veteran's court program in exchange for his guilty plea. Dew failed to demonstrate his counsel's performance was deficient or resulting prejudice. In the written plea agreement and at the plea canvass, Dew acknowledged he had not been promised or guaranteed any particular sentence. In addition, in the written plea agreement and at the plea canvass, Dew acknowledged he understood the district court had the discretion to determine the appropriate sentence. Dew failed to demonstrate a reasonable probability he would have refused to plead guilty and insisted on proceeding to trial had counsel offered different advice regarding the veteran's court program. Therefore, we conclude the district court did not err by denying this claim.¹

Second, Dew argued his counsel was ineffective for failing to discuss an insanity defense with him. Dew failed to demonstrate his counsel's performance was deficient or resulting prejudice. In the written plea agreement, Dew 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.

¹To the extent Dew raised a separate claim asserting he should be permitted to withdraw his guilty plea because it was involuntarily entered due to counsel's advice regarding the veteran's court program, Dew failed to demonstrate withdrawal of his plea was necessary to correct a manifest injustice. *See* NRS 176.165.

In addition, prior to Dew's guilty plea, he was evaluated and determined to be competent and Dew failed to provide any support for an assertion he was in a delusional state during the crime such that he could not know or understand the nature and capacity of his acts or could not appreciate the wrongfulness of his acts. *See Finger v. State*, 117 Nev. 548, 576, 27 P.3d 66, 84-85 (2001). An unsupported claim, such as this one, is insufficient to demonstrate a petitioner is entitled to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, we conclude the district court did not err by denying this claim.

Third, Dew argued his counsel was ineffective for failing to submit a complete application for the veteran's court program and for failing to request a continuance until his eligibility for the program was determined. Dew failed to demonstrate his counsel's performance was deficient or resulting prejudice.

During the sentencing hearing, counsel advised the sentencing court she had submitted an application seeking Dew's acceptance into the veteran's court program, but had not been informed of a decision regarding the application. Counsel further informed the sentencing court the public defender's office, her employer, challenged a number of the questions on the standard form. For that reason, she submitted a form generated by the public defender's office, but was not sure if such a form would be accepted. Counsel requested the district court sentence Dew to serve probation, with the veteran's court program as a condition, and the court could take further actions should Dew's application to the program be declined. The sentencing court concluded, regardless of the status of Dew's application to

the veteran's court program, a prison term was the appropriate sentence given the dangerous nature of Dew's arson, Dew's criminal history, and the necessity to protect society.


Under the circumstances in this matter, Dew did not demonstrate counsel acted in an objectively unreasonable manner. Further, given the sentencing court's conclusion that Dew should serve a prison term, Dew failed to demonstrate a reasonable probability of a different outcome had counsel submitted a completed veteran's court application or requested a continuance to await the status of his application. Therefore, we conclude the district court did not err in denying this claim.

Fourth, Dew argued his counsel was ineffective for failing to inform the sentencing court of Dew's mental health history, submit proof of his housing and support, and inform the court of Dew's military service history. A review of the record reveals counsel advised the sentencing court of these issues during the sentencing hearing. In addition, the presentence investigation report informed the sentencing court regarding Dew's mental health issues and his military service. Given the circumstances of this case and the information provided to the sentencing court regarding these issues, Dew failed to demonstrate his counsel acted in an objectively unreasonable manner or a reasonable probability of a different outcome had counsel provided further information to the sentencing court regarding these issues. Therefore, we conclude the district court did not err in denying this claim.

Next, Dew argues the district court erred in denying his petition without conducting an evidentiary hearing. 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. *Id.* The district court concluded Dew failed to meet that standard and the record before this court reveals the district court's conclusions in this regard were proper. Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Kenneth C. Cory, District Judge
Wright Stanish & Winckler
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²The Honorable Abbi Silver did not participate in the decision in this matter.