

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JEFFREY LEE GAVALAS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 73150

FILED

AUG 14 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Jeffrey Lee Gavalas appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Gavalas argues the district court erred by denying the claims of ineffective assistance of counsel he raised in his March 24, 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. *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). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous 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).

First, Gavalas argued his counsel was ineffective for failing to advise him of the possibility he would be sentenced under the habitual criminal enhancement. Gavalas failed to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, Gavalas' trial-level counsel testified she did not specifically remember all of the details regarding her pre-plea discussions with Gavalas, but the notes she made during that time state that she reviewed the written plea agreement with him. Counsel testified it is her common practice to review the entire written plea agreement with a defendant and to explain every paragraph. Counsel testified that this practice encompasses explaining the potential penalties a defendant eligible for adjudication as a habitual criminal faces from a sentence under both the small and large habitual criminal enhancement. Counsel testified she could not recall an occasion where she failed to review and explain the entire written plea agreement with a defendant. In addition, counsel testified she met with Gavalas following entry of his guilty plea and explained in detail that he could be sentenced under the habitual criminal enhancement if he withdrew his guilty plea or breached the guilty plea agreement.

The district court found counsel's testimony was credible and Gavalas had actual knowledge of the potential penalties he faced under the habitual criminal enhancement. Substantial evidence supports the district court's conclusions. Accordingly, Gavalas failed to demonstrate his

counsel's performance fell below an objectively reasonable standard or a reasonable probability of a different outcome had counsel further explained the habitual criminal enhancement. Therefore, we conclude the district court did not err by denying this claim.<sup>1</sup>

Second, Gavalas argued his counsel was ineffective for failing to object to the State's untimely filing of the notice of its intent to seek the habitual criminal enhancement. Gavalas failed to demonstrate his counsel's performance was deficient. The State was required to file its notice of intent to seek sentence under the habitual criminal enhancement at least 15 days prior to Gavalas' sentencing hearing, unless the parties agreed otherwise. *See* NRS 207.016(2), (6); *see also Lachance v. State*, 130 Nev. 263, 276, 321 P.3d 919, 928 (2014) (stating NRS 207.016(2) allows the State to add a count of habitual criminality shortly before "sentence is imposed, so long as there is sufficient time between addition and sentence.").

During the sentencing hearing, the State and the sentencing court noted the defense was entitled to a continuance of the sentencing hearing due to the State's recent filing of the habitual-criminal-enhancement notice. Given the State's recent filing of the notice, Gavalas could have properly sought to continue the sentencing hearing pursuant to NRS 207.016(2). Gavalas' sentencing counsel, however, informed the

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<sup>1</sup>Gavalas also asserted his guilty plea was not knowingly entered because he was not informed of the penalties he faced under the habitual criminal enhancement. Given the district court's finding that Gavalas had actual knowledge of the potential penalties he faced under the habitual criminal enhancement, Gavalas failed to demonstrate that withdrawal of his guilty plea was necessary to correct a manifest injustice. *See* NRS 176.165; *Harris v. State*, 130 Nev. 435, 448, 329 P.3d 619, 628 (2014). Therefore, the district court did not err by denying this claim.

sentencing court the defense wished to proceed with the sentencing hearing that day and did not want the hearing continued. Counsel's decision to waive the opportunity to continue the sentencing hearing was a tactical decision. "Tactical decisions are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which Gavalas did not demonstrate. As Gavalas did not demonstrate counsel's tactical decision amounted to an extraordinary circumstance, he failed to meet his burden to show that his counsel's performance fell below an objective standard of reasonableness. Therefore, we conclude the district court did not err by denying this claim.

Third, Gavalas argued his counsel was ineffective for failing to argue his prior felony convictions were constitutionally invalid or were stale. Gavalas failed to demonstrate his counsel's performance was deficient or resulting prejudice. Gavalas made only a bare claim regarding the constitutional validity of his prior convictions, which is insufficient to demonstrate he was entitled to relief. *See Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). In addition, this court has already considered a claim concerning the staleness of Gavalas' prior convictions and concluded the sentencing court did not commit error by considering those convictions because the habitual criminal statute does not make an allowance for the remoteness of a prior conviction. *Gavalas v. State*, Docket No. 67875 (Order of Affirmance, September 15, 2015). Accordingly, Gavalas failed to demonstrate his counsel's failure to raise these issues was objectively unreasonable or a reasonable probability of a different outcome had counsel raised these issues. Therefore, we conclude the district court did not err by denying this claim.

Next, Gavalas argued his appellate counsel was ineffective. To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have 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. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford*, 105 Nev. at 853, 784 P.2d at 953.

Gavalas asserted his appellate counsel was ineffective for failing to argue on appeal that the State failed to provide proper notice of its intent to seek the habitual criminal enhancement. Gavalas failed to demonstrate his counsel's performance was deficient or resulting prejudice. As previously discussed, the sentencing court informed Gavalas' that he had the opportunity to continue the sentencing hearing due to the State's late notice, but Gavalas' counsel waived that issue and requested to proceed with sentencing that day.


Given the waiver of the timely-notice-filing requirement, Gavalas failed to demonstrate his appellate counsel was objectively unreasonable for failing to raise the underlying issue on direct appeal or a reasonable likelihood of success had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

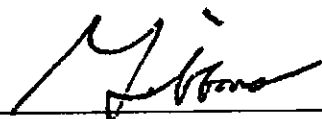
Finally, Gavalas argued the sentencing court failed to adequately provide Gavalas notice of the potential penalties he faced at sentencing and abused its discretion by sentencing him under the small

habitual criminal enhancement. These claims were not based on an allegation that Gavalas' plea was involuntarily or unknowingly entered or that his plea was entered without the effective assistance of counsel and, therefore, were not permissible in a postconviction petition for a writ of habeas corpus stemming from a guilty plea. See NRS 34.810(1)(a). Accordingly, the district court did not err by denying relief for these claims.

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

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Robert W. Lane, District Judge  
Flangas Law Firm, Ltd.  
Attorney General/Carson City  
Nye County District Attorney  
Nye County Clerk