

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GILBERTO POLALNCO, A/K/A
GILBERTO POLANCO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74864-COA

FILED

DEC 19 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

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

Gilberto Polalnco appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on August 16, 2017.¹ Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Polalnco argues the district court erred by denying his claims counsel was ineffective and his plea was not knowingly and voluntarily entered. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate his 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, 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 v. Washington*, 466 U.S. 668, 697 (1984). We give deference to

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

the 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).

After sentencing, a district court may permit a petitioner to withdraw a guilty plea where necessary "[t]o correct manifest injustice." NRS 176.165. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently. *Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). In determining the validity of a guilty plea, this court looks to the totality of the circumstances. *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000).

First, Polalnco argued counsel was ineffective and his plea was invalid because counsel promised him he would be sentenced to one to three years in prison and counsel did not explain the failure to appear for sentencing clause in his guilty plea agreement. Polalnco also raised these claims in a presentence motion to withdraw his plea. The district court at that time held an evidentiary hearing. The district court found Polalnco was not credible and Polalnco testified he was not promised a specific sentence. Further, the district court found Polalnco's claims were belied by the transcript of the change of plea hearing. Polalnco answered in the affirmative he understood the potential minimum and maximum sentences, no one promised him a particular sentence, and he understood the consequences for failing to appear for sentencing. The district court reaffirmed those findings when denying this petition. Substantial evidence supports the decision of the district court, and we conclude the district court did not err by denying these claims.

Polalnco also argued counsel was ineffective and his plea was invalid because counsel failed to explain to him that he could lose his residency in the United States. This claim is also belied by the transcript of the change of plea hearing. Polalnco answered affirmatively when the district court asked him if he and counsel discussed the plea agreement and if he understood that if he was not a United States citizen he could be deported. Therefore, the district court did not err by denying this claim.

Second, Polalnco argued counsel was ineffective for failing to investigate. Polalnco failed to demonstrate counsel was deficient or resulting prejudice because he failed to allege what a more thorough investigation would have revealed. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (a petitioner claiming counsel did not conduct an adequate investigation must specify what a more thorough investigation would have uncovered). Therefore, the district court did not err by denying this claim.


Third, Polalnco argued counsel was ineffective for failing to present mitigating evidence at sentencing. Polalnco failed to demonstrate counsel was deficient or resulting prejudice because he failed to support this claim with specific facts that, if true, would entitle him to relief. *See Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Further, the parties stipulated that if Polalnco failed to appear for his original sentencing date, Polalnco would receive a sentence of 24 to 60 months in prison with a consecutive sentence of 28 to 72 months. Polalnco failed to appear for his original sentencing date and he received the stipulated sentence. Therefore, he failed to demonstrate a reasonable probability of a different outcome at trial had counsel presented mitigation evidence at


sentencing. See *Strickland*, 466 U.S. at 687-88 (1984). Accordingly, the district court did not err by denying this claim.

Fourth, Polalnco argued counsel was ineffective for failing to file an appeal on his behalf when asked to do so. Polalnco supported his claim with specific facts that, if true, would entitle him to relief. See *Hargrove*, 100 Nev. at 502, 686 P.2d at 225; see also *Toston v. State*, 127 Nev. 971, 978, 267 P.3d 795, 800 (2011) (when the defendant who pleads guilty and requests counsel to file an appeal, counsel has a duty to file an appeal). Therefore, we conclude the district court erred by denying this claim without first conducting an evidentiary hearing.

Finally, we conclude Polalnco failed to demonstrate he was entitled to relief from his convictions based on the cumulative errors of counsel. 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. Elissa F. Cadish, District Judge
Gilberto Polalncó
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk