

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENTRELL DUMURIE WELCH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 75281-COA

FILED

DEC 19 2018

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

ORDER OF AFFIRMANCE

Kentrell Dumurie Welch appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Welch argues the district court erred by denying the claims of ineffective assistance of counsel raised in his October 15, 2014, petition and later filed supplement. 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

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

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, Welch argued his counsel was ineffective for failing to investigate his competency to enter a guilty plea. Welch failed to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, Welch's counsel testified that Welch's competency was evaluated during the trial-level proceedings and Welch was found to be competent. Counsel testified that he had no concerns regarding Welch's competency or ability to understand the proceedings when he reviewed the plea agreement with him. The district court found counsel's testimony credible and substantial evidence supports that finding. Based on the record, Welch did not demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel sought additional competency evaluations. Therefore, we conclude the district court did not err by denying this claim.

Second, Welch argued his counsel was ineffective for failing to properly advise Welch regarding entry of a guilty plea and ensure Welch understood the waiver of rights. Welch failed to demonstrate his counsel's performance was deficient or resulting prejudice. In the written plea

agreement and at the plea canvass, Welch acknowledged he had discussed his rights with his counsel and understood the rights he waived by entering a guilty plea. In both the written plea agreement and at the plea canvass, Welch was informed of the potential penalties he faced, Welch asserted he believed entering a guilty plea was in his best interest, and Welch acknowledged his counsel had answered all of his questions regarding the agreement. Given the record, Welch failed to demonstrate his counsel acted below an objective standard of reasonableness or a reasonable probability he would have rejected the plea agreement and insisted on proceeding to trial had counsel explained the plea agreement in a different manner. Therefore, we conclude the district court did not err by denying this claim.

Third, Welch argued his counsel was ineffective for coercing him into pleading guilty by threatening to withdraw from representing him if he did not accept the State's plea offer. Welch also asserted counsel coerced his guilty plea by stating that Welch would be found guilty at a trial due to jurors' racial bias. Welch failed to demonstrate his counsel's performance was deficient or resulting prejudice. In the written plea agreement and at the plea canvass, Welch asserted he was not acting under duress or coercion. At the evidentiary hearing, counsel testified he had not threatened to withdraw from representing Welch and had not informed Welch that he would be found guilty due to jurors' racial bias. The district court found counsel's testimony to be credible and substantial evidence supports that finding. Based on the record, Welch failed to demonstrate his counsel performed below an objectively reasonable standard or a reasonable probability he would have refused to plead guilty and insisted on proceeding to trial had counsel explained the plea offer in a different manner. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Welch argued his counsel was ineffective for failing to investigate potential defenses, such as insanity or voluntary intoxication. Welch failed to demonstrate his counsel's performance was deficient or resulting prejudice. Counsel testified at the evidentiary hearing that, based on his discussions with Welch, he pursued an identification defense and would have utilized such a defense had this matter proceeded to trial. Given counsel's testimony, Welch did not demonstrate it was objectively unreasonable to decline to investigate additional potential defenses. *Strickland*, 466 U.S. at 691 (1984) ("Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."). Welch failed to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial had counsel investigated additional defenses. Therefore, we conclude the district court did not err by denying this claim.

Fifth, Welch argued his counsel was ineffective for misleading him concerning the application of presentence credits and for failing to object when the State informed the sentencing court that Welch was only entitled to 84 days of presentence credits. Welch failed to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he did not mislead Welch concerning presentence credits and was aware Welch faced a separate criminal offense during the time he awaited sentencing for this offense. During the sentencing hearing, the sentencing court stated it only awarded Welch 84 days of presentence credit because the additional days had previously been applied to Welch's separate case. Given the record in this matter, Welch failed to demonstrate his counsel acted in an objectively unreasonable

manner or a reasonable probability of a different outcome had counsel performed different actions regarding presentence credits. Therefore, we conclude the district court did not err by denying this claim.

Sixth, Welch argued his counsel was ineffective for failing to advise Welch concerning a direct appeal and for failing to pursue a direct appeal on Welch's behalf. Welch failed to demonstrate his counsel's performance was deficient or resulting prejudice. In the written plea agreement, Welch acknowledged he understood that he unconditionally waived his right to a direct appeal and that his counsel had explained that waiver to him. In addition, counsel testified at the evidentiary hearing that he did not attempt to pursue a direct appeal on Welch's behalf because Welch did not ask him to do so. The district court concluded counsel's testimony was credible and that Welch failed to demonstrate counsel had a duty to file a notice of appeal. Our review of the record reveals the district court's factual findings are supported by substantial evidence. *See Toston v. State*, 127 Nev. 971, 979, 267 P.3d 795, 801 (2011) (explaining that the defendant has the burden to inform counsel that he wishes to pursue a direct appeal). Therefore, we conclude the district court did not err by denying this claim.

Finally, Welch contends the district court erred by failing to appoint postconviction counsel to represent him at the evidentiary hearing. The record reveals the district court initially appointed postconviction counsel to represent Welch and counsel filed a supplement in support of Welch's petition. Welch later filed motions requesting the removal of his counsel and the district court granted Welch's request. During the evidentiary hearing, Welch requested the appointment of postconviction counsel to help him with that hearing. The district court reminded Welch

that he had previously requested to represent himself and the court had granted his request. The court further informed Welch that he would represent himself during the evidentiary hearing and then the hearing proceeded with Welch acting in pro se. Given Welch's prior request to represent himself, we conclude the district court did not abuse its discretion by declining to appoint postconviction counsel for the evidentiary hearing. See NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. ___, ___, 391 P.3d 760, 760-61 (2017). Accordingly, we

ORDER the judgment of the district court AFFIRMED.



Silver

C.J.



Tao

J.



Gibbons

J.

cc: Hon. Kathleen E. Delaney, District Judge
Kentrell Dumurie Welch
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk