

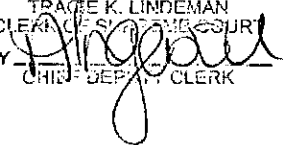
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ELIZABETH KAY CARLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68503

FILED

DEC 18 2015

TRACEE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

In her April 8, 2015, petition, appellant Elizabeth Kay Carley claimed her counsel was ineffective. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that her 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).

¹This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).

First, Carley claimed her counsel was ineffective for failing to file a motion to suppress evidence obtained pursuant to a search warrant. Carley asserted the warrant violated her Fourth Amendment rights because it was not based on probable cause and lacked particularity. Carley failed to demonstrate her counsel's performance was deficient or resulting prejudice. Carley stated her counsel informed her that counsel had reviewed the warrant, concluded it was valid, and declined to file a motion to suppress on that basis. Tactical decisions such as this one "are virtually unchallengeable absent extraordinary circumstances," *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), which Carley did not demonstrate.

Moreover, search warrants must be based on probable cause. See U.S. Const. amend. IV; *Mapp v. Ohio*, 367 U.S. 643, 646 n.4 (1961); *Keesee v. State*, 110 Nev. 997, 1002, 879 P.2d 63, 66-67 (1994). "Probable cause requires . . . trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched for are: seizable and will be found in the place to be searched." *Keesee*, 110 Nev. at 1002, 879 P.2d at 66 (internal quotation marks omitted).

Additionally, search warrants must describe the items to be seized with particularity. See U.S. Const. amend. IV. While the descriptions must be specific enough to allow the person conducting the search to reasonably identify the things authorized to be seized, a search warrant that describes generic categories of items will not be deemed invalid if a more specific description of an item is not possible. See *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986).

Here, we conclude Carley's admissions regarding her involvement in fraudulent activity, her recorded jailhouse phone call to an accomplice further discussing the fraudulent activities, and the authorities' investigation into Carley and her associates fraudulent activities sufficiently established probable cause for the issuance of the search warrant. We also conclude the warrant described the items to be seized with sufficient particularity to permit the persons conducting the search to identify the things authorized to be seized because the warrant plainly authorized the searchers to collect evidence that could be used in making fraudulent documents. Accordingly, Carley failed to demonstrate a reasonable probability she would have refused to plead guilty and would have insisted on going to trial had counsel challenged the validity of the search warrant. Therefore, the district court did not err in denying this claim.²

Second, Carley claimed her counsel was ineffective for advising her she was not eligible for adjudication as a habitual criminal. Carley failed to demonstrate her counsel's performance was deficient or resulting prejudice. In the guilty plea agreement, Carley acknowledged discussing her case with her counsel and acknowledged she faced adjudication as a habitual criminal. In addition, at the plea canvass the

²Carley also claimed counsel should have attempted to suppress evidence obtained through a search during the arrest of a codefendant. Carley cannot demonstrate either deficiency for prejudice for this claim because she did not have standing to challenge the search of her codefendant. *See Rakas v. Illinois*, 439 U.S. 128, 133-34, (1978) ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted").

district court advised Carley that she was subject to adjudication as a habitual criminal, informed Carley of the sentencing range, and Carley acknowledged that she understood. Carley failed to demonstrate a reasonable probability she would have refused to plead guilty and would have insisted on going to trial had she had further discussions with her counsel regarding adjudication as a habitual criminal. Therefore, the district court did not err in denying this claim.

Third, Carley claimed her counsel was ineffective for coercing her into pleading guilty. Carley cannot demonstrate either deficiency or prejudice for this claim because the Nevada Supreme Court has already considered the underlying claim and concluded Carley was not coerced into pleading guilty. *Carley v. State*, Docket No. 66034 (Order of Affirmance, January 15, 2015). Therefore, the district court did not err in denying this claim.

Fourth, Carley claimed her counsel was ineffective for failing to investigate a subpoena regarding telephone communications, inconsistencies between the police reports and grand jury testimony, and surveillance evidence. Carley asserted investigation into this evidence would reveal that Carley was not a resident of the apartment that contained the forgery materials. Carley failed to demonstrate her counsel's performance was deficient or resulting prejudice. Carley provided no factual basis to support this claim. Bare claims, such as this one, are insufficient to demonstrate that a petitioner is entitled to relief. *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); *see also Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225

(explaining that bare and naked claims are insufficient to demonstrate that a petitioner is entitled to relief).

Moreover, the search of the apartment revealed a large amount of documents containing Carley's information and Carley was listed as a resident on the rental insurance agreement. Under these circumstances, Carley failed to demonstrate a reasonable probability she would have insisted on going to trial and would have refused to plead guilty had counsel conducted further investigation. Therefore, the district court did not err in denying this claim.

Fifth, Carley claimed counsel was ineffective for failing to investigate a fraudulently obtained vehicle. Carley asserted further investigation would have revealed a codefendant was actually the person responsible for obtaining the vehicle. Carley failed to demonstrate either deficiency or prejudice for this claim because Carley confessed to using forged documentation to purchase the vehicle. Therefore, the district court did not err in denying this claim.

Sixth, Carley claimed counsel was ineffective for failing to investigate the victims, as she asserts they may have actually been involved in the fraudulent activities. Carley failed to demonstrate either deficiency or prejudice for this claim. Carley provided no factual support for this claim. Bare claims, such as this one, are insufficient to demonstrate a petitioner is entitled to relief. *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Therefore, the district court did not err in denying this claim.

Seventh, Carley claimed counsel was ineffective for failing to argue she was selectively prosecuted for refusing to be a government informant. Carley failed to demonstrate her counsel's performance was

deficient or resulting prejudice. “A defendant alleging unconstitutional selective prosecution has an onerous burden” and Carley does not demonstrate she was prosecuted based “upon an unjustifiable classification, such as race, religion or gender.” *Salaiscooper v. Eighth Judicial Dist. Court*, 117 Nev. 892, 903, 34 P.3d 509, 516 (2001). To the extent Carley asserted she was subject to vindictive prosecution, she provided no evidence to support such a claim. *See Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (explaining punishment for exercising one’s rights is a due process violation, but there is no “element of punishment or retaliation so long as the accused is free to accept or reject the prosecutions offer”). Therefore, the district court did not err in denying this claim.

Eighth, Carley claimed counsel was ineffective for failing to argue transcripts of her interview with the police were not accurate and the State destroyed a recording of that interview in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Carley failed to demonstrate her counsel’s performance was deficient or resulting prejudice. Carley made only a bare and unsupported claim, which is insufficient to demonstrate she is entitled to relief. *Hargrove*, 100 Nev. at 502-03 686 P.2d at 225. Carley does not demonstrate the recording of the interview was destroyed by the State and she failed to demonstrate the interview contained any exculpatory evidence. *See State v. Huebler*, 128 Nev. ___, ___, 275 P.3d 91, 95 (2012). As there was substantial evidence of Carley’s guilt and she received a substantial reduction in charges by entry of her plea, Carley failed to demonstrate a reasonable probability she would have refused to plead guilty and would have insisted on trial had counsel raised the underlying arguments. Therefore, the district court did not err in denying this claim.

Ninth, Carley claimed her counsel was ineffective for failing to file a pretrial writ of habeas corpus arguing there was insufficient evidence presented at the grand jury proceedings. Carley failed to demonstrate either deficiency or prejudice for this claim because the State presented sufficient evidence to support the grand jury's probable cause finding. *See Sheriff, Washoe Cty. v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980). Therefore, the district court did not err in denying this claim.

Tenth, Carley claimed her counsel was ineffective for failing to assert Carley could not have participated in a conspiracy with one of her codefendants because Carley did not know that person. Carley failed to demonstrate her counsel's performance was deficient or resulting prejudice. By entry of her plea, Carley waived the opportunity to challenge the strength of the State's evidence against her at trial, including the evidence she committed fraudulent activities with her codefendants. Given the substantial bargain Carley received through her guilty plea, she failed to demonstrate she would have refused to plead guilty and would have insisted on going to trial had counsel pursued this type of defense. Therefore, the district court did not err in denying this claim.

Eleventh, Carley appeared to claim her counsel was ineffective for advising her to reject an earlier plea offer and then advising her to accept a later plea offer. Carley failed to demonstrate either deficiency or prejudice for this claim. Carley did not provide sufficient facts to support this claim. A bare claim, such as this one, is insufficient to demonstrate a petitioner is entitled to relief. *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. In addition, Carley did not demonstrate a reasonable probability there was a plea offer from the State she would have accepted absent


ineffective assistance of counsel, the State would not have withdrawn it in light of intervening circumstances, and the district court would have accepted such an offer. *See Lafler v. Cooper*, 566 U.S. ___, ___, 132 S. Ct. 1376, 1385 (2012). Therefore, the district court did not err in denying this claim.


Twelfth, Carley claimed her counsel was ineffective for failing to argue the indictment does not contain a sufficient factual description of her charges. Carley failed to demonstrate either deficiency or prejudice for this claim because a review of the indictment reveals it provided a plain and concise statement of the essential facts of the charged crimes. *See* NRS 173.075(1). Therefore, the district court did not err in denying this claim.

Next, Carley claimed she was improperly detained for a violation of her probation for a previous conviction. As this claim did not challenge the instant judgment of conviction, this claim is not cognizable in this postconviction petition for a writ of habeas corpus. *See* NRS 34.720(1); NRS 34.724(1); NRS 34.738(3); *see also Jackson v. State*, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999). Therefore, Carley was not entitled to relief for this claim.

Finally, Carley claimed the police violated her rights during her interview, the police had a reckless disregard for the truth, the district court encouraged her counsel to engage in coercive behavior, and the prosecution committed misconduct by engaging in a conspiracy to improperly punish her. These claims are not properly raised in a postconviction petition for a writ of habeas corpus stemming from a guilty plea. *See* NRS 34.810(1)(a). Therefore, the district court did not err in denying relief for these claims.

Having concluded Carley is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Douglas Smith, District Judge
Elizabeth Kay Carley
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³We have reviewed all documents Carley has submitted in this matter, and we conclude no relief based upon those submissions is warranted. To the extent Carley has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we decline to consider them in the first instance.