

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PHILIP STOTT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68036

FILED

MAR 16 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
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. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Appellant Philip Stott argues the district court erred in denying his claims of ineffective assistance of counsel raised in his December 16, 2011, petition. To prove ineffective assistance of 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 there is a reasonable probability that, 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*). 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, Stott argues his counsel was ineffective for failing to file a motion to suppress evidence as he asserts officers improperly entered his apartment prior to obtaining a search warrant. Stott fails to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he was aware of the information showing officers entered Stott's apartment prior to obtaining a search warrant and considered filing a motion to suppress evidence. However, counsel stated the evidence related to the charges in this case did not arise from that search. Accordingly, counsel chose not to file a motion to suppress in this case. 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 Stott does not demonstrate. Stott fails to demonstrate he would have refused to plead guilty and would have insisted on going to trial had counsel filed a motion to suppress evidence obtained from the search of the apartment. Therefore, the district court did not err in denying this claim.

Second, Stott argues his counsel was ineffective for coercing him into pleading guilty, telling Stott to lie to the district court when the court asked if Stott had been coerced, and by promising he would not be adjudicated as a habitual criminal. Stott fails to demonstrate his counsel's performance was deficient or resulting prejudice. At the evidentiary hearing, counsel testified he explained the plea offer to Stott, made counter offers which were not accepted by the State, and that Stott eventually accepted the State's offer. Counsel further stated he did not tell Stott to lie when the court asked Stott if he had been coerced. Counsel


also stated he did not promise Stott he would not be adjudicated a habitual criminal. The district court concluded counsel's testimony was credible and substantial evidence supports that conclusion. Stott fails to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on going to trial had counsel performed different actions with respect to these issues. Therefore, the district court did not err in denying this claim.


Third, Stott argues his counsel was ineffective at the sentencing hearing because counsel stated Stott was a thief and a habitual drug user. Stott fails to demonstrate his counsel's performance was deficient or resulting prejudice. At the sentencing hearing, counsel acknowledged Stott was a thief and a drug user, but argued Stott did not have the type of criminal record which would warrant adjudication as a habitual criminal. Stott does not demonstrate these were the actions of an objectively unreasonable defense attorney. In addition, the record before this court reveals the State submitted 8 judgments of conviction containing 14 prior felony convictions for the district court's consideration at sentencing. Given Stott's extensive criminal record, he fails to demonstrate a reasonable probability of a different outcome had counsel raised different arguments at the sentencing hearing. Therefore, the district court did not err in denying this claim.

Stott also argues the district court erred in concluding his guilty plea was knowing, voluntary, and intelligent. Stott asserts his guilty plea was the product of coercion and the State improperly threatened to pursue a lengthier sentence if he did not accept the plea offer. Stott fails to meet his burden to demonstrate that he did not enter a knowing and voluntary plea. *See Hubbard v. State*, 110 Nev. 671, 675, 877

P.2d 519, 521 (1994); *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986). Stott was informed in the guilty plea agreement and at the plea canvass of the charges he faced, of the possible range of penalties, and of the rights he waived by entering a guilty plea. In addition, Stott acknowledged in the plea agreement and at the plea canvass that he did not act under duress or due to threats. At the evidentiary hearing, counsel testified the State informed him that if Stott decided not to accept a plea offer, the State would seek a sentence of life without the possibility of parole under the habitual criminal enhancement. See NRS 207.010(1)(b). Counsel testified he explained this to Stott and that Stott then chose to accept the State's plea offer. As Stott could have been sentenced to serve life without the possibility of parole, it was not improper for the State to assert it would seek such a sentence if Stott rejected the plea offer. A review of the record reveals the totality of the circumstances demonstrates Stott's guilty plea was valid. See *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). Therefore, the district court did not err in denying this claim.

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Patrick Flanagan, District Judge
David Kalo Neidert
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk