

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

VICTOR JOE POTTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76451-COA

FILED

JUL 30 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT

BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Victor Joe Potter appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on January 3, 2014, and supplemental petition filed on March 2, 2015. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Potter contends the district court erred by denying his claims that trial-level counsel rendered ineffective assistance. To demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *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 that are supported by substantial evidence and not clearly wrong 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). And in particular, we defer to the district court's credibility findings "absent a clear showing that the court reached the wrong conclusion." *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), *abrogated on other grounds by Harte v. State*, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000).


First, Potter contends counsel did not properly advise him regarding the conditional nature of his guilty plea. Specifically, Potter argues counsel did not tell him that, if he triggered the failure-to-appear clause, he would not be allowed to withdraw his guilty plea in the event the district court did not impose the stipulated sentence. Potter failed to demonstrate deficiency or prejudice. The district court found counsel informed Potter that, so long as he met all of the requirements in the plea agreement, he would be able to withdraw his guilty plea in the event the sentence imposed was greater than that to which the parties stipulated. The district court further found counsel informed Potter that if he did not comply with all of the requirements in the plea agreement, he would likely be habitualized. These findings are supported by counsel's testimony at the evidentiary hearing held in this matter, and the district court found counsel to be credible. Potter failed to demonstrate by a preponderance of the evidence that counsel failed to properly advise him and, accordingly, that but for the alleged error, he would have refused to plead guilty and would have insisted on going to trial. We therefore conclude the district court did not err by denying this claim.

Second, Potter contends counsel failed to convey the State's earlier, second plea offer to him.¹ Potter failed to demonstrate deficiency or prejudice. The second plea offer was for Potter to plead guilty to a category C theft and the State would not oppose probation. The district court found that counsel conveyed the second plea offer to Potter but Potter rejected it because he believed that, despite the State's lack of opposition to probation, the district court would sentence him to prison in light of his criminal history. This finding is supported by counsel's testimony at the evidentiary hearing held in this matter, and the district court found counsel to be credible. It is also supported by Potter's rejection of plea offers² until the State stipulated to probation and agreed to make the plea conditional upon Potter receiving probation. Potter failed to demonstrate by a preponderance of the evidence that counsel failed to convey the second plea offer to him. We therefore conclude the district court did not err by denying this claim.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

¹Potter also argues counsel failed to convey the State's first plea offer to him. However, this argument was not raised below, and we decline to consider it on appeal in the first instance. *McNelson v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

²Potter finally accepted the State's fourth plea offer.

cc: Hon. Stefany Miley, District Judge
Gaffney Law
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk