

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

No. 72465

FILED

OCT 12 2017

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

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

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 a supplemental petition filed on March 2, 2015.¹ Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Potter contends the district court erred by denying his ineffective-assistance-of-trial-counsel claims without first conducting an evidentiary hearing. 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, 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). To warrant an evidentiary hearing,

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

a petitioner must raise claims supported by specific factual allegations that, if true and not repelled by the record, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). We give deference to 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).

First, Potter contended counsel should have sought to have him admitted to a drug-abuse treatment program prior to sentencing. Potter did not allege he requested counsel do so, and he failed to demonstrate counsel's failure to do so sua sponte was objectively unreasonable. We therefore conclude the district court did not err in denying this claim without first conducting an evidentiary hearing.

Second, Potter contended counsel should have investigated the State's evidence as to the value of the stolen wire and property damage because the value determined whether the crime was a misdemeanor or a category B or C felony. Potter failed to specify how a more thorough investigation would have altered the range of the value such that it would have altered the category of the offense. Thus he failed to demonstrate a reasonable probability of a different outcome but for counsel's failure. See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (petitioner claiming counsel did not conduct adequate investigation must specify what a more thorough investigation would have uncovered). We therefore conclude the district court did not err in denying this claim without first conducting an evidentiary hearing.

Third, Potter contended counsel should have moved to withdraw his guilty plea when the district court did not sentence him to

probation. There was no dispute Potter's guilty plea was conditioned on the district court sentencing him to a term of probation, and if it sentenced him otherwise, he could withdraw his guilty plea. The only dispute was whether that provision remained in effect if, by Potter's failure to appear at his first sentencing hearing, the State became free to argue for any legal sentence. The district court found the provision allowing Potter to withdraw his plea was in effect only so long as Potter complied with the terms of the agreement. However, the record before this court does not necessarily support the district court's finding.

In his guilty plea agreement, Potter acknowledged if he (among other wrongs) failed to appear for his sentencing hearing, the State could argue for any legal sentence. The single-sentence paragraph immediately following this said, "Otherwise I am entitled to receive the benefits of these negotiations as stated in this plea agreement."

Potter asserted he believed this language meant he could withdraw his plea if the district court did not impose probation, regardless of whether the State was permitted to argue for any legal sentence. The State argued Potter was only entitled to receive any of the benefits contained in the plea agreement if he did not commit any of the enumerated wrongs. Given the grammatical structure of the plea agreement, both interpretations were reasonable, and Potter's assertion was not belied by the record. An evidentiary hearing was therefore necessary to investigate Potter's understanding of the meaning of the clause. Accordingly, we conclude the district court erred in denying this claim without first conducting an evidentiary hearing, and we remand for an evidentiary hearing on this claim.

Fourth, Potter contended counsel failed to convey to him an earlier, more favorable plea offer which he would have accepted. Counsel has a duty to convey favorable plea offers to his client, and the failure to do so is objectively unreasonable. *See Missouri v. Frye*, 566 U.S. 134, 145 (2012). To demonstrate prejudice in such a situation, a petitioner must show a reasonable probability of four things: (1) he would have accepted the earlier, uncommunicated plea offer, (2) the State would not have rescinded the offer prior to entry of the plea, (3) the trial court would not have rejected the guilty plea, and (4) “the end result of the criminal process would have been more favorable *by reason of a plea to a lesser charge* or a sentence of less prison time.” *Id.* at 147 (emphasis added).


The district court’s order focused on the third prejudice prong and Potter’s failure to appear at his first sentencing hearing. However, this prong addresses the trial court’s actions at the time of the plea, not at later sentencing hearings. Accordingly, the district court’s analysis was incorrect as a matter of law. And because Potter’s allegations regarding an earlier, favorable plea offer are not belied by the record, we conclude the district court erred in denying this claim without first conducting an evidentiary hearing. We therefore remand for an evidentiary hearing on this claim. Further, because the district court already determined counsel was warranted to litigate this claim, we direct the district court to appoint counsel to represent Potter at the evidentiary hearing.² *See Renteria-Novoa v. State*, 133 Nev. ___, ___, 391 P.3d 760, 760-61 (2017).

²Potter renewed his request for the appointment of postconviction counsel to raise claims of ineffective assistance of appellate counsel, claims which were unavailable when he filed the instant petition. The district court may, in its discretion, allow Potter to supplement his petition to
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Potter also contends the district court erred by denying his claim that his guilty plea was invalid. Because he could have challenged the validity of his guilty plea on direct appeal but did not, his claim was waived. See *Franklin v. State*, 110 Nev. 750, 877 P.2d 1058 (1994) overruled on other grounds by *Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999). Accordingly, we conclude the district did not err in denying this claim. For the foregoing reasons, 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

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raise these claims, see NRS 34.750(5); *Barnhart v. State*, 122 Nev. 301, 303-04, 130 P.3d 650, 651-52 (2006). Potter may also raise these claims in a separate postconviction petition for a writ of habeas corpus. However, we express no opinion as to whether Potter can meet the procedural requirements of NRS chapter 34.

cc: Hon. Stefany Miley, District Judge
Victor Joe Potter
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk