

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JERRY LEE CROSS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70345

FILED

DEC 28 2016

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Jerry Cross appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on October 8, 2015.¹ Eighth Judicial District Court, Clark County; J. Charles Thompson, Senior Judge.

Cross claims the district court erred by denying his ineffective-assistance-of-counsel claims. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his 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). Further, to show prejudice for alleged errors at sentencing, a petitioner must demonstrate there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*,

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

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466 U.S. 668, 687-88 (1984). Both components of the inquiry must be shown. *Id.*, 466 U.S. at 697. 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, Cross claimed counsel was ineffective for failing to adequately prepare for the preliminary hearing. Specifically, Cross claimed had counsel been better prepared, counsel could have negotiated a better plea agreement. The district court concluded counsel was not deficient because counsel's performance at the preliminary hearing was reasonable based on the limited purpose of the preliminary hearing. Substantial evidence supports the findings of the district court and we conclude the district court did not err in denying this claim.

Second, Cross claimed counsel was ineffective for failing to file a motion for an investigator and a motion for additional discovery. Cross failed to demonstrate resulting prejudice. The district court concluded Cross conceded he knew about any additional information and evidence counsel could have discovered and chose to plead guilty anyway. Substantial evidence supports the decision of the district court and we conclude the district court did not err in denying this claim.

Third, Cross claimed counsel was ineffective for failing to file a pretrial petition for a writ of habeas corpus. Cross failed to demonstrate counsel was deficient. The district court concluded because the charges only had to be supported by slight or marginal evidence and the State met its burden, it would have been futile for counsel to file a pretrial petition for a writ of habeas corpus. Substantial evidence supports the decision of the district court, *see Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (counsel is not deficient for failing to file futile motions), and we conclude the district court did not err in denying this claim.

Fourth, Cross claimed counsel was ineffective for failing to file a motion for psychological examination of the victim, a motion for experts, a request for the detective's qualifications as a drug recognition expert, and a motion pursuant to *Miller v. State*, 105 Nev. 497, 501, 779 P.2d 87, 89 (1989). Cross failed to demonstrate counsel was deficient or resulting prejudice. The district court found the filing of these motions would have either been futile or would only have been appropriate had Cross proceeded to trial. Further, the district court found Cross failed to demonstrate a reasonable probability he would not have pleaded guilty and would have proceeded to trial had counsel filed these motions. Substantial evidence supports the decision of the district court, see *Donovan*, 94 Nev. at 675, 584 P.2d at 711, and we conclude the district court did not err in denying this claim.

Fifth, Cross claimed counsel was ineffective for failing to develop a theory of defense. Cross failed to demonstrate counsel was deficient. The district court found counsel did begin to develop a theory of defense at the preliminary hearing—that the victim voluntarily had sex with Cross in exchange for drugs. Substantial evidence supports the decision of the district court, and we conclude the district court did not err in denying this claim.

Sixth, Cross claimed counsel was ineffective for failing to advise him of his right to appeal. Cross failed to demonstrate counsel was deficient. Cross did not claim he inquired about an appeal and Cross failed to demonstrate he expressed dissatisfaction sufficient to trigger counsel's duty to discuss an appeal. See *Toston v. State*, 127 Nev. 971, 978, 267 P.3d 795, 800 (2011). Further, Cross specifically waived his right to appeal in the guilty plea agreement. Therefore, the district court did not err by denying this claim.

Seventh, Cross claimed counsel was ineffective because there was a conflict of interest between him and counsel. Specifically, he claimed the conflict attorney program in Clark County violates due process and the equal protection clause because the conflict attorney is not guaranteed to have any experience defending sexual offenses. He also claimed there was a conflict because his attorney was not specialized in sex crimes. Cross failed to demonstrate there was an actual conflict of interest. See *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). He failed to demonstrate his counsel was placed in a situation conducive to divided loyalties, *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992), or his counsel actively represented conflicting interests, *Burger v. Kemp*, 483 U.S. 776, 783 (1987). Therefore, the district court did not err in denying this claim.

Eighth, Cross claimed counsel was ineffective because counsel did not receive the presentence investigation report until the day before sentencing and counsel failed to review the report with him prior to sentencing. To the extent Cross claimed counsel was ineffective for not receiving the presentence investigation report until the day before sentencing, this claim was belied by the record. Counsel received the original report well before sentencing. The Division of Parole and Probation revised the report as to Cross' psychosexual evaluation rating and re-sent the report the day before sentencing. Further, Cross failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel reviewed the report with Cross prior to sentencing. While Cross claimed his felony burglary was reduced to a misdemeanor after he completed probation, Cross failed to provide the district court with any evidence the charge had been reduced. Cross also failed to demonstrate the district court relied on this conviction when sentencing Cross. Cross also failed to demonstrate the report's statement of the risk to reoffend

was erroneous. Therefore, we conclude the district court did not err in denying this claim.

Ninth, Cross claimed counsel was ineffective for failing to advise him about what would happen at the presentence investigation report interview or tell him he should refuse to answer certain questions or areas of inquiry. Specifically, Cross claimed counsel should have told him to inform the interviewer of his version of the facts to counteract the fact section contained in the report. Cross failed to demonstrate prejudice because he failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel further advised him about the interview. At sentencing, counsel informed the district court regarding Cross' version of the facts. Therefore, the district court did not err in denying this claim.

Next, Cross claimed the district court erred by denying his claims that his plea was not voluntarily and knowingly entered. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently. *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); *see also Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion. *Hubbard*, 110 Nev. at 675, 877 P.2d at 521. In determining the validity of a guilty plea, this court looks to the totality of the circumstances. *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); *Bryant*, 102 Nev. at 271, 721 P.2d at 367.

First, Cross claimed his plea was invalid because the district court did not inform him he was not eligible for probation, the guilty plea agreement was silent regarding his eligibility, and his counsel was ineffective for arguing for probation when it was not available. This claim

is without merit. Cross was eligible for probation. See NRS 176A.100(1)(a). Therefore the district court did not err in denying this claim.

Second, Cross claimed his plea was invalid because he was never informed lifetime supervision would be imposed. This claim was belied by the record. Cross' guilty plea agreement informed him lifetime supervision would be imposed and Cross acknowledged at the guilty plea canvass that he read and understood the guilty plea agreement. Therefore, the district court did not err in denying this claim.

Third, Cross claimed his plea was invalid because he did not sign the plea agreement until the day of sentencing and counsel did not discuss the actual consequences of signing the plea agreement. This claim was belied by the record. The guilty plea agreement was filed in open court on August 28, 2014, the day of the guilty plea canvass. Further, Cross acknowledged at the guilty plea canvass he read and understood the guilty plea agreement and counsel assisted him and answered all of his questions. Therefore, the district court did not err in denying this claim.

Fourth, Cross claimed his plea was invalid because he was under the influence of several different psychotropic medications and the doctor who examined him for competency only performed a cursory inquiry. The district court found Cross failed to demonstrate his medications rendered him incompetent to enter a plea. The district court also found the doctors who evaluated Cross' competency completed a thorough review of Cross and his mental health and medication history. Substantial evidence supports the decision of the district court, and we conclude the district court did not err by denying these claims.

Fifth, Cross claimed his plea was invalid because counsel failed to conduct any interviews or do any independent investigation regarding the victim. The district court concluded Cross failed to

demonstrate counsel was deficient or resulting prejudice. The district court found Cross failed to demonstrate any additional evidence or testimony would exonerate or exculpate him. Further, Cross conceded he knew about this evidence and potential testimony and chose to plead guilty. Substantial evidence supports the decision of the district court and we conclude the district court did not err by denying this claim.

Next, Cross claimed the State withheld witness statements and text messages from him, which constituted a *Brady*² violation. Cross failed to demonstrate the witness statements and text messages were material. The evidence Cross claims was withheld may have been used for impeaching the victim. However, Cross fails to demonstrate a reasonable probability he would not have pleaded guilty and would have insisted on going to trial had this evidence been disclosed. *State v. Huebler*, 128 Nev. 192, 203, 175 P.3d 91, 98-99 (2012) (when no specific request for evidence has been made, withheld evidence is material when there is a reasonable probability “that but for the failure to disclose the evidence the defendant would have refused to plead and would have insisted on going to trial”). Even assuming impeachment evidence must be disclosed when a defendant pleads guilty, most of the evidence Cross claims was withheld was evidence Cross admitted he knew.³ Further, the text messages he claims were withheld were text messages between himself and the victim. Therefore, we conclude the district court did not err in denying this claim.

Finally, Cross claimed he was sentenced under materially untrue assumptions regarding his criminal history and psychosexual

²*Brady v. Maryland*, 373 U.S. 83, 86 (1963)

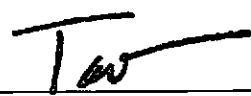
³The court in *Huebler* noted it is not settled whether Nevada law requires the State to disclose impeachment evidence when a defendant pleads guilty. *Huebler*, 128 Nev. at 200 n.6, 175 P.3d at 97 n.6.


examination rating. This claim fell outside the scope of claims that may be raised in a postconviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. See NRS 34.810(1)(a). Therefore, we conclude the district court did not err in denying this claim.

Having considered Cross' claims and concluded he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.⁴


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Chief Judge, Eighth Judicial District Court
Hon. J. Charles Thompson, Senior Judge
Jerry Lee Cross
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁴We have reviewed all documents Cross has filed in this matter and deny his request for portions of the record. Cross should seek copies of any transcripts through a document properly filed in the district court. See *Peterson v. Warden*, 87 Nev. 134, 135-36, 483 P.2d 204, 205 (1971).