

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES WILLIAM KECK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69300

FILED

SEP 20 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
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. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant James William Keck argues the district court erred in denying his claims of ineffective assistance of counsel he raised in his November 26, 2014. 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*). To demonstrate prejudice regarding the decision to enter a guilty plea, a petitioner must demonstrate 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*, 466 U.S. at 697. To warrant an

evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Keck argues his counsel was ineffective for failing to ensure Keck understood his offenses were not probationable. Keck cannot demonstrate either deficiency or prejudice for this claim because the offenses which Keck pleaded guilty to were probationable. See NRS 176A.100(1)(c); NRS 193.165(5); NRS 205.060(2). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Second, Keck argues his counsel was ineffective for failing to sufficiently review the written plea agreement with Keck prior to entry of his guilty plea. Keck fails to demonstrate his counsel's performance was deficient or resulting prejudice. In the written plea agreement, Keck acknowledged that he had discussed the charges and possible defenses with counsel, and that counsel had answered all of his questions regarding the agreement. At the plea canvass, Keck further asserted that he had read and understood the written plea agreement, and that his attorney had answered all of his questions regarding the agreement. Accordingly, Keck fails to demonstrate his counsel did not sufficiently review the written plea agreement with Keck. Keck fails to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on going to trial had counsel spent further time discussing the written plea agreement with Keck. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Third, Keck argues his counsel was ineffective for failing to permit him to review the presentence investigation report (PSI) and advising him to decline to talk with parole and probation during the preparation of the PSI. Keck fails to demonstrate either deficiency or prejudice for this claim. Keck makes only a bare claim for this issue and does not explain how personally reviewing the PSI or talking with the person preparing that report would have altered the outcome in this matter. A bare claim, such as this one, is insufficient to demonstrate a petitioner is entitled to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Fourth, Keck argues his counsel was ineffective for failing to ensure Keck was prepared to give a statement during the sentencing hearing and for failing to ensure Keck had the opportunity to review a competency evaluation which discussed Keck's issues regarding substance abuse. Keck also argues counsel should have hired additional experts to further explain Keck's withdrawal from those substances. Keck asserts that these issues prevented him from properly presenting to the sentencing court the withdrawal information in mitigation.

Keck fails to demonstrate his counsel's performance was deficient or resulting prejudice. Keck made a brief statement during the sentencing hearing, a competency evaluation discussing his substance abuse was presented to the sentencing court, and counsel made a lengthy argument in mitigation regarding Keck's substance abuse and withdrawal from those substances. Keck fails to demonstrate this was the conduct of objectively unreasonable counsel. In addition, Keck makes only a bare claim that counsel should have hired additional experts and he does not

demonstrate counsel could have uncovered further favorable expert testimony regarding this issue. *See id.* In light of the nature of Keck's crimes, Keck fails to demonstrate a reasonable probability of a different outcome at the sentencing hearing had counsel provided further information regarding Keck's substance abuse issues or permitted Keck to further review the evidence pertaining to his issues. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.

Fifth, Keck argues his counsel was ineffective during the sentencing hearing for failing to object to impermissible victim impact testimony. During the sentencing hearing, one victim stated she was fearful that if Keck was released from prison he could find her and harm her or her family. Another victim also referred to Keck as the devil and asserted that Keck had "murdered the lives of the victims" because he had forever altered their lives.

Keck fails to demonstrate his counsel's performance was deficient or resulting prejudice. When placed in context, the victims' statements reveal they were expressing their fear of Keck, their desire that he receive a lengthy prison sentence, and the impact Keck had on their lives following the workplace-shooting incident. Given the nature of the victim-impact testimony, Keck fails to demonstrate that objectively reasonable counsel would have objected during the victims' statements. *See* NRS 176.015(3)(b) (victims may "[r]easonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution"); *see also Gallego v. State*, 117 Nev. 348, 370, 23 P.3d 227, 242 (2001) ("A victim can express an opinion regarding the defendant's sentence . . . in non-capital cases."), *overruled on*

other grounds by Nunnery v. State, 127 Nev. 749, 776 n.12, 263 P.3d 235, 255 n.12 (2011). Keck fails to demonstrate a reasonable probability of a different outcome had counsel objected during the victim-impact testimony. *See Dieudonne v. State*, 127 Nev. 1, 9 n.3, 245 P.3d 1202, 1207 n.3 (2011) (recognizing that erroneous admission of victim-impact statements is reviewed for harmless error). Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.


Sixth, Keck argues his counsel was ineffective for failing to object during the sentencing hearing when the State informed the district court that Keck acted after a victim rejected his romantic advances and Keck acted while under the influence of alcohol. Keck asserts there was no factual support for these statements and these statements are misrepresentations. Keck fails to demonstrate counsel's performance was deficient or resulting prejudice. The record reveals that witnesses informed the police the victim had rejected Keck's romantic advances. The PSI also stated Keck had informed authorities he was under the influence of alcohol during the incident. Under these circumstances, Keck fails to demonstrate objectively reasonable counsel would have asserted these statements lacked factual support. Keck also fails to demonstrate a reasonable probability of a different outcome at the sentencing hearing had counsel objected to these statements. Therefore, the district court did not err in denying this claim without conducting an evidentiary hearing.


Seventh, Keck argues his counsel was ineffective for failing to object at the sentencing hearing when the district court failed to make factual findings as required by NRS 193.165(1) when imposing the deadly weapon enhancement. Keck did not raise this claim in his petition or

supplements before the district court. Because Keck does not demonstrate cause for his failure to raise this claim in his petition or supplements, we decline to consider it in this appeal. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

Next, Keck argues he should be permitted to withdraw his guilty plea because he was misinformed his offenses were probationable. Keck fails to demonstrate withdrawal of his plea was necessary to correct a manifest injustice. *See* NRS 176.165. As stated previously, Keck's offenses were probationable, *see* NRS 176A.100(1)(c); NRS 193.165(5); NRS 205.060(2), and accordingly, Keck was properly so informed in the guilty plea agreement and at the plea canvass. Therefore, the district court did not err in denying this claim.

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Michelle Leavitt, District Judge
Potter Law Offices
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk