

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSEPH BARRERA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69634

FILED

APR 19 2017

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

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

Appellant Joseph Barrera appeals from the district court order denying the postconviction petition for a writ of habeas corpus he filed on September 18, 2013.¹ Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Validity of guilty plea

Barrera claims the district court erred by finding he entered his guilty plea knowingly, voluntarily, and intelligently because his plea

¹The State claims we do not have jurisdiction to review this appeal. The State argues Barrera is appealing from a district court order reconsidering its previous denial of Barrera's postconviction habeas petition and Barrera's appeal is untimely because his motion for reconsideration did not toll the 30-day period for filing a notice of appeal. However, the State previously presented this argument in a motion to dismiss that was rejected by the Nevada Supreme Court. *Barrera v. State*, Docket Number 69634 (Order Denying Motion, December 1, 2016). We conclude the State has failed to demonstrate this court lacks jurisdiction to consider Barrera's appeal.

was made on the advice of defense counsel and defense counsel incorrectly advised him on the potential range of punishments.

After sentencing, a district court may permit a petitioner to withdraw a guilty plea where necessary “[t]o correct manifest injustice.” NRS 176.165. “A manifest injustice occurs where a defendant makes a plea involuntarily or without knowledge of the consequences of the plea—or where the plea is entered without knowledge of the charge or that the sentence actually imposed could be imposed.” *State v. James*, 500 N.W.2d 345, 348 (Wis. Ct. App. 1993) (internal quotation marks omitted). “[We] will not overturn the district court’s determination on manifest injustice absent a clear showing of an abuse of discretion.” *Rubio v. State*, 124 Nev. 1032, 1039, 194 P.3d 1224, 1229 (2008) (internal quotation marks omitted).

The district court reviewed a video recording of Barrera entering his guilty plea and made the following findings: Defense counsel informed the district court he had communicated the terms of the plea agreement to Barrera and, although it was a plea of guilty but mentally ill, he was satisfied Barrera fully understood the nature of the proceedings. The district court fully canvassed Barrera and explained the procedures and consequences of entering into a plea of guilty but mentally ill. And Barrera entered a knowing, voluntary, and intelligent plea.

We conclude these findings are not belied by the record,² Barrera has failed to demonstrate manifest injustice, and we conclude the

²Barrera did not provide a copy of the video recording or a transcript of the plea canvass for our review. *See Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) (“The burden to make a proper appellate record rests on appellant.”).

district court did not err by rejecting Barrera's challenge to the validity of his guilty plea without an evidentiary hearing. See NRS 34.770(2); *Berry v. State*, 131 Nev. ___, ___, 363 P.3d 1148, 1156 (2015) (reviewing the district court's determination that a petitioner is not entitled to an evidentiary hearing for abuse of discretion).

Ineffective assistance of counsel

Barrera claims the district court erred by finding he was not deprived of effective assistance of counsel. He argues defense counsel's mitigation investigation was inadequate because defense counsel neglected to interview his family and friends who would have testified the events in this case were not in Barrera's character and a lengthy consecutive sentence would not be necessary.

To prevail on a claim of ineffective assistance of counsel, a petitioner must show (1) counsel's performance was deficient because it fell below an objective standard of reasonableness and (2) the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate prejudice sufficient to invalidate a judgment of conviction based on a guilty plea, the petitioner must show, but for trial counsel's errors the outcome would have been different. *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components of the ineffective-assistance inquiry—deficiency and prejudice—must be shown. *Strickland*, 466 U.S. at 697. We review the district court's resolution of ineffective-assistance claims de novo, giving deference to the court's factual findings if they are supported by substantial evidence and not clearing wrong. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). 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).

Barrera's assertion that his defense counsel's mitigation investigation was inadequate is not belied by the record and it appears, if counsel was deficient in this regard, Barrera may be entitled to relief. Accordingly, we conclude an evidentiary hearing was warranted on this issue. Therefore we reverse the denial of this claim and remand for an evidentiary hearing.³

Having concluded Barrera is only entitled to relief identified herein, 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.
Gibbons

cc: Hon. Eric Johnson, District Judge
Law Office of Julian Gregory, L.L.C.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³We express no opinion as to the merit of the claim.