

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT MICHAEL FLUKER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 69162

**FILED**

FEB 23 2017

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

*ORDER OF AFFIRMANCE*

Appellant Robert Michael Fluker appeals from an order of the district court denying his February 10, 2014, postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Fluker argues the district court erred in denying his claims of ineffective of counsel. 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). Both components of the inquiry must be shown. *Strickland v. Washington*, 466 U.S. 668, 697 (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, Fluker argues his counsel were ineffective for failing to file a motion to withdraw his guilty plea. Fluker asserted he wished to withdraw his plea because he initially entered his guilty plea to avoid imposition of the habitual criminal enhancement, but after he failed to appear for the sentencing hearing the State had decided to pursue that enhancement. Fluker asserted counsel had a duty to file the motion to withdraw his guilty plea under these circumstances. Fluker failed to demonstrate his attorneys' performances were deficient or resulting prejudice.

At the evidentiary hearing, Fluker's initial counsel testified Fluker sought his advice regarding moving to withdraw the guilty plea, counsel stated he advised Fluker against pursuing that motion, and Fluker abandoned pursuit of the motion to withdraw the guilty plea. The district court concluded counsel's testimony was credible and Fluker's was incredible. Substantial evidence supports the district court's conclusion. Given counsel's advice and Fluker's decision to abandon pursuit of withdrawal of his guilty plea, Fluker failed to demonstrate counsel acted in an objectively unreasonable manner.

Moreover, Fluker did not question his second counsel at the evidentiary hearing regarding counsel's actions or decisions with respect to a motion to withdraw his guilty plea. As stated previously, the district court concluded Fluker's testimony regarding this matter was not credible. Because Fluker failed to question his second counsel at the evidentiary hearing regarding this issue, he did not meet his burden to demonstrate that counsel was deficient in this regard. *See Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (explaining a petitioner has the burden to establish the factual allegations underlying a claim of ineffective

assistance of counsel); *see also Strickland*, 466 U.S. at 690 (recognizing “counsel is strongly presumed to have rendered adequate assistance”).


Fluker also failed to demonstrate a reasonable probability of a different outcome had counsel filed a motion to withdraw his guilty plea. At the evidentiary hearing, Fluker acknowledged he chose not to attend the sentencing hearing out of fear he would receive a lengthy sentence. Following Fluker’s decision not to attend the sentencing hearing, the State was free to pursue any appropriate sentence due to a provision in the guilty plea agreement. That the State was free to pursue any appropriate sentence, including the habitual criminal enhancement, because Fluker chose not to attend the initial sentencing hearing does not demonstrate a fair and just reason for withdrawing the guilty plea. *See* NRS 176.165; *Stevenson v. State*, 131 Nev. \_\_\_, \_\_\_, 354 P.3d 1277, 1282 (2015) (explaining that entry of a guilty plea should not “become a mere gesture, a temporary and meaningless formality reversible at a defendant’s whim.” (internal quotation marks omitted)). Therefore, we conclude the district court did not err in denying this claim.

Second, Fluker argues his counsel were ineffective for failing to seek a competency evaluation because he had suffered a head injury, which caused memory loss and mental health issues. Fluker failed to demonstrate his attorneys’ performances were deficient or resulting prejudice. At the evidentiary hearing, both of Fluker’s counsel testified Fluker never gave them any reason to question his competence. They both testified Fluker never appeared to be confused and he helped them with his case. The district court concluded counsel were credible and substantial evidence supports that conclusion. As counsel had no basis to pursue a competency evaluation, their actions did not fall below an

objective standard of reasonableness. In addition, Fluker failed to demonstrate he did not have the ability to consult with his attorney with a reasonable degree of rational understanding and that he did not have a rational and factual understanding of the proceedings against him. See *Melchor-Gloria v. State*, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983) (citing *Dusky v. United States*, 362 U.S. 402 (1960)). Accordingly, Fluker failed to demonstrate a reasonable probability of a different outcome had counsel sought a competency evaluation. Therefore, we conclude the district court did not err in denying this claim.

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

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Lynne K. Simons, District Judge  
Law Office of Thomas L. Qualls, Ltd.  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk