

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TROY LEE MULLNER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 77811-COA

**FILED**

JAN 14 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Troy Lee Mullner appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

First, Mullner argues the district court erred by denying the claims of ineffective assistance of counsel he raised in his July 24, 2018, petition. To prove ineffective assistance of counsel, a petitioner must demonstrate 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, 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, petitioner must raise

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claims 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).

Mullner claimed his counsel was ineffective for failing to investigate Mullner's drug use and mental health history. Mullner appeared to assert he was unable to enter a knowing and intelligent guilty plea due to these deficiencies. Mullner also appeared to assert counsel should have investigated whether these issues caused him to be impaired when he committed the crimes, and therefore he was not criminally responsible.

Mullner did not specify what a more thorough investigation concerning his drug use and mental health history would have uncovered or how it would have altered the outcome. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Because Mullner did not specify what information his counsel could have reasonably uncovered concerning these issues, he failed to demonstrate his counsel acted in an objectively unreasonable manner, or a reasonable probability of a different outcome had counsel investigated his drug use or mental health issues. Therefore, we conclude the district court did not err in denying this claim without conducting an evidentiary hearing.<sup>1</sup>

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<sup>1</sup>To the extent Mullner also asserted his guilty plea was not knowingly and voluntarily entered because of his substance abuse and mental health issues, his claim lacked merit. Mullner did not provide sufficient allegations concerning his underlying claim. Moreover, the record reveals that at the plea canvass and in the written plea agreement, Mullner asserted he understood the plea agreement and entered his plea voluntarily. Further, in the written plea agreement, Mullner asserted he was not under the influence of alcohol or a controlled substance that impaired his ability to

Mullner also claimed his counsel was ineffective for failing to file a motion to suppress his confession. Mullner contended he did not remember receiving the *Miranda*<sup>2</sup> warning and waiving his rights because he had used drugs and alcohol shortly before talking with the detective. “[I]ntoxication is not, by itself, sufficient to render a confession involuntary when the totality of the circumstances otherwise indicate that the statements were voluntary.” *Gonzales v. State*, 131 Nev. 481, 488 n.2, 354 P.3d 654, 659 n.2 (Ct. App. 2015).

Before the grand jury, a detective testified he informed Mullner of his *Miranda* rights, Mullner stated he understood those rights, and Mullner agreed to speak with him about the crimes. The detective testified Mullner provided detailed information concerning his commission of the crimes. The detective further testified Mullner informed him that he abused alcohol and methamphetamine, but the detective explained that Mullner had no trouble during their discussion explaining the commission of the crimes.

Based upon the record, the totality of the circumstances indicate Mullner voluntarily waived his *Miranda* rights and voluntarily confessed to committing the crimes. Therefore, Mullner did not demonstrate his counsel’s failure to move to suppress his confession amounted to the actions of objectively unreasonable counsel or a reasonable probability of a different outcome had counsel filed a motion to suppress his

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understand the agreement or proceedings. Based on the record, Mullner failed to demonstrate withdrawal of his guilty plea was necessary to correct a manifest injustice. *See* NRS 176.165.

<sup>2</sup>*Miranda v. Arizona*, 384 U.S. 436 (1966).

confession. Accordingly, the district court did not err by denying this claim without conducting an evidentiary hearing.

Mullner further claimed his counsel was ineffective for failing to advise him of favorable plea offers made by the State. Mullner contended there was a plea offer that would have resulted in a more lenient prison sentence than what he ultimately received, but counsel did not inform him of that offer prior to its expiration. Mullner did not identify the source for his allegation or provide additional information concerning the alleged plea offer, particularly regarding the charges that would have been included and the structure of the sentence that would have been recommended to the sentencing court. In addition, Mullner did not address whether he would have accepted the plea offer absent ineffective assistance of counsel, whether the State would have withdrawn the plea offer in light of intervening circumstances, or whether the district court would have accepted such an offer.

As Mullner failed to provide information concerning the plea offer and the parties' actions concerning that offer, he failed to meet his burden to demonstrate he was entitled to relief. *See Missouri v. Frye*, 566 U.S. 134, 147 (2012); *see also Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225 (explaining that a bare, unsupported claim is insufficient to demonstrate a petitioner is entitled to relief). Accordingly, Mullner failed to demonstrate his counsel's actions regarding the communication of plea offers fell below an objectively reasonable standard. Moreover, Mullner did not demonstrate "a reasonable probability that 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," *Frye*, 566 U.S. at 147, and therefore failed to meet his burden to demonstrate he was prejudiced by counsel's actions regarding the

plea negotiations. Accordingly, the district court did not err by denying this claim without conducting an evidentiary hearing.

Mullner finally claimed his counsel was ineffective for failing to secure a more favorable plea agreement. Mullner contended counsel should have utilized information concerning Mullner's substance abuse and mental health history or a motion to suppress his statement to the detective in order to receive a more lenient plea offer. Mullner did not demonstrate counsel could have reasonably obtained concessions during plea negotiations based upon these issues. Mullner also failed to demonstrate a reasonable probability he would have received a more lenient plea bargain had counsel made further attempts at negotiation utilizing this information. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Mullner claims his appellate counsel was ineffective. To prove ineffective assistance of appellate 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 the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Mullner claimed his appellate counsel acted under a conflict of interest because she advised him to drop his postconviction motion to withdraw guilty plea. Mullner contended he raised issues regarding her

ineffectiveness in that motion and the advice she offered concerning the motion amounted to a conflict of interest.

The record reveals that Mullner's postconviction motion to withdraw guilty plea did not raise issues concerning the actions of his appellate counsel but rather raised issues concerning a different attorney that represented him during the guilty-plea-and-sentencing proceedings. At a hearing after he filed the motion, Mullner's appellate counsel informed the trial-level court that Mullner was withdrawing the motion based upon her advice. Mullner then personally informed the district court that he no longer wished to pursue the motion, he did not want to withdraw his guilty plea, and he wished to focus on a different issue. The issues discussed at that hearing did not concern any claims of ineffective assistance of Mullner's appellate counsel.

In the context of an ineffective-assistance-of-counsel claim based on an alleged conflict of interest, "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland*, 466 U.S. at 692 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350, 348 (1980)). Given the issues raised in Mullner's motion and his statement demonstrating his desire to withdraw the motion from consideration, Mullner did not demonstrate his appellate counsel actively represented conflicting interests. Accordingly, Mullner failed to demonstrate his appellate counsel acted under a conflict of interest. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Mullner also claimed his appellate counsel was ineffective for raising three non-meritorious issues and declining to raise a claim

regarding the validity of his guilty plea. Mullner did not identify any meritorious issues that appellate counsel should have raised. In addition, challenges to the validity of a guilty plea must generally be raised in the district court in the first instance by either filing a presentence motion to withdraw the plea or commencing a postconviction proceeding pursuant to NRS chapter 34. See *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986), limited by *Smith v. State*, 110 Nev. 1009, 1010 n.1, 879 P.2d 60, 61 n.1 (1994). Mullner did not file a presentence motion to withdraw his guilty plea. Therefore, a challenge to the validity of Mullner's guilty plea would not have appropriately been raised on direct appeal. See *O'Guinn v. State*, 118 Nev. 849, 851-52, 59 P.3d 488, 489-90 (2002).

For those reasons, Mullner did not demonstrate his counsel's performance fell below an objectively reasonable standard or a reasonable likelihood of success on direct appeal had counsel raised additional issues or challenged the validity of his plea. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Mullner further claimed his appellate counsel was ineffective for failing to contend on direct appeal that his confession should have been suppressed due to a violation of *Miranda*. As stated previously, Mullner failed to demonstrate that the interviewing detective violated his *Miranda* rights. Accordingly, Mullner did not demonstrate his counsel's performance fell below an objectively reasonable standard or a reasonable likelihood of success on direct appeal had counsel argued that his confession should have been suppressed. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Mullner argues he was entitled to relief due to the cumulative effect of the errors of counsel. However, Mullner failed to

demonstrate any errors and, accordingly, he was not entitled to relief. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Mullner argues the district court erred by denying the petition without giving Mullner the opportunity to file an amended petition or a supplement. The district court has the discretion as to whether to allow a petitioner to file an amended petition or a supplement to the initial petition. *See* NRS 34.750(5); *State v. Powell*, 122 Nev. 751, 758, 138 P.3d 453, 458 (2006). “An abuse of discretion occurs if the district court’s decision is arbitrary or capricious or if it exceeds the bounds of law or reason.” *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (internal quotation marks omitted). Mullner does not identify additional claims that he would have raised had he been permitted to file additional documents. Based on the record before this court, Mullner does not demonstrate the district court’s exercise of its discretion to decide Mullner’s petition without first giving him the opportunity to file an amended petition or a supplement was arbitrary or capricious. Therefore, Mullner is not entitled to relief based upon this claim.

Fifth, Mullner argues the district court erred by conducting a hearing concerning the petition outside of his presence. A criminal defendant does not have an unlimited right to be present at every proceeding. *See Gallego v. State*, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 776 n.12, 263 P.3d 235, 253 n.12 (2011). A “defendant must show that he was prejudiced by the absence.” *Kirksey*, 112 Nev. at 1000, 923 P.2d at 1115. The record indicates the hearing at issue was not an evidentiary hearing, no testimony was presented and there was no argument, the district court



announced its decision to deny the petition, and the district court directed the State to prepare an order denying the petition. *Cf. Gebers v. State*, 118 Nev. 500, 504, 50 P.3d 1092, 1094-95 (2002) (concluding a petitioner's statutory rights were violated when she was not present at a hearing where testimony and evidence were presented). Mullner does not demonstrate he was prejudiced by his absence from the relevant hearing. Accordingly, we conclude the district court did not err in this regard.

Sixth, Mullner argues he was improperly not given the opportunity to review and respond to the State's proposed order denying the petition. As previously discussed, the district court properly denied the claims Mullner raised in his petition, and, therefore, any failure of the district court to ensure that he had an opportunity to review and respond to the proposed order was harmless. *See* NRS 178.598 (stating "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"); *cf. Byford v. State*, 123 Nev. 67, 69, 156 P.3d 691, 692 (2007) (stating that when a district court requests a party to prepare a proposed order, the court must ensure that the other parties are aware of the request and given the opportunity to respond to the proposed order). Mullner does not demonstrate that any error in this regard adversely affected the outcome of the proceedings or his ability to seek appellate review.<sup>3</sup>

Seventh, Mullner argues the district court erred by denying the petition without allowing him to conduct discovery. However, because the

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<sup>3</sup>Mullner also states that the district court's order did not dispose of all of his claims. However, a review of the district court's order reveals that it addressed all of Mullner's claims and denied the petition as a whole. Accordingly, Mullner is not entitled to relief based upon this issue.

district court did not set an evidentiary hearing, Mullner was not entitled to conduct discovery. *See* NRS 34.780(2). Therefore, Mullner is not entitled to relief based upon this claim.

Eighth, Mullner argues the district court erred by denying the petition without appointing postconviction counsel. The appointment of counsel in this matter was discretionary. *See* NRS 34.750(1). A review of the record reveals the issues in this matter were not difficult, Mullner was able to comprehend the proceedings, and discovery with the aid of counsel was not necessary. *See id.* Therefore, Mullner fails to demonstrate the district court abused its discretion by denying the petition without appointing postconviction counsel. *See Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 760-61 (2017). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Valerie Adair, District Judge  
Troy Lee Mullner  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk