136 Nev., Advance Opinion 60

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MELVIN LEROY GONZALES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 78152-COA

FILED

OCT 01 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

Affirmed.

Karla K. Butko, Verdi,
for Appellant.

Aaron D. Ford, Attorney General, Carson City; Michael Macdonald, District Attorney, and Anthony R. Gordon, Deputy District Attorney, Humboldt County,
for Respondent.

BEFORE GIBBONS, C.J., TAO and BULLA, JJ.

OPINION

PER CURIAM:

NRS 34.810(1)(a) requires a district court to dismiss a petition for a writ of habeas corpus challenging the validity of a judgment of conviction arising from a plea of guilty or guilty but mentally ill, unless it is based on allegations that the plea was not voluntarily and knowingly

entered or it was entered without the effective assistance of counsel. In this opinion, we outline the types of ineffective-assistance claims that are permitted by NRS 34.810(1)(a) and conclude that the plain language of the statute permits only ineffective-assistance claims that challenge the validity of the guilty plea. Thus, the statute excludes claims of ineffective assistance that do not allege a deficiency affecting the validity of the guilty plea, as well as claims that allege deficiencies that occur only after the entry of the guilty plea, such as those related to sentencing. Therefore, for the reasons discussed in this opinion, we affirm the district court's decision denying appellant's postconviction habeas petition.

PROCEDURAL HISTORY

Melvin Gonzales was convicted, pursuant to a guilty plea, of three counts of aggravated stalking for sending threatening text messages to his ex-wife and her family. The Nevada Supreme Court affirmed Gonzales's conviction on direct appeal. *Gonzalez v. State*, Docket No. 65768 (Order of Affirmance, Nov. 12, 2014). Gonzales filed a timely postconviction habeas petition, and postconviction counsel filed two supplements. The district court denied the petition. This appeal follows.

DISCUSSION

In his petition, Gonzales raised several claims of ineffective assistance of trial-level and appellate counsel. The district court dismissed nearly all of Gonzales's claims on the ground that they fell outside the scope of postconviction habeas claims allowed by NRS 34.810(1)(a). Gonzales contends this was error.

Postconviction habeas review at the state level is a creation of state law. *See Pellegrini v. State*, 117 Nev. 860, 870 n.11, 34 P.3d 519, 526 n.11 (2001) ("The Federal Constitution provides no right to post-conviction

habeas review by state courts."), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018). Thus, resolution of this issue turns on the meaning of NRS 34.810(1)(a), which provides the scope of claims that may be presented in a postconviction habeas petition that challenges a judgment of conviction entered pursuant to a guilty plea. This issue is a matter of statutory interpretation, which, as a question of law, is subject to de novo review. *See Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). Statutory interpretation begins with the plain language of the statute in question. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). The goal is to give effect to the intent of the Legislature. *Hobbs*, 127 Nev. at 237, 251 P.3d at 179. When the language is clear and unambiguous, we must give effect to that intent without looking beyond the plain language. *Coleman v. State*, 134 Nev. 218, 219, 416 P.3d 238, 240 (2018); *Sheriff v. Burcham*, 124 Nev. 1247, 1253, 198 P.3d 326, 329 (2008). In giving effect to a statute's plain meaning, statutes "must be construed as a whole." *Butler v. State*, 120 Nev. 879, 892, 102 P.3d 71, 81 (2004) (internal quotation marks omitted); *accord Pellegrini*, 117 Nev. at 873-74, 34 P.3d at 528-29.

NRS 34.810(1) states

> The court shall dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or

> that the plea was entered without effective assistance of counsel.[1]

Plain language

The plain language of NRS 34.810(1)(a), as a whole, limits cognizable claims to two types, both of which challenge the validity of the guilty plea. *See Harris v. State*, 130 Nev. 435, 438-39, 329 P.3d 619, 621-22 (2014) (citing NRS 34.810(1)(a) for the proposition that "the validity of a guilty plea may be challenged in a post-conviction petition for a writ of habeas corpus" and for the proposition that the issues that may be raised are limited). The first acceptable challenge is a direct attack against the validity of a guilty plea on the basis that the plea was not voluntarily or knowingly entered. *See Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) ("A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.'" (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970))); *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000) ("This court will not invalidate a plea as long as . . . the plea was knowingly and voluntarily made . . . ."). The second acceptable challenge is an indirect attack against the validity of a guilty plea on the basis that "the plea was entered without effective assistance of counsel." It is the meaning of this passage that is at the crux of the issue in this appeal.

By its plain meaning, "the plea was entered without effective assistance of counsel" permits a petitioner to raise claims of ineffective assistance of counsel that are related to the entry of the plea. This means

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[1]For brevity, and because the petitioner pleaded "guilty" in this case, this opinion refers to guilty pleas. The holding herein, however, applies equally to pleas of "guilty but mentally ill."

that, contrary to Gonzales's suggestion, not all claims of ineffective assistance may be raised. Rather, to be cognizable, the ineffective-assistance claims that may be raised are limited to those that challenge the *validity* of the guilty plea. *See Nollette v. State*, 118 Nev. 341, 348-49, 46 P.3d 87, 92 (2002) ("A defendant who pleads guilty upon the advice of counsel may attack the validity of the guilty plea by showing that he received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution."). Any ineffective-assistance-of-counsel claims relating to events that do not affect the validity of the guilty plea fall outside the scope of claims permitted.

Statutory and legislative history

Because NRS 34.810(1)(a) is not ambiguous, "this court does not look beyond its plain language in interpreting it." *Coleman*, 134 Nev. at 219, 416 P.3d at 240. We nevertheless explore the statutory and legislative history of the statute to aid the parties in understanding how the Legislature came to limit the scope of postconviction petitions for a writ of habeas corpus.

Beginning in 1967, offenders could collaterally challenge their convictions through either the postconviction relief provisions of NRS Chapter 177 or the habeas corpus provisions of NRS Chapter 34. *See Pellegrini*, 117 Nev. at 870-73, 34 P.3d at 526-28 (setting forth an in-depth history of the evolution of Nevada's postconviction remedies). Although this dual-remedy system lasted for more than 20 years, "the Legislature incrementally amended Chapters 34 and 177 to curtail the ability to alternatively use the two remedies and to limit the filing of successive or delayed applications for post-conviction or habeas relief." *Id.* at 871, 34 P.3d at 527.

Initially, neither Chapter 34 nor Chapter 177 contained any specific limitation regarding the claims that could be raised when the petitioner's conviction was the result of a guilty plea. This changed in 1973 when Chapter 177 was amended in an effort to limit the relief available in all postconviction petitions to those instances where *"the court finds that there has been a specific denial of the petitioner's constitutional rights with respect to his conviction or sentence."* 1973 Nev. Stat., ch. 349, § 8, at 439. For petitioners convicted pursuant to a guilty plea, NRS 177.375(1) limited the available claims even further: *"If the petitioner's conviction was upon a plea of guilty, all claims for post-conviction relief are waived except the claim that the plea was involuntarily entered."* 1973 Nev. Stat., ch. 349, § 7(1), at 438. With this amendment, it is clear that the Legislature intended to limit the scope of cognizable claims to those that challenged the validity of a guilty plea.

It was not until 1985 that Chapter 34 was also amended to include a similar limitation on the scope of claims that could be raised when the petitioner's conviction was the result of a guilty plea. *See* 1985 Nev. Stat., ch. 435, § 10(1), at 1232. This amendment was codified as NRS 34.810(1)(a). As enacted, NRS 34.810(1) stated the following:

> The court shall dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.

NRS 34.810(1)(a) has been in substantially the same form since its enactment.

The legislative history for the 1985 amendments to Chapter 34 is silent as to why the language in the newly enacted NRS 34.810(1)(a) was different than the language used in NRS 177.375(1). We do know, however, that the 1985 amendments to Chapter 34 were intended to consolidate procedures between the habeas corpus provisions in Chapter 34 and the postconviction relief provisions in Chapter 177. *See* Hearing on A.B. 517 Before the Assembly Judiciary Comm., 63d Leg. (Nev., May 7, 1985). Decisions of the United States and Nevada Supreme Courts leading up to the amendment offers further insight into understanding the change in language.

Prior to the amendment of NRS 177.375(1), "it was the law [in Nevada] that when a guilty plea is not coerced, and the defendant was represented by competent counsel, at the time it was entered, the subsequent conviction is not open to collateral attack and any errors are superseded by the plea of guilty." *Mathis v. Warden*, 86 Nev. 439, 441, 471 P.2d 233, 235 (1970). In 1970, the United States Supreme Court issued a series of cases (the *Brady* trilogy) in which the Court set forth the general rule governing federal collateral attacks on convictions based on a guilty plea. *See Parker v. North Carolina*, 397 U.S. 790 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Brady v. United States*, 397 U.S. 742 (1970). In the *Brady* trilogy cases, each defendant "alleged some deprivation of constitutional rights that preceded his decision to plead guilty." *Tollett v. Henderson*, 411 U.S. 258, 265 (1973). The Court held that the entry of a guilty plea foreclosed direct inquiry into the merits of constitutional violations that occurred prior to entry of the plea and "concluded in each case that the issue was not the merits of [the] constitutional claims as such, but rather whether the guilty plea had been

made intelligently and voluntarily with the advice of competent counsel." *Id.* Thus, inquiry into constitutional violations that preceded entry of the plea was relevant, but only to the extent it implicated the voluntary and intelligent nature of the guilty plea. The 1973 amendment to NRS 177.375(1) reflected both the law in Nevada and the general rule established in the *Brady* trilogy because it limited the scope of cognizable claims to those challenging the voluntariness of the plea.

Days after the amendment of NRS 177.375(1), the United States Supreme Court issued the opinion in *Tollett*. In *Tollett*, the Court

> reaffirm[ed] the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the [range of competence demanded of attorneys in criminal cases].

Id. at 267. The *Tollett* Court made it clear that an ineffective-assistance claim that challenges the voluntary and intelligent nature of a guilty plea is a constitutional claim that is an exception to the general rule that a criminal defendant who pleads guilty "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Id.* In the years between the amendment of NRS 177.375(1) and the enactment of NRS 34.810(1)(a), the Nevada Supreme Court applied the general rule and the ineffective-assistance exception as set forth in *Tollett* in several cases. *See Bounds v.*

Warden, 91 Nev. 428, 429-30, 537 P.2d 475, 476 (1975); *Bacon v. State*, 90 Nev. 368, 370, 527 P.2d 118, 119 (1974); *Cline v. State*, 90 Nev. 17, 18-19, 518 P.2d 159, 159-60 (1974).

In 1984, the United States Supreme Court first announced the test for determining whether counsel was ineffective in *Strickland v. Washington*, 466 U.S. 668 (1984). The Nevada Supreme Court quickly adopted the *Strickland* test the same year. *See Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984). Both *Strickland* and *Lyons* involved convictions obtained pursuant to pleas. *See Strickland*, 466 U.S. at 672; *Lyons*, 100 Nev. at 431, 683 P.2d at 504. The Legislature added NRS 34.810(1)(a) during the legislative session following the issuance of the opinion in *Lyons*. Thus, it appears that "the plea was entered without the effective assistance of counsel" was added to enshrine in Nevada law the principle first suggested in the *Brady* trilogy: a petitioner may challenge the voluntary and intelligent nature of a guilty plea through a claim that counsel was ineffective.

In 1987, NRS 177.375(1) was amended to substantively mirror the language in NRS 34.810(1)(a).[2] *See* 1987 Nev. Stat., ch. 539, § 45(1), at 1231. Effective January 1, 1993, the postconviction provisions in Chapter 177 were repealed and the current single postconviction remedy under Chapter 34 was created. 1991 Nev. Stat., ch. 44, §§ 31, 33, at 92.

In summary, both the plain language of the statute and the legislative and statutory history of NRS 34.810(1)(a) demonstrate that the

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[2]NRS 177.375(1) was amended to read, "If the petitioner's conviction was upon a plea of guilty, all claims for post-conviction relief are waived except the claim that the plea was involuntarily or unknowingly entered or that the plea was entered without the effective assistance of counsel."

scope of claims that may be raised in a postconviction petition challenging a conviction entered as a result of a guilty plea are limited to claims that challenge the validity of the guilty plea. These claims may be raised either directly, i.e., a claim asserting the plea was not voluntarily or knowingly entered, or indirectly, i.e., a claim asserting the plea was entered without the effective assistance of counsel.

Application of NRS 34.810(1)(a) to ineffective-assistance claims

Generally, to demonstrate ineffective assistance of counsel, a petitioner must show both that counsel's performance was deficient in that it fell below an objective standard of reasonableness and that petitioner was prejudiced in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland*, 466 U.S. at 687-88, 697. Because counsel must be effective during the plea negotiation process, *Missouri v. Frye*, 566 U.S. 134, 144 (2012), the test for deficiency focuses on the course of counsel's legal action that preceded the plea to determine whether counsel's advice, or failure to give advice, regarding the plea "was within the range of competence demanded of attorneys in criminal cases," *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (quoting *McMann*, 397 U.S. at 771); *see, e.g.*, *Frye*, 566 U.S. at 145 (holding counsel was deficient for allowing a plea "offer to expire without advising the defendant or allowing him to consider it"); *Tollett*, 411 U.S. at 267-68 (describing attorney competence when conviction is the result of a guilty plea). Because the deficiency being evaluated is the advice rendered by counsel, claims relating to constitutional deprivations occurring prior to entry of the plea are only pertinent in the context of evaluating counsel's advice. *See Tollett*, 411 U.S. at 266 ("The focus of federal habeas inquiry is the nature of the advice and the voluntariness of the plea, not the existence as such of an antecedent

constitutional infirmity."). And when evaluating whether counsel's advice was objectively reasonable, the court should "look beyond the plea canvass to the entire record." *Rubio v. State*, 124 Nev. 1032, 1040, 194 P.3d 1224, 1229 (2008).

"[T]he . . . 'prejudice,' requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. That is, it focuses on whether counsel's deficient performance affected the petitioner's acceptance or rejection of the guilty plea offer. For example, where a petitioner claims that counsel's improper advice "led him to accept a plea offer as opposed to proceeding to trial, the [petitioner] will have to show 'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Frye*, 566 U.S. at 148 (quoting *Hill*, 474 U.S. at 59). Or where a petitioner claims that counsel's improper advice led him or her to reject an earlier, more favorable plea offer, the petitioner will have to show a reasonable probability that "he would have accepted the offer to plead pursuant to the terms earlier proposed" and that, if it was within their discretion, neither the prosecution nor the trial court would have prevented the offer's acceptance. *Id.*

As discussed above, to fall within the scope of NRS 34.810(1)(a), an ineffective-assistance claim must challenge events that affected the validity of the guilty plea. The familiar standard for whether a petitioner is entitled to an evidentiary hearing on an ineffective-assistance claim provides a useful framework for determining whether an ineffective-assistance claim is sufficiently pleaded to come within the scope of claims permitted by NRS 34.810(1)(a). To come within the scope, a petitioner must raise claims supported by specific factual allegations that are not belied by

the record and, if true, would entitle him or her to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Thus, a petitioner must allege specific facts demonstrating both that counsel's advice (or failure to give advice) regarding the guilty plea was objectively unreasonable and that the deficiency affected the outcome of the plea negotiation process. Any claim that does not satisfy this standard is outside the scope of permitted claims and must be dismissed. *Cf. Rippo*, 134 Nev. at 426, 423 P.3d at 1100 (concluding a petitioner who has not satisfied the *Hargrove* standard is not entitled to relief). Because events occurring after the entry of the plea cannot have affected either counsel's advice regarding entering the guilty plea or the outcome of the plea negotiation process, ineffective-assistance claims relating to post-plea proceedings necessarily fall outside the scope of claims permitted by NRS 34.810(1)(a).[3]

With this test in mind, we turn to Gonzales's specific claims of ineffective assistance of counsel. Gonzales claimed that trial-level counsel was ineffective for not objecting to the State's breach of the plea agreement at the sentencing hearing and that appellate counsel was ineffective for not raising the breach on appeal. Because both of these claims alleged deficiencies that occurred after Gonzales entered his guilty plea, they were not sufficiently pleaded to fall within the scope of claims permitted by NRS 34.810(1)(a). We therefore affirm the dismissal of these claims.

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[3]The exclusion of these claims does not abrogate a defendant's right to the effective assistance of counsel in post-plea proceedings. It merely highlights that the Nevada Legislature has not provided petitioners a means of collaterally challenging counsel's efficacy in post-plea proceedings at the state level. Offenders remain free to seek redress of constitutional deprivations in federal courts in the first instance.

Gonzales also raised several ineffective-assistance claims that challenged events that preceded the entry of the guilty plea. As noted below, however, these claims also were not sufficiently pleaded to fall within the scope of permitted claims. First, Gonzales claimed that counsel failed to move to sever charges. However, he did not indicate how the failure rendered counsel's advice regarding the guilty plea objectively unreasonable. Second, Gonzales claimed that counsel should have moved to lower the severity of the crimes charged and should not have advised Gonzales to plead to the more severe crimes. Gonzales, however, did not allege that any deficiency affected his decision to enter a guilty plea. And third, Gonzales claimed that counsel threatened that the State would seek habitual criminal treatment if he did not accept the plea negotiations. However, he did not indicate that counsel's advice was objectively unreasonable or that any deficiency affected his decision to enter a guilty plea.[4] Because none of these claims were sufficiently pleaded, we affirm the dismissal of these claims.

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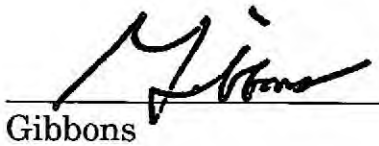
[4]To the extent Gonzales alleges that the district court erred by dismissing his claim that his guilty plea was invalid because it was coerced by counsel's repeated warnings of possible habitual criminal treatment, as well as counsel's failure to file motions to sever the charges or suppress the fruits of a search and by allowing Gonzales to plead to crimes he did not commit, we conclude that no relief is warranted. Although these additional allegations directly challenged the voluntary nature of the guilty plea and fall within the scope of NRS 34.810(1)(a), the district court found they lacked merit.

A guilty plea is presumed to be valid. *Rubio*, 124 Nev. at 1038, 194 P.3d at 1228. And while a coerced guilty plea is invalid, *see North Carolina v. Alford*, 400 U.S. 25, 31 (1970) (reiterating the standard for a valid guilty plea is whether it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant"); *accord Stevenson v.*

CONCLUSION

NRS 34.810(1)(a) limits the scope of cognizable ineffective-assistance claims to those that challenge the validity of the guilty plea. A sufficiently pleaded claim must allege specific facts demonstrating both that counsel's advice (or failure to give advice) regarding the guilty plea was objectively unreasonable and that the deficiency affected the outcome of the plea negotiation process. Because all of Gonzales's ineffective-assistance claims were outside the scope of cognizable claims under NRS 34.810(1)(a), the district court properly dismissed them.



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State, 131 Nev. 598, 604-05, 354 P.3d 1277, 1281 (2015), a guilty plea is not involuntary simply "because [it is] motivated by a desire to avoid the possibility of a higher penalty" or habitual criminal treatment, *Whitman v. Warden*, 90 Nev. 434, 436, 529 P.2d 792, 793 (1974). And Gonzales's other allegations do not support that he was coerced, *see Coerce*, *Black's Law Dictionary* (11th ed. 2019) ("To compel by force or threat . . . ."), or that he was unable to make a voluntary and intelligent choice to plead guilty. Thus, we affirm the district court's dismissal of his claim on this basis.