IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GERALD JEROME POLK, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 80787-COA
GERALD JEROME POLK, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 80788-COA

FILED

DEC 08 2020

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

ORDER OF AFFIRMANCE

Gerald Jerome Polk appeals from identical orders of the district court denying a postconviction petition for a writ of habeas corpus filed in district court case number A-19-787309-W (Docket No. 80788-COA). The district court's order was also filed in district court case number C-17-325126-1 (Docket No. 80787-COA). These cases were consolidated on appeal. *See* NRAP 3(b). Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Polk argues the district court erred by denying the claims of ineffective assistance of counsel raised in his June 5, 2019, petition.[1] To

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[1]Polk filed a postconviction petition for a writ of habeas corpus in the district court on January 11, 2019. The district court denied that petition without prejudice because it was not filed in compliance with NRS 34.735, but granted Polk leave to file a petition that cured those defects. Polk

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demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *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 show a reasonable probability that, 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, 987-88, 923 P.2d 1102, 1107 (1996). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 687, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

First, Polk claimed that his counsel was ineffective for pressuring him into accepting a plea offer by telling him he would likely be found guilty at a trial and by talking to him about the plea offer instead of pursuing pretrial motions. Polk also appeared to contend his counsel improperly pressured him into accepting the plea offer even though a prosecution witness had been arrested for an unrelated crime and the witness's testimony about this case would therefore have been discredited. In the written plea agreement and at the plea canvass, Polk acknowledged that he entered his plea voluntarily and did not act under duress or coercion. In the written plea agreement, Polk acknowledged that he discussed the

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subsequently filed his June 5, 2019, petition in compliance with NRS 34.735. The district court considered Polk's claims on the merits and denied relief.

facts of the case and possible defenses with his counsel, but came to the conclusion that acceptance of a plea offer was in his best interests. Moreover, counsel's candid advice about the possible outcome of a trial is not evidence of deficient performance. *See Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 69, 412 P.3d 56, 62 (2018) (noting that one of the roles of an attorney is to provide candid advice to his or her client). Accordingly, Polk failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Therefore, we conclude the district court did not err by denying this claim.

Second, Polk claimed his counsel was ineffective for failing to object after the sentencing court imposed an overly lengthy sentence as a result of listening to the victim impact testimony. "The district court is capable of listening to the victim's feelings without being subjected to an overwhelming influence by the victim in making its sentencing decision," *Randell v. State*, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993), and Polk failed to demonstrate his counsel's performance during the sentencing hearing fell below an objective standard of reasonableness. Polk also failed to demonstrate a reasonable probability of a different outcome at the sentencing hearing had counsel argued the sentence imposed was improperly influenced by the victim impact testimony. Therefore, we conclude the district court did not err by denying this claim.

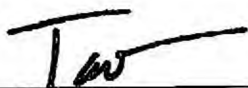
Finally, Polk appeared to assert that his guilty plea was not voluntarily entered because the trial-level court improperly pressured him into entering a guilty plea. Polk contended the trial-level court's facial expressions and body language at the plea canvass indicated to him that he

should accept the plea offer. Polk also asserted that the trial-level court improperly caused him to enter a guilty plea by telling him the plea offer was beneficial and by promising him that he would not be "maxed out" on his sentence.

The record reveals the trial-level court explained the potential penalties Polk faced by proceeding to trial versus entry of a guilty plea. The court also explained that, due to the plea agreement, the State would only be permitted to request a total sentence of 10 to 26 years in prison if Polk entered a guilty plea. The court further explained that sentencing judges often follow the recommendations contained within a plea agreement, but that no one could guarantee him a particular sentence. Polk acknowledged he had sufficient time to consider the plea offer, he understood his potential sentences, and decided to voluntarily enter a guilty plea. Polk failed to demonstrate that any actions of the trial-level court caused him to enter an unknowing and involuntary guilty plea. *See Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986), *superseded by statute on other grounds as stated in Hart v. State*, 116 Nev. 558, 562 n.3, 1 P.3d 969, 971 n.3 (2000). Therefore, we conclude the district court did not err by denying this claim. Accordingly, we

ORDER the judgments of the district court AFFIRMED.

_______________, C.J.
Gibbons



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COURT OF APPEALS OF NEVADA

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cc: Hon. Michael Villani, District Judge
Gerald Jerome Polk
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk