

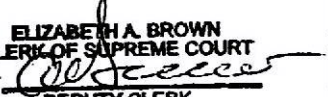
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARLENE FITZGERALD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81649-COA

FILED

AUG 06 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Marlene Fitzgerald appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on August 2, 2019, and a supplemental petition filed on March 5, 2020. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Fitzgerald argues the district court erred in failing to allow her to withdraw her guilty plea, because she was coerced into pleading guilty. “[U]ndue coercion occurs when a defendant is induced by promises or threats which deprive the plea of the nature of a voluntary act.” *Stevenson v. State*, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015) (internal quotation marks omitted). We review the district court’s determination that Fitzgerald failed to demonstrate manifest injustice for abuse of discretion. *Rubio v. State*, 124 Nev. 1032, 1039, 194 P.3d 1224, 1229 (2008).

Fitzgerald argued her plea was coerced because, when the trial-level judge was informed that Fitzgerald’s counsel may not have been prepared for the entry of the plea, the district court directed counsel to go out to the hall and indicated Fitzgerald “may go into custody today if she’s not ready.” Fitzgerald agreed she would plead guilty in a separate case and then plead guilty in this case within 45 days. As part of that agreement,

the State would recommend Fitzgerald for electronically monitored own-recognition release pending sentencing. When Fitzgerald failed to enter her plea in the instant case within the agreed-upon timeframe, the State moved to have her release revoked. It was at a hearing on the State's motion to revoke, conducted nearly four months after Fitzgerald entered her guilty plea in the other case, that the district court made the challenged comment. Thus the court's comment that Fitzgerald may go into custody was made during a hearing in which Fitzgerald's custody status was a primary issue. And Fitzgerald knew even before the judge's comment that going into custody was a possibility. In light of its context, the judge's comment did not amount to a threat that deprived Fitzgerald of her voluntary act of pleading guilty, something she had already signaled she intended to do. Accordingly, we conclude the district court did not abuse its discretion in denying this claim.

Fitzgerald also argues the district court erred by denying her claims of ineffective assistance of defense counsel. To demonstrate ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that, but for counsel's errors, there is a reasonable probability 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 v. Washington*, 466 U.S. 668, 687 (1984), 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). 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, Fitzgerald argued counsel was not adequately prepared prior to the entry of her plea. Fitzgerald argued counsel was not ready on the day of the entry of her plea, did not have a copy of the plea agreement, and "presumably" had inadequate time to go over the documents. As discussed above, Fitzgerald had agreed to plead guilty months before her guilty plea was entered. Further, at the evidentiary hearing on Fitzgerald's petition, counsel testified that he had gone over the plea agreement with Fitzgerald and discussed the case with her prior to the plea hearing, he believed Fitzgerald's plea was voluntary, he did not remember Fitzgerald telling him that she needed additional time, and Fitzgerald said nothing to him on the day of the plea hearing that led him to believe that she was not entering her plea freely, intelligently, and voluntarily. For these reasons, Fitzgerald failed to demonstrate counsel's performance fell below an objective standard of reasonableness or that she would not have pleaded guilty had counsel performed differently. Accordingly, we conclude the district court did not err in denying this claim.

Second, Fitzgerald argued counsel did not properly advise her of the immigration consequences of her plea. In both her guilty plea agreement and plea canvass, Fitzgerald acknowledged that this criminal conviction would likely result in serious negative immigration consequences. Fitzgerald's bare claim did not identify what else counsel should have advised her of. *See Padilla v. Kentucky*, 559 U.S. 356, 369 (2009) (holding criminal defense attorneys are not required to provide complex immigration law advice). Therefore, Fitzgerald failed to

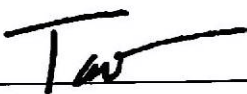
demonstrate counsel's performance fell below an objective standard of reasonableness or that she would not have pleaded guilty had counsel performed differently. Accordingly, we conclude the district court did not err in denying this claim.

Finally, Fitzgerald claimed counsel failed to conduct a sufficient investigation into her claims of actual innocence. Fitzgerald did not offer evidence of her actual innocence to the district court. Therefore, Fitzgerald failed to demonstrate counsel's performance fell below an objective standard of reasonableness or that she would not have pleaded guilty had counsel performed differently. Accordingly, we conclude the district court did not err in denying this claim.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Kathleen E. Delaney, District Judge
Law Office of Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Attorney General/Ely
Eighth District Court Clerk