

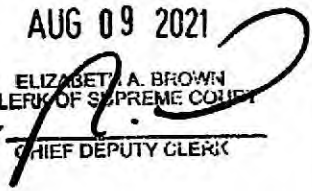
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PHILLIP MOORE,
Appellant,
vs.
JERRY HOWELL, WARDEN,
Respondent.

No. 81965-COA

FILED

AUG 09 2021

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

ORDER OF AFFIRMANCE

Phillip Moore appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Moore argues the district court erred by denying the claims of ineffective assistance of trial-level counsel raised in his July 9, 2019, petition and later-filed supplement without first conducting an evidentiary hearing. To 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.¹ *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

¹Moore appears to argue he did not need to demonstrate prejudice stemming from errors committed by his counsel. However, Moore's argument lacks merit. Prejudice under *Strickland* is presumed in limited circumstances, see *United States v. Cronin*, 466 U.S. 648, 659-60, 661 n.28 (1984), that are not presented in this case.

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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, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687.

We give deference to the district 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). To warrant an evidentiary hearing, a petitioner must raise 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).

First, Moore argued his counsel was ineffective for failing to explain the plea agreement to him in an understandable manner. Moore contended he did not understand the plea agreement because he is of low intelligence and counsel should have done a more thorough job of explaining the plea agreement to him due to his comprehension issues. Moore also appeared to assert that he did not understand the potential sentences he faced from entry of a guilty plea, he entered a guilty plea because counsel assured him he would be released on bail following entry of the plea, and counsel did not discuss the case or possible defenses with him.

At the plea canvass, Moore asserted he read the written plea agreement and understood it. Moore also asserted at the plea canvass that he reviewed the written plea agreement with his counsel and counsel answered his questions regarding the agreement. The hearing master also explained the potential sentences Moore faced and Moore asserted that he understood those potential penalties. In the written plea agreement, Moore

acknowledged that he understood the potential sentences he faced, he understood he could be sentenced to serve consecutive or concurrent terms, and he asserted he had not been promised a particular sentence. In addition, Moore asserted he did not act due to “any promises of leniency, except for those set forth in this agreement,” and the agreement contained no promises concerning a release on bail. Moore also acknowledged in the written plea agreement that he had discussed “any possible defenses, defense strategies and circumstances which might be in my favor” with his counsel.

Moreover, Moore filed a presentence motion to withdraw his guilty plea and contended in that motion that his counsel did not adequately explain the potential sentences he faced by entry of his guilty plea and that he did not fully understand that he could be sentenced to serve consecutive terms. The trial-level court considered the motion and concluded Moore was not entitled to relief because his claims were belied by the record.

In light of the record concerning Moore’s understanding of the plea agreement, Moore failed to demonstrate his counsel’s performance fell below an objective standard of reasonableness. Moore also failed to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial had counsel done a more thorough job of explaining the plea agreement to him or discussed the plea agreement in a different manner. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Moore argued his counsel was ineffective during the proceedings concerning Moore’s presentence motion to withdraw guilty plea. Moore asserted that counsel should have attempted to present

information concerning Moore's learning disabilities in an effort to demonstrate that Moore did not understand the plea agreement. Moore also contended counsel failed to advise the trial-level court of the proper fair-and-just standard for withdrawal of a plea and instead improperly claimed that Moore should be permitted to withdraw his guilty plea due to manifest injustice.

As stated previously, Moore claimed in the motion to withdraw guilty plea that counsel did not adequately explain the potential sentences he faced by entry of his guilty plea and that he did not fully understand he could be sentenced to serve consecutive terms. The trial-level court reviewed Moore's presentence motion to withdraw guilty plea and concluded he was not entitled to relief because his claims were belied by the record. Because the trial-level court denied the motion on the grounds that Moore's claims were belied by the record, Moore did not demonstrate a reasonable probability of a different outcome had his counsel attempted to present information concerning Moore's learning disability or asserted he was entitled to relief based upon the fair-and-just standard. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Moore argued his counsel was ineffective at the sentencing hearing for failing to present mitigation evidence concerning Moore's learning disability. Moore also asserted counsel should have presented information to provide the sentencing court a better picture of Moore's life.

At the sentencing hearing, the sentencing court listened to the arguments of the parties concerning the appropriate sentence. Counsel requested leniency because Moore accepted responsibility for his actions

and felt empathy toward the victims. The sentencing court responded that it had decided to impose sentence based upon its consideration of the nature of the offenses and the potential danger involved in Moore's crimes. The district court also noted that Moore had multiple prior felony convictions and his crimes in this matter were "quite violent." In light of the record concerning the sentencing hearing, and in particular the sentencing court's stated reasons for imposing a lengthy prison sentence, Moore failed to demonstrate a reasonable probability of a different outcome had counsel presented mitigation evidence or attempted to present additional information about Moore's life. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Finally, Moore argued the district court erred by granting the State's motion to strike affidavits he filed during the postconviction proceedings. "After appointment by the court, counsel for the petitioner may file and serve supplemental pleadings, exhibits, transcripts and documents within 30 days" of the later of either the date the district court ordered the filing of an answer and return or the date of counsel's appointment. NRS 34.750(3). The district court has the discretion to allow a petitioner to file supplemental pleadings, *see* NRS 34.750(5); *State v. Powell*, 122 Nev. 751, 758, 138 P.3d 453, 458 (2006), but has no obligation to permit a petitioner to raise issues that were not raised in an appropriately filed pleading, *see Barnhart v. State*, 122 Nev. 301, 303-04, 130 P.3d 650, 651-52 (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) (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)).

The district court noted that Moore's affidavits contained information that was not germane to the issues raised in his petition and Moore improperly had attempted to present that information via affidavits filed in an untimely manner. The district court therefore struck the affidavits from the record. Based on the record before this court, Moore does not demonstrate the district court's exercise of its discretion to strike the untimely filed affidavits was arbitrary, capricious, or exceeded the bounds of law or reason. Therefore, we conclude Moore is not entitled to relief based upon this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michael Villani, District Judge
Lowe Law LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk