

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHELLE J. PHILLIPS,
Appellant,
vs.
DWIGHT NEVEN, WARDEN, NDOC,
Respondent.

No. 82190-COA

FILED

AUG 12 2021

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

ORDER OF AFFIRMANCE

Michelle J. Phillips appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on November 8, 2019, and a supplemental petition filed on February 3, 2020. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

Phillips claims the district court erred by denying her claims of ineffective assistance of counsel. 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. *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, 988, 923 P.2d 1102, 1107 (1996).

Both components of the inquiry—deficiency and prejudice—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). A petitioner claiming counsel did not conduct an adequate investigation must demonstrate what the results of a better investigation would have been and how it would have affected the outcome of the proceedings. *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). 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).

First, Phillips claimed counsel were ineffective for failing to adequately investigate the allegations before advising her to plead guilty. Phillips claimed counsel should have interviewed the victim to determine whether the victim was competent and whether he granted Phillips consent to access his bank account and/or pawn his firearms. Phillips failed to demonstrate by a preponderance of the evidence what the victim would have said or that but for the alleged error, she would not have pleaded guilty and would have insisted on going to trial had counsel interviewed the victim. Therefore, we conclude the district court did not err by denying this claim.

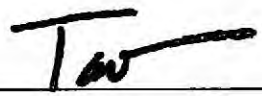
Second, Phillips claimed counsel¹ was ineffective for failing to object at sentencing to the restitution amount imposed or conduct his own investigation into the restitution amount. The district court conducted a restitution hearing during which counsel cross-examined the State's financial expert regarding his conclusion that Phillips was responsible for \$137,469.45 in restitution. At the close of the hearing, counsel challenged the restitution amount, arguing that the cash withdrawals could have been

¹At the time of her plea, Phillips was represented by two attorneys. They were later replaced by a third attorney.

used on the victim's behalf. The court continued the hearing so it could review the bank records, and it later imposed restitution in the amount of \$95,645.41. During the evidentiary hearing on Phillips' petition, counsel testified that his cross-examination of the State's financial expert gave him what he thought hiring his own expert would have given him. And Phillips did not present any evidence that the restitution amount was improper. For these reasons, Phillips did not demonstrate counsel's actions in this regard fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel further investigated or challenged the restitution amount. Therefore, we conclude the district court did not err by denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. John Schlegelmilch, District Judge
Orrin Johnson Law
Attorney General/Carson City
Lyon County District Attorney
Third District Court Clerk