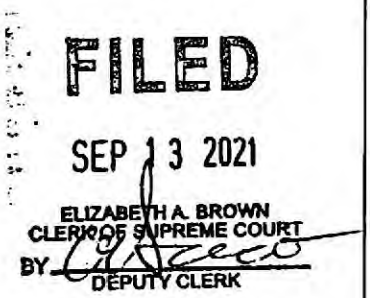
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LAMAR BROWN, A/K/A CALVIN LAMAR NICKO BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81577-COA



ORDER OF AFFIRMANCE

Lamar Brown appeals from an order of the district court denying a postconviction petition for writ of habeas corpus, a postsentence motion to withdraw plea,[1] and a motion to modify and/or correct an illegal sentence, all filed on April 13, 2018, and a supplemental pleading filed on June 17, 2019. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

Postconviction petition for a writ of habeas corpus

Brown argues the district court erred by denying his claims that he received ineffective assistance of trial-level counsel without 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

[1]The district court should have construed the motion to withdraw plea as a postconviction petition for a writ of habeas corpus. *See Harris v. State*, 130 Nev. 435, 448, 329 P.3d 619, 628 (2014). We note that the claims contained in Brown's petition and the motion were based on the same facts and analysis.

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. 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, Brown argued counsel was ineffective for failing to argue that the application of a more recent version of the lifetime supervision statute to him violated the Ex Post Facto Clause. A requirement for an Ex Post Facto Clause violation is that the statute applies to events occurring before it was enacted. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). "[U]nless the Legislature clearly expresses its intent to apply a law retroactively, Nevada law requires the application of the law in effect at the time of the commission of a crime." *State v. Second Judicial Dist. Court (Pullin)*, 124 Nev. 564, 567, 188 P.3d 1079, 1081 (2008).

Brown was convicted of violation of lifetime supervision pursuant to NRS 213.1243. He argued that, because he committed the

offenses giving rise to the lifetime supervision requirement in 2006, the version of NRS 213.1243 in effect in 2006, and not the 2009 amendments, should apply to his violation of lifetime supervision. However, lifetime supervision begins only after an offender has expired his prison sentence and has been discharged from any further obligations of parole or probation. Violation of lifetime supervision by a convicted sex offender is a new, separate, and distinct offense. *Coleman v. State,* 130 Nev. 190, 194-95, 321 P.3d 863, 866-67 (2014). Brown entered the lifetime supervision agreement in 2011, and he violated it in 2014. At all relevant times, the 2009 version of NRS 213.1243 was in effect, *see* 2009 Nev. Stat., ch. 300, § 2, at 1299-1300, and applied to Brown's offense of violation of lifetime supervision. Thus, there was no Ex Post Facto Clause violation, and Brown failed to demonstrate counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by counsel's alleged failure to pursue this defense. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Brown argued counsel was ineffective for advising him to enter a guilty plea to a single count of violation of lifetime supervision when two of the three alleged violations did not constitute a crime. He also argued counsel was ineffective for failing to advise him of the holding of *McNeill v. State,* 132 Nev. 551, 375 P.3d 1022 (2016), which was issued after he pleaded guilty but before he was sentenced and invalidated the two alleged violations.

The *McNeill* decision analyzed the 2009 version of the lifetime supervision statute, NRS 213.1243, and concluded its plain language did not delegate authority to the parole board to impose conditions of lifetime supervision that are not enumerated in the statute. 132 Nev. at 555, 375

P.3d at 1025. Thus, *McNeill* did not announce new law, but rather clarified that defendants cannot be convicted of a violation of lifetime supervision when the condition allegedly violated was not listed in NRS 213.1243.

Here, the information alleged Brown violated the following conditions: failing to participate in counseling, and/or failing to report, and/or failing to obtain permission before changing his address. Of those violations, failure to obtain permission prior to changing his address is the only one enumerated by statute. *See* NRS 213.1243(3)(a) (providing an offender may live at a location only if, among other things, "[t]he residence has been approved by the parole and probation officer assigned to the person"). Because *McNeill* was decided based on the plain meaning of the statute, a claim similar to that raised in *McNeill* was reasonably available to Brown's counsel at the time Brown entered his plea, as well as thereafter.

However, it does not necessarily follow that counsel was ineffective. Brown admitted to violating a lawful condition of the lifetime supervision agreement: failing to obtain permission prior to changing his address. He thus failed to demonstrate counsel's advice to plead guilty to a single count of violation of lifetime supervision or counsel's failure to advise him of the *McNeill* decision fell below an objective standard of reasonableness.

Further, in light of the totality of the circumstances, Brown's claim that he would have insisted on going to trial was not reasonable. Not only did he admit to the illegal conduct,[2] but the negotiated terms prevented the State from opposing probation and allowed for a potential drop-down

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[2]Brown failed to demonstrate that his attempt to register his new address with the police department would have been a defense to the allegation that he failed to obtain permission *prior* to moving.

from a felony to a misdemeanor and own-recognizance release. Therefore, we conclude Brown has failed to demonstrate a reasonable probability of a different outcome had counsel put forth the arguments raised in *McNeill* or advised Brown of that opinion when it issued. *See State v. Huebler*, 128 Nev. 192, 203-04, 275 P.3d 91, 99 (2012) (observing that the prejudice prong of *Hill* begins with "a subjective assertion" but that "the validity and reasonableness of that subjective assertion must be evaluated through an objective analysis considering the totality of the circumstances"). Accordingly, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Brown also argues the district court erred by denying his claim challenging the validity of his guilty plea without conducting an evidentiary hearing. Brown asserted that his plea was not knowingly and voluntarily entered because counsel was ineffective in failing to advise Brown of the unlawful conditions in his lifetime supervision agreement. After sentencing, a district court may permit a petitioner to withdraw a guilty plea where necessary "[t]o correct manifest injustice." NRS 176.165. "A guilty plea entered on advice of counsel may be rendered invalid by showing a manifest injustice through ineffective assistance of counsel. Manifest injustice may also be demonstrated by a failure to adequately inform a defendant of the consequences of his plea." *Rubio v. State*, 124 Nev. 1032, 1039, 194 P.3d 1224, 1228-29 (2008) (footnote and internal quotation marks omitted). We review a district court's manifest injustice determination for abuse of discretion but review claims of ineffective assistance of counsel de novo. *Id.* at 1039, 194 P.3d at 1229. As discussed above, Brown has not demonstrated ineffective assistance of trial-level

counsel. Therefore, we conclude the district court did not abuse its discretion by denying this claim without conducting an evidentiary hearing.

Motion to modify and/or correct an illegal sentence

Finally, Brown argues the district court erred by denying his motion to modify and/or correct an illegal sentence. In his motion, Brown claimed his adjudication as a habitual criminal and the associated sentence of 5 to 20 years in prison was illegal because the information charging Brown violated the Ex Post Facto Clause and improperly charged violation of lifetime supervision as a felony rather than a misdemeanor. Brown did not allege that the district court relied on mistaken assumptions regarding his criminal record that worked to his extreme detriment. *See Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). Brown also failed to allege that his sentence was facially illegal or the district court lacked jurisdiction. *See id.* Therefore, we conclude the district court did not err by denying Brown's motion to modify and/or correct an illegal sentence. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Mary Kay Holthus, District Judge
The Law Office of Daniel M. Bunin
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk