

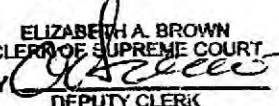
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JAMES HOWARD HAYES, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 82734-COA

FILED

SEP 17 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

James Howard Hayes, Jr., appeals from orders of the district court denying a postconviction petition for a writ of habeas corpus and a motion to compel judgment. Eighth Judicial District Court, Clark County; Monica Trujillo, Judge.

*Postconviction petition for a writ of habeas corpus*

In his February 12, 2020, petition<sup>1</sup> and later-filed supplements, Hayes claimed that his trial-level counsel was ineffective. To demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of

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<sup>1</sup>Hayes filed an "amended petition," and due to the nature of the claims raised, the district court construed it as a postconviction petition for a writ of habeas corpus. See NRS 34.724(2)(b). The district court also found that Hayes' petition was successive and procedurally barred pursuant to NRS 34.810(2) because he had previously filed a postconviction petition for a writ of habeas corpus. However, Hayes' first petition has not yet been resolved by the district court. Because the petition was not denied on the merits, the district court erred by concluding Hayes' petition was successive. See NRS 34.810(2).

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 an *Alford*<sup>2</sup> plea, a petitioner must show a reasonable probability that, but for counsel's errors, petitioner would not have entered an *Alford* plea 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). 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, Hayes claimed counsel was ineffective for failing to assert that his prosecution was barred by NRS 174.085(3) and NRS 178.562 because a count of attempted grand larceny was dismissed during the preliminary hearing. NRS 174.085(3) bars re-prosecution of a defendant for a charge after that defendant has been convicted, acquitted, or placed in jeopardy for that charge. NRS 178.562 bars re-prosecution of an offense under certain situations when a criminal action is dismissed and bars the filing of another complaint against a person for an offense that had previously been discharged following a preliminary hearing.

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<sup>2</sup>*North Carolina v. Alford*, 400 U.S. 25 (1970).

During the preliminary hearing in this matter, the State moved to strike a count of attempted grand larceny, and the justice court granted its request. The justice court later found probable cause to believe that Hayes committed burglary and bound Hayes over to district court. Before the district court, the burglary charge was reduced to a charge of attempted grand larceny as a result of the plea agreement reached between the parties. Because the justice court found probable cause to support the burglary charge, and at no point was that charge dismissed or was Hayes discharged, NRS 178.562 did not bar Hayes' prosecution. In addition, because the preliminary hearing proceedings did not convict, acquit, or place Hayes in jeopardy, NRS 174.085(3) did not bar Hayes' prosecution.

Accordingly, Hayes did not demonstrate that his counsel's performance fell below an objective standard of reasonableness by failing to argue that Hayes' prosecution was barred by the application of NRS 174.085(3) or NRS 178.562. Hayes also failed to demonstrate a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Second, Hayes claimed counsel was ineffective for failing to ensure he fully understood the plea agreement and potential consequences he faced from entry of an *Alford* plea. The written plea agreement, which Hayes acknowledged having read and understood, informed Hayes of the potential sentences he faced by entry of his plea. The written plea agreement also informed Hayes of the potential sentences he faced due to the habitual criminal enhancement if he violated the failure-to-appear (FTA) clause. At the plea canvass, Hayes informed the trial-level court that he read the written plea agreement and his counsel was available to answer any of his questions concerning the agreement. At the canvass, Hayes also

asserted he understood the plea agreement and believed entry of an *Alford* was in his best interests.

In light of the record concerning Hayes' understanding of the plea agreement and the consequences he faced from entry of his plea, Hayes failed to demonstrate his counsel's performance fell below an objective standard of reasonableness. Hayes also failed to demonstrate a reasonable probability he would have refused to enter an *Alford* plea and would have insisted on proceeding to trial had counsel done a more thorough job of explaining the plea agreement and potential consequences to him or discussed the plea agreement in a different manner. Therefore, we conclude the district court did not err by denying this claim.

Third, Hayes claimed counsel was ineffective for failing to move to withdraw his plea after it became clear he would not receive a sentence in accordance with the plea agreement. In the plea agreement, the State agreed not to oppose probation in exchange for Hayes' *Alford* plea. However, the written plea agreement also contained the FTA clause and explained the potential consequences Hayes faced if he violated that clause, including a sentence pursuant to the habitual criminal enhancement. Accordingly, Hayes' sentence pursuant to the habitual criminal enhancement was in accordance with Hayes' plea agreement. Thus, Hayes did not demonstrate that his counsel's performance fell below an objective standard of reasonableness by failing to assert that Hayes should be permitted to withdraw his plea or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Hayes claimed counsel was ineffective for failing to argue that Hayes did not violate the FTA clause contained within the plea

agreement. The written plea agreement contained a clause that permitted the State to argue for any legal sentence, including one under the habitual criminal enhancement, if an independent magistrate confirmed probable cause against Hayes for new criminal charges. After entry of his plea, Hayes was charged with committing a new burglary offense and a justice court found probable cause to support that charge. Because an independent magistrate confirmed there was probable cause to support the new burglary charge, Hayes failed to demonstrate his counsel's performance fell below an objective standard of reasonableness by failing to assert he did not violate the FTA clause. Hayes also failed to demonstrate a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Fifth, Hayes claimed counsel was ineffective for failing to assert he was not eligible for sentencing under the habitual criminal enhancement as his two Texas convictions should not have been considered felonies for sentencing purposes because he did not serve prison terms for those convictions. Hayes also appeared to assert that his prior felony convictions should have only been considered as a single prior conviction for enhancement purposes because they arose out of one event.

The State provided the sentencing court with two judgments of conviction from the state of Texas demonstrating that Hayes was convicted of two separate felony convictions in that state and sentenced to serve two years in prison for each conviction. *See* NRS 207.016(5) ("For the purposes of NRS 207.010, 207.012 and 207.014, a certified copy of a felony conviction is prima facie evidence of conviction of a prior felony."). Because Hayes had at least two prior convictions "which under the laws of the situs of the crime" were felonies, he was eligible to be sentenced pursuant to the small habitual

criminal enhancement. 2009 Nev. Stat., ch. 156, § 1, at 567 (NRS 207.010(1)(a)). In addition, the State filed two separate judgments of conviction from Texas containing different criminal case numbers for each conviction. Hayes thus did not demonstrate the Texas convictions were prosecuted in the same indictment or information. Therefore, Hayes did not demonstrate his prior convictions should have been considered as a single prior conviction for purposes of enhancing his sentence pursuant to the habitual criminal statute. *See Rezin v. State*, 95 Nev. 461, 462, 596 P.2d 226, 227 (1979) (“[W]here two or more convictions grow out of the same act, transaction or occurrence, and are prosecuted in the same indictment or information, those several convictions may be utilized only as a single ‘prior conviction’ for purposes of applying the habitual criminal statute.”). Accordingly, Hayes did not demonstrate that his counsel’s performance fell below an objective standard of reasonableness by failing to raise Hayes’ underlying arguments or a reasonable probability of a different outcome had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Next, Hayes claimed his appellate counsel was ineffective. To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel’s performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that the omitted issue would have a reasonable probability of success on appeal. *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114. 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*, 120 Nev. at 1012, 103 P.3d at 33. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745,

751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, Hayes claimed his appellate counsel was ineffective for failing to investigate meritorious claims because Hayes asserted counsel would have discovered that the State did not properly file a notice of its intent to request sentencing under the habitual criminal enhancement. The State filed a notice of its intent as required by NRS 207.016(2) to request the sentencing court to sentence Hayes pursuant to the habitual criminal enhancement, and did so prior to entry of Hayes' *Alford* plea. Hayes failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness by failing to argue the State did not properly file the notice or a reasonable likelihood of success on appeal had counsel done so. Therefore, we conclude the district court did not err by denying this claim.

Second, Hayes claimed his appellate counsel was ineffective for failing to file a notice of appeal or inform him of his right to an appeal. Hayes filed a pro se notice of appeal and this court considered his direct appeal. *See Hayes v. State*, Docket No. 78590-COA (Order of Affirmance, January 14, 2020). Because Hayes pursued a direct appeal, Hayes does not demonstrate that any failure by counsel to perform these actions caused him to suffer prejudice. Therefore, we conclude the district court did not err by denying this claim.

Third, Hayes appeared to claim his appellate counsel was ineffective for withdrawing after issuance of the remittitur on appeal. Hayes filed a pro se motion requesting the withdrawal of his counsel and the district court granted that motion. Hayes did not demonstrate that

withdrawal by counsel under these circumstances was objectively unreasonable. Hayes also failed to demonstrate a reasonable probability of a different outcome had counsel declined to withdraw from Hayes' case. Therefore, we conclude the district court did not err by denying this claim.

Next, Hayes appeared to claim that his plea was not knowing and voluntary because the trial-level court failed to explain the consequences he faced by violating the FTA clause. "This court will not invalidate a plea as long as the totality of the circumstances, as shown by the record, demonstrates that the plea was knowingly and voluntarily made and that the defendant understood the nature of the offense and the consequences of the plea." *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). As explained previously, the written plea agreement explained to Hayes the consequences he faced by violating the FTA clause and Hayes acknowledged that he read and understood the written plea agreement. Thus, the totality of the circumstances demonstrated that Hayes understood the consequences he faced from entry of his plea and from violating the FTA clause. Therefore, we conclude that Hayes is not entitled to relief based upon this claim.

Next, Hayes claimed the State breached the plea agreement, presented impalpable evidence at the sentencing hearing, amended the information in bad faith, violated his right to equal protection, and should have been barred from prosecuting him. Hayes also asserted that the trial-level court lacked jurisdiction to convict him and the presentence investigation report contained mistakes concerning his criminal record. These claims were not based on an allegation that his plea was involuntarily or unknowingly entered or that his plea was entered without the effective assistance of counsel, and therefore, these claims were not permissible in



Hayes' postconviction petition for a writ of habeas corpus. See NRS 34.810(1)(a). Accordingly, we conclude the district court properly denied relief for these claims.

*Motion to compel judgment*

Hayes also appealed from an order denying his motion to compel judgment. However, no statute or court rule permits an appeal from an order denying a motion to compel judgment. Therefore, we lack jurisdiction to consider this portion of Hayes' appeal. See *Castillo v. State*, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Monica Trujillo, District Judge  
James Howard Hayes, Jr.  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk