

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARC ANTHONY EARLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82301-COA

FILED

JAN 05 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Marc Anthony Earley appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on January 24, 2020. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Earley first claims the district court erred by denying his claim that the ineffective assistance of alternate counsel¹ entitled him to withdraw his guilty plea. Earley claimed alternate counsel had an actual conflict of interest: He was acting as an advocate for the court and not in Earley's interests. On appeal from Earley's judgment of conviction, this court concluded it was error for the district court to appoint counsel to advise it whether Earley had a valid claim to withdraw his plea. *See Earley v. State*, No. 74734-COA, 2019 WL 1772002 (Nev. Ct. App. Apr. 18, 2019) (Order of Reversal and Remand). This court reversed and remanded this

¹Earley moved to withdraw his guilty plea shortly after entering it. The trial court appointed counsel ("alternate counsel") to determine whether Earley had a basis to seek to withdraw his guilty plea. Alternate counsel reported back that there was no valid basis for Earley to withdraw his guilty plea.

case to the district court to determine whether, prior to alternate counsel being appointed, Earley had presented a fair and just reason to withdraw his plea. *Id.* Therefore, in essence, this court already decided that counsel had a conflict of interest and granted relief. In granting relief, this court put Earley back into the position he was in prior to the appointment of alternate counsel. Earley has not demonstrated that he is entitled to additional relief based on alternate counsel's actions or why, in light of the procedural history of his case, alternate counsel's actions would entitle him to withdraw his plea. Thus, we conclude the district court did not abuse its discretion by denying this claim.

Earley next claims the district court abused its discretion by denying his claim that he had a fair and just reason to withdraw his plea because the medications he was taking and his mental health issues caused him to be confused about the terms of the plea agreement

A defendant may move to withdraw a guilty plea before sentencing, NRS 176.165, and "a district court may grant a defendant's motion to withdraw his guilty plea before sentencing for any reason where permitting withdrawal would be fair and just," *Stevenson v. State*, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015). To this end, the Nevada Supreme Court disavowed the standard previously announced in *Crawford v. State*, 117 Nev. 718, 30 P.3d 1123 (2001), which focused exclusively on whether the plea was knowingly, voluntarily, and intelligently made, and affirmed that "the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just." *Stevenson*, 131 Nev. at 603, 354 P.3d at 1281. We review the district court's decision on a motion to withdraw a guilty plea for

an abuse of discretion. *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986).

Earley claimed the combination of medications he was taking at the time he ended his trial and decided to plead guilty had left him feeling overwhelmed, exceedingly angry, and confused in general. Earley claimed he was confused about two things specifically: why he was pleading guilty to robbery of a victim age 60 years or older when he did not actually rob the man, and why he was pleading guilty to burgling the Family Dollar while in possession of a deadly weapon when he did not possess a deadly weapon during that crime. Further, he claimed counsel told him he could not testify because Earley did not include himself as a witness on the witness list.² He also claimed counsel told him he could not appeal his conviction.

Earley chose to plead guilty on the third day of his jury trial. The charges he agreed to plead guilty to included robbery of a person age 60 years or older and burglary while in possession of a deadly weapon of a Verizon store and/or a Family Dollar store. Earley was facing the charge of robbery of a person age 60 years or older at trial, and he failed to show he did not understand the charge prior to pleading guilty or why he pleaded guilty to a charge he believed he was innocent of, especially given his decision to plead guilty mid-trial. The burglary while in possession of a deadly weapon was charged in the alternative: he committed either the Verizon store or the Family Dollar store burglary while in possession of a deadly weapon. Even if he did not agree that he committed the Family Dollar store burglary while in possession of a deadly weapon, he has not disputed that he possessed a deadly weapon during the Verizon store

²Earley represented himself during some of the pretrial proceedings.

burglary. And, he has failed to demonstrate that charging the burglaries in the alternative was a fair and just reason to withdraw his plea. Finally, counsel testified at the evidentiary hearing³ that he never told Earley he could not testify at trial, nor did he tell Earley he could not appeal.

Further, Earley was canvassed regarding the charges he was pleading guilty to and stated he understood the nature of the charges and the potential consequences. Counsel testified that he went over the plea agreement line by line with Earley, Earley asked appropriate questions, and Earley appeared to understand the proceedings. Earley also affirmed during the plea canvass that he and counsel discussed the plea agreement, he understood the plea agreement, and he was agreeing to plead guilty. Looking at the totality of the circumstances, Earley was not confused about the terms of the plea agreement. Rather, he understood the nature of the plea agreement and agreed to plead guilty. Therefore, we conclude the district court did not abuse its discretion by denying this claim.

Finally, Earley claims the district court erred by denying his claim that counsel was ineffective for failing to investigate and, therefore, was not prepared for trial. Earley claimed that had counsel investigated and been prepared for trial, counsel would have been able to further his defense that his cousin was the actual perpetrator of the crimes. He also claimed that the district court erred by not holding an evidentiary hearing on this claim.

To demonstrate ineffective assistance of defense 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

³The hearing was conducted on both the remanded claims and those raised in the postconviction petition.

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). 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). 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, Earley claimed counsel should have cross-examined his cousin and his cousin's girlfriend regarding their changing stories on where the clothing items were found and turned over to the police. In his opening statement, counsel told the jury the State failed to investigate alternate suspects, thus indicating Earley's defense would be that he was not the perpetrator. During trial, counsel questioned the victims regarding the height and weight of the assailant, pointed out that none of the victims definitively identified Earley as the assailant, and drew attention to the similarities in size between Earley and his cousin. Further, counsel cross-examined Earley's cousin and the cousin's girlfriend regarding their differing stories of how they provided Earley's clothes to the police. Earley has not demonstrated how additional questions from counsel regarding the clothes would have affected his decision to plead guilty midtrial. To the extent Earley argued counsel should have cross-examined the cousin or

cousin's girlfriend regarding the police officer's reports and previous testimony of how the clothes were collected, these questions were better directed toward those police officers. Earley chose to plead guilty prior to the police officers' testimony at trial. Thus, Earley failed to demonstrate counsel was deficient or a reasonable probability that, had counsel questioned the witnesses as Earley suggests, he would not have pleaded guilty and would have continued with trial. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, he claimed counsel should have had Earley's cousin's DNA tested against the DNA found on one of the victim's keys. The victims testified that the assailant wore gloves during the robbery where the assailant stole the victim's car. Therefore, it was not likely that Earley's cousin's DNA would have been found in the car. Thus, Earley failed to demonstrate counsel was deficient or a reasonable probability that, had counsel done more investigation or had been more prepared, he would not have pleaded guilty and would have continued with trial. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Having concluded Earley is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michelle Leavitt, District Judge
Gaffney Law
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk