

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN JAMES FITZSIMMONS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82969-COA

FILED

MAR 04 2022

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

ORDER OF AFFIRMANCE

Kevin James Fitzsimmons appeals from orders of the district court dismissing a postconviction petition for a writ of habeas corpus filed on July 26, 2016, and a supplemental petition filed on November 6, 2017. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

Fitzsimmons claims the district court erred by denying his claims of ineffective assistance of 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 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, Fitzsimmons claimed his counsel was ineffective for allowing him to sign a plea agreement containing a clause which provided that the sentencing court could consider at sentencing “any other cases charged or uncharged which are either to be dismissed or not pursued by the State.” Fitzsimmons claimed counsel failed to explain the meaning and consequences of this clause and that the clause allowed the State to use at the time of sentencing evidence of uncharged acts for the purpose of influencing the sentencing court to impose an enhanced sentence under the habitual criminal statute. Fitzsimmons also claimed counsel misinformed him that certain evidence related to his 2006 guilty plea could not be introduced by the State at sentencing because Fitzsimmons was not deemed competent in 2006.

Fitzsimmons was originally indicted on 18 felony counts and, if convicted of all counts, could have been subject to up to 18 consecutive terms

of life in prison. Fitzsimmons' guilty plea to only two counts thus constituted a substantial benefit from his plea. Accordingly, he failed to demonstrate he would have refused to plead guilty and would have insisted on going to trial even if counsel's performance were deficient. Therefore, we conclude the district court did not err by dismissing these claims without first conducting an evidentiary hearing.

Second, Fitzsimmons claimed his counsel failed to inform him that the State filed a notice to introduce the above-referenced evidence at sentencing or of the prejudicial content of the evidence. Fitzsimmons claimed this left him unprepared and unable to defend against the evidence at sentencing and that he would have filed a presentence motion to withdraw his guilty plea had counsel informed him. Fitzsimmons' bare claim failed to explain how he would have challenged the State's notice. And because he received a substantial benefit from his plea agreement, Fitzsimmons failed to demonstrate he would have sought withdrawal of his plea and would have insisted on going to trial had his counsel informed him of the State's notice. Therefore, we conclude the district court did not err by dismissing this claim without first conducting an evidentiary hearing.

Third, Fitzsimmons claimed his counsel was ineffective for not filing an objection or otherwise responding in writing to the State's notice to introduce the above-referenced evidence at sentencing. Fitzsimmons claimed that, while counsel orally objected to the admission of the evidence at sentencing, the evidence was already before the sentencing court. The district court admitted the evidence over counsel's objection, and Fitzsimmons' bare claim did not indicate what additional argument counsel

could have raised in a written motion. Further, the evidence was before the sentencing court regardless of whether counsel's objections were in writing or made orally. Accordingly, Fitzsimmons failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome but for counsel's alleged errors. Therefore, we conclude the district court did not err by dismissing this claim without first conducting an evidentiary hearing.

Fourth, Fitzsimmons claimed his counsel was ineffective for failing to correct errors in the amended presentence investigation report (PSI). Fitzsimmons claimed two misdemeanor offenses from 1997 had been dismissed and that their incorrect dispositions will be used to determine his parole eligibility. The amended PSI provided that Fitzsimmons indicated that the domestic battery case had been dismissed "per guilty plea to C141390," and Fitzsimmons failed to specify how the incorrect dispositions would impact his parole eligibility. Accordingly, Fitzsimmons failed to demonstrate a reasonable probability of a different outcome but for counsel's alleged errors. Therefore, we conclude the district court did not err by dismissing this claim without first conducting an evidentiary hearing.


Fifth, Fitzsimmons claimed his counsel was ineffective for failing to go over the amended PSI with him until 15 minutes before the sentencing hearing. At the sentencing hearing, counsel stated that he went over "each page" of the amended PSI with Fitzsimmons while Fitzsimmons was in custody at the Washoe County jail. Moreover, Fitzsimmons acknowledged he told counsel about the above-referenced errors in the

amended PSI and failed to explain how additional time discussing the amended PSI with counsel would have been beneficial. Accordingly, Fitzsimmons failed to demonstrate counsel's performance was deficient or a reasonable probability of a different outcome but for counsel's alleged errors. Therefore, we conclude the district court did not err by dismissing this claim without first conducting an evidentiary hearing.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Kathleen M. Drakulich, District Judge
Oldenburg Law Office
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk