

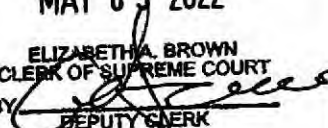
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TONEY ANTHONY WHITE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82889-COA

FILED

MAY 05 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

Toney Anthony White appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on November 5, 2020. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

In his petition, White first claimed that 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 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 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). 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. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, White claimed counsel was ineffective for failing to obtain White's mental health records and retain experts. White claimed his mental health records and an expert may have supported his claim that he acted under duress and without the intent to commit the crimes. White failed to support this claim with specific factual allegations that are not belied by the record and, if true, would have entitled him to relief. Although he claimed he had mental health issues and his codefendant threatened him, he failed to allege how those mental health issues or threats affected his behavior in this case or how they may have reduced his level of culpability. Therefore, we conclude the district court did not err by denying this claim.

Second, White claimed counsel was ineffective for failing to ensure he received proper *Marcum*¹ notice prior to the grand jury proceedings. White failed to allege how the *Marcum* notice or lack thereof affected his decision to plead guilty. Further, counsel stated at a hearing held on April 18, 2017, that White had received *Marcum* notice in court a month prior to the grand jury proceedings and that counsel was served with the *Marcum* notice by email. Therefore, White failed to support this claim with specific factual allegations that are not belied by the record and, if true,

¹*Sheriff, Humboldt County v. Marcum*, 105 Nev. 824, 783 P.2d 1389 (1989).

would have entitled him to relief. Thus, we conclude the district court did not err by denying this claim.

Third, White claimed counsel was ineffective for failing to discuss the grand jury proceedings with him. White did not allege how counsel's purported failure affected his decision to plead guilty. Therefore, White failed to support this claim with specific factual allegations that are not belied by the record and, if true, would have entitled him to relief. Thus, we conclude the district court did not err by denying this claim.

Fourth, White claimed counsel was ineffective for failing to obtain exculpatory and/or impeachment information and for failing to use this information at trial. White claimed counsel should have interviewed witnesses and obtained witnesses' criminal histories, 9-1-1 tapes, and documents relevant to the searches. He also claimed counsel should have been prepared to present "friendly" witnesses. White failed to allege what evidence would have been discovered had counsel interviewed the witnesses. White merely speculated the witnesses had prior criminal histories that counsel did not receive and that these other police reports existed. White also failed to allege what the 9-1-1 tapes or search documents contained that would have resulted in a reasonable probability of different outcome. Further, White failed to allege what friendly witnesses should have been called at trial or what the substance of their testimony would have been. Finally, White pleaded guilty before the State called all of its witnesses and before counsel could put on White's defense case. For these reasons, he failed to support these claims with specific factual allegations that are not belied by the record and, if true, would have entitled him to relief. Therefore, we conclude the district court did not err by denying these claims.

Fifth, White claimed counsel was ineffective for failing to pursue the suppression of the search of the vehicle. White claimed counsel

should have argued that the person driving the vehicle—his codefendant Wong—did not have the actual authority to consent to the search of the vehicle because it belonged to White and Wong stole it. Evidence obtained during a warrantless vehicle search may nevertheless be admissible if law enforcement officers had the consent of someone with either actual or apparent authority to give consent to the search. *See Lastine v. State*, 134 Nev. 538, 541, 429 P.3d 942, 947 (Ct. App. 2019). “Actual authority is proved (1) where defendant and a third party have mutual use of and joint access to or control over the property at issue or (2) where defendant assumes the risk that the third party might consent to a search of the property.” *Id.* at 542, 429 P.3d at 947. Under the apparent authority doctrine, a search is valid if the officer reasonably believes that the third party has actual authority to consent. *Id.* at 544-45, 429 P.3d at 949.

Just prior to the search, Wong was observed acting as lookout for his codefendants. When the police started to enter the scene, Wong fled in the vehicle using the keys to the vehicle that were in his possession. After being arrested, Wong gave permission to the officers to search. In light of these facts, White failed to demonstrate Wong did not have the apparent authority to consent to the search.

To the extent White argued that Wong’s *Miranda*² rights were violated and, therefore, the consent to search was invalid, he did not have standing to raise that claim. *See Bowman v. United States*, 350 F.2d 913, 915 (9th Cir. 1965) (“[T]he privilege against self-incrimination is personal to the witness.”). Similarly, to the extent White argued the police illegally searched his girlfriend’s purse that was found in the car, he did not have standing to raise this claim. *Cf. Scott v. State*, 110 Nev. 622, 627, 877 P.2d 503, 507 (1994) (concluding that a defendant lacked standing to challenge

²*Miranda v. Arizona*, 384 U.S. 436 (1966).

the search of personal property he did not own). For these reasons, White failed to demonstrate a motion to suppress would have had a reasonable probability of success, and counsel is not deficient for failing to pursue futile motions. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Thus, we conclude the district court did not err by denying these claims.

Sixth, White claimed counsel was ineffective for failing to pursue the suppression of the “pre-arrest surreptitious surveillance.” White failed to demonstrate that the surveillance violated any protected constitutional or statutory right. Therefore, he failed to demonstrate such a motion to suppress would have had a reasonable probability of success, and counsel is not deficient for failing to file futile motions. *See id.* Thus, we conclude the district court did not err by denying this claim.

Seventh, White claimed counsel was ineffective for failing to present White’s mental health issues at sentencing. Specifically, White claimed counsel should have presented information that White suffered from schizophrenia, had a past traumatic brain injury, and was intoxicated at the time of the crime. He also claimed counsel should have argued in a sentencing memorandum that these issues demonstrated he lacked culpability. White had six prior felony convictions, had pending charges from another state, and committed very violent crimes in this case to which he pleaded guilty. The State also presented evidence that White attempted to dissuade the victims and witnesses from testifying at trial. For these reasons, White failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel presented information concerning White’s mental health. Accordingly, we conclude the district court did not err by denying this claim.

Eighth, White claimed counsel was ineffective for failing to investigate the threats and coercion that resulted in his October 2017 guilty plea. Counsel successfully moved to withdraw White’s 2017 plea based on

this information. White failed to explain what more counsel should have done with this information. Therefore, White failed to demonstrate counsel was deficient or a reasonable probability of a different outcome had counsel done further investigation. Thus, we conclude the district court did not err by denying this claim.

Ninth, White claimed counsel was ineffective for failing to object to the imposition of restitution because White was not informed that he would be subject to restitution. The district court found White was not canvassed regarding restitution but that he indicated he “understood the consequences of his plea and the sentencing decision was strictly up to the Court.” From this, the district court concluded the totality of the circumstances demonstrated that White understood he would be subject to restitution. White’s generic assertion that he understood the consequences of the plea and that sentencing was up to the trial-level court was not probative of whether White understood he could be subject to any particular consequence or sentence of which he was not actually informed. Accordingly, we conclude the district court erred by relying on White’s generic assertion to deny this claim.

Restitution is a direct consequence of a guilty plea of which the defendant must be informed. *See Cruzado v. State*, 110 Nev. 745, 747, 879 P.2d 1195, 1196 (1994), *as limited by Lee v. State*, 115 Nev. 207, 209-10, 985 P.2d 164, 166 (1999) (holding that if a defendant is otherwise informed of the restitution requirement, the district court does not have to specifically canvass the defendant on this requirement). Because White was not canvassed on the possibility he would be responsible for restitution, this court requested the State to respond to this claim.

In its response, the State notes that the written guilty plea agreement accompanying White’s October 2017 guilty plea informed him of the restitution requirement. Thus, the State argues, under the totality of

the circumstances, White understood he was subject to restitution. White's previous plea agreement was entered into more than a year before the instant plea, and it was ultimately withdrawn. We are not convinced that the previous plea agreement, alone, satisfied the requirement that White be advised of the consequences of the plea at issue.³ Therefore, we reverse and remand this claim to the district court to conduct an evidentiary hearing to determine whether, under the totality of the circumstances, White understood he would be subject to restitution at sentencing. If the district court determines that White did not understand he would be subject to the imposition of restitution, the remedy would be to strike the restitution requirement from the judgment of conviction. *See Cruzado*, 110 Nev. at 747, 879 P.2d at 1196; *see also McConnell v. State*, 125 Nev. 243, 251, 212 P.3d 307, 313 (2009) (holding that where the totality of the circumstances demonstrate that a defendant is otherwise properly canvassed and is found to understand the consequences of his plea, the failure to canvass a defendant regarding restitution does not render the plea unknowing or involuntary).

White next claimed that 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. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463

³Further, in reply to the State's argument on appeal, White notes that his previous written plea agreement stated he was subject to restitution pursuant to "this agreement." White argues that he was not informed that he would be subject to restitution as a result of the *instant* plea.

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, White claimed counsel was ineffective for failing to argue his right to represent himself was improperly denied at a hearing held on April 18, 2017 (“April hearing”), and for failing to obtain the transcript from that hearing. Criminal defendants have an unqualified right to represent themselves. *See Lyons v. State*, 106 Nev. 438, 443, 796 P.2d 210, 213 (1999), clarified on other grounds by *Vanisi v. State*, 117 Nev. 330, 341, 22 P.3d 1164, 1171-72 (2001). When a defendant makes an unequivocal request for self-representation, “court[s] should conduct a *Faretta* canvass.”⁴ *O’Neill v. State*, 123 Nev. 9, 17, 153 P.3d 38, 43-44 (2007) (internal quotation marks omitted). However, a defendant may abandon or waive the request by failing to renew the request when given the opportunity to do so. *Wilson v. Walker*, 204 F.3d 33, 37-39 (2d Cir. 2000) (holding that where there has not been a clear denial of the request for self-representation, a failure to reassert the request can be seen as abandonment of the request).

On March 27, 2017, White filed a “motion for trial extension for 180 days, motion to recuse counsel and application to proceed in propria person.” In that motion, he raised several claims challenging trial-level counsel’s performance, and he requested new counsel or to represent himself. At the April hearing, the district court addressed the issues White had with counsel and denied his motion without addressing White’s request to represent himself. White did not renew his motion to represent himself at the hearing. Thus, we conclude White abandoned his request. Moreover, we note that when White explicitly renewed his request to represent himself

⁴*See Faretta v. California*, 422 U.S. 806 (1975).

in December 2017,⁵ the district court conducted a canvass and denied his request, and this court affirmed that decision on appeal. *See White v. State*, No. 78483-COA, 2020 WL 2432168 (Nev. Ct. App. May 11, 2020) (Order of Affirmance). For these reasons, White failed to demonstrate his counsel was deficient for failing to raise this claim on appeal or that it had a reasonable probability of success. Accordingly, we conclude the district court did not err by denying this claim.

Second, White claimed counsel was ineffective for failing to argue his plea was invalid because he was coerced into pleading because of threats made against his sister. He claimed the affidavit would show that his plea was involuntary because in the affidavit his sister claimed she was threatened with violence if White did not take the plea and she communicated that threat prior to White pleading guilty. Claims challenging the voluntariness of a plea are generally not appropriate to be raised on appeal, especially where the claim was not previously raised in the district court. *See Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986), *as limited by Smith v. State*, 110 Nev. 1009, 1010-11 n.1, 879 P.2d 60, 61 n.1 (1994) (limiting *Bryant* by stating that only errors that clearly

⁵We note that White filed a pro se objection in May 2017 in which he stated,

On March 27, 2017, Defendant White filed a motion that was set for hearing on April 18, 2017, which among other matters sought recusal of counsel. The court denied the motion retaining counsel on defendant's case. Defendant hereby incorporates by reference the entirety of the motion as if contained herein at full length. Full objection is given on the court's denial of the motion to preserve appellate review.

As the motion focused on the retention of counsel, White failed to demonstrate this was an unequivocal request to represent himself.

appear in the record may be raised on direct appeal). The “error” complained of by White did not appear clearly in the record, and therefore, counsel was not deficient for failing to raise this claim on appeal. Accordingly, we conclude the district court did not err by denying this claim.

Third, White claimed counsel was ineffective for failing to discuss the appeal and claims to be raised and for failing to present a written summary of the issues and possible merits of each claim prior to filing the appeal. White failed to demonstrate any claims were missed by counsel that would have had a reasonable probability of success on appeal. Therefore, we conclude the district court did not err by denying this claim.

White next claimed his plea was not knowingly, voluntarily, and intelligently entered. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently. *Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). Further, this court will not reverse a district court’s determination concerning the validity of a plea absent a clear abuse of discretion. *Id.* In determining the validity of a guilty plea, this court looks to the totality of the circumstances. *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000); *Bryant*, 102 Nev. at 271, 721 P.2d at 367.

First, White claimed his plea was coerced by threats made by his codefendant and, therefore, his plea was not knowingly, voluntarily, and intelligently entered. White had previously been granted leave to withdraw his plea based on coercion and threats from his codefendant. Thus, when White pleaded guilty again, he was specifically canvassed regarding this issue. The trial-level court specifically asked White whether his codefendant had threatened or coerced him into pleading guilty. White stated his codefendant had not done so and that he was pleading guilty after having heard the victims’ testimony. Therefore, this claim is belied by

White's own statements, and we conclude the district court did not err by denying this claim.

Second, White claimed his plea was invalid because his medications were altered prior to trial and adversely affected him. He claimed the change in medications caused a relapse of his schizophrenia and caused him not to trust counsel. At the hearing on the change of plea, White specifically stated he was taking his medications and they were not impacting his decision to plead guilty. He stated he decided to plead guilty after hearing the victims' testimony. Further, White's answers to the district court's questions were appropriate and indicated he understood the proceedings. Therefore, we conclude the district court did not err by denying this claim.

Third, White claimed his plea was invalid because he was not informed by either the district court or counsel that he would be subject to restitution. At the same time that the Nevada Supreme Court acknowledged that restitution is a direct consequence of a guilty plea, it also concluded that the failure to advise of that consequence does not, alone, render the plea unknowing or involuntary. *See McConnell*, 125 Nev. at 251, 212 P.3d at 313. Here, even assuming White was unaware he could be subject to restitution, he did not allege that he failed to understand the remaining consequences of his plea. Therefore, the failure to canvass him regarding the restitution requirement did not render his plea invalid. Accordingly, we conclude the district court did not err by denying this claim.

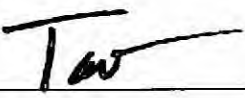
Next, White raised several claims that neither challenged the validity of his guilty plea nor claimed counsel rendered ineffective assistance. He claimed he was improperly adjudicated a habitual criminal, he was not informed of his restitution obligation, the trial judge operated under a conflict of interest, he was improperly denied the right to represent himself, the district court abused its discretion by declining to adjudicate

his pro se pretrial writ petitions, material information and evidence introduced at trial was obtained in violation of the Fourth Amendment, and the State committed prosecutorial misconduct when it withheld evidence. Because these claims were outside the scope of a postconviction petition for a writ of habeas corpus challenging a judgment of conviction entered pursuant to a guilty plea, *see* NRS 34.810(1)(a), we conclude the district court did not err by denying them.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.⁶


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michelle Leavitt, District Judge
Toney Anthony White
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁶We have considered all documents filed or received in this matter. We conclude White is only entitled to the relief described herein.