

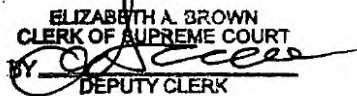
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENNETH MCDONALD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84395-COA

FILED

DEC 12 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Kenneth McDonald appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

McDonald argues that the district court erred by denying his claims of ineffective assistance of trial-level counsel raised in his January 2, 2019, petition and later-filed supplement. 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, 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, McDonald argued that his counsel was ineffective for failing to conduct an adequate investigation into his mental health and for permitting him to enter a guilty plea when he did not understand the plea agreement and the consequences he faced from acceptance of the plea agreement. At the evidentiary hearing on McDonald's petition, counsel testified that McDonald was evaluated for competency and determined to be competent. Counsel also testified that a mitigation specialist reviewed McDonald's background to see if there was mental illness. Counsel testified that after McDonald's competency evaluation, he had no reason to believe that McDonald had any competency issues. Counsel also stated that he reviewed the plea agreement with McDonald and believed that McDonald understood the agreement. In addition, in the written plea agreement, McDonald acknowledged that he reviewed the agreement and he understood its terms.

In light of counsel's testimony at the evidentiary hearing and McDonald's acknowledgement in the written plea agreement,¹ McDonald failed to demonstrate his counsel's performance fell below an objective standard of reasonableness. McDonald also failed to demonstrate a reasonable probability he would have refused to plead guilty and would

¹McDonald did not provide this court with a transcript of his plea canvass.

have insisted on proceeding to trial had counsel performed additional investigation into his mental health issues or performed additional actions concerning McDonald's understanding of the plea agreement. Therefore, we conclude the district court did not err by denying this claim.

Second, McDonald argued that his counsel was ineffective for failing to advise him of the right to a direct appeal. Counsel has a duty to consult with a defendant concerning the right to a direct appeal "in the guilty-plea context only when the defendant inquires about the right to appeal or in circumstances where the defendant may benefit from receiving advice about the right to a direct appeal." *Toston v. State*, 127 Nev. 971, 977, 267 P.3d 795, 799 (2011). At the evidentiary hearing, counsel testified that he discussed McDonald's appellate rights with him when they reviewed the written plea agreement. The district court found that counsel's testimony was credible, and the record supports the district court's decision. Accordingly, McDonald did not demonstrate his counsel failed to advise him of his appellate rights. Therefore, we conclude the district court did not err by denying this claim.

Third, McDonald argued that his counsel was ineffective for failing to assist him with pleading guilty but mentally ill. At the evidentiary hearing, counsel testified that he discussed pursuing a plea of guilty but mentally ill with McDonald. Counsel stated they ultimately decided not to pursue such a plea because McDonald's low intelligence did not necessarily fit within such a plea and because counsel did not believe that the State would agree to permit McDonald to plead guilty but mentally ill. Counsel also stated that they decided not to pursue a plea of guilty but mentally ill because it could have negative impacts on McDonald's housing assignments in prison and upon his ability to receive parole. In light of counsel's

testimony, McDonald did not demonstrate that his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different outcome had counsel performed different actions concerning a possible plea of guilty but mentally ill. Therefore, we conclude the district court did not err by denying this claim.


Next, McDonald claimed that the district court erred by denying his request to withdraw his plea to correct a manifest injustice. McDonald contended that he should be permitted to withdraw his guilty plea because he did not enter a knowing and intelligent plea due to his mental health issues. "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, McDonald's counsel testified that McDonald's mental health issues were evaluated prior to entry of the plea and he believed that McDonald understood the plea agreement.

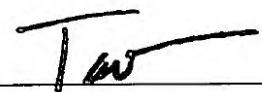
In addition, McDonald acknowledged in the written plea agreement that he had reviewed the agreement, understood its terms, and understood the nature of the charges against him and the potential penalties he faced by entry of a guilty plea. In light of counsel's testimony and the written plea agreement, the totality of the circumstances demonstrate that McDonald's plea was knowingly and voluntarily made and that he understood the nature of the offenses and the consequences of his guilty plea. McDonald accordingly did not demonstrate withdrawal of his guilty plea was necessary to correct a manifest injustice. *See* NRS

176.165. Therefore, we conclude the district court did not err by denying this claim.

Finally, McDonald claims that the district court failed to provide sufficient findings of facts and conclusions of law when denying his claims. However, we conclude the district court's order contains findings and conclusions with sufficient specificity to permit this court to appropriately review its decision on appeal. Therefore, we conclude McDonald fails to demonstrate he is entitled to relief based upon this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Tierra Danielle Jones, District Judge
Law Office of Christopher R. Oram
Law Office of Rachael E. Stewart
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk