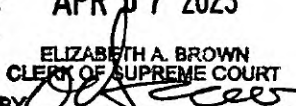


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CRAIG ALLEN RODGERS,
Appellant,
vs.
WILLIAM HUTCHINGS, WARDEN;
STEVEN B. WOLFSON, DISTRICT
ATTORNEY; AND THE STATE OF
NEVADA,
Respondents.

No. 84822-COA

FILED
APR 07 2023
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

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

Craig Allen Rodgers appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on August 31, 2020, and an amended petition filed on December 23, 2021. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Claims of ineffective assistance of counsel

Rodgers first contends the district court erred by denying his claims of ineffective assistance of trial-level counsel.¹ To demonstrate ineffective assistance of 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 below an objective standard of

¹Multiple attorneys represented Rodgers at the trial court level. Of those, Rodgers appeared to allege only the ineffective assistance of Melinda E. Simpkins, Esq., who represented Rodgers from some time after his preliminary hearing until some time prior to the entry of his first guilty plea, and John P. Parris, Esq., who represented Rodgers from after the entry of his first guilty plea through sentencing on his second and final guilty plea.

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 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, Rodgers claimed that Ms. Simpkins was ineffective because the district court denied Rodgers' pretrial motion to remand for a new preliminary hearing or to dismiss due to prior counsel's conflict of interest. Rodgers' bare claim failed to allege how Ms. Simpkins was ineffective. Accordingly, Rodgers failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial absent counsel's alleged error. Therefore, we conclude the district court did not err by denying this claim.²

Second, Rodgers claimed that Mr. Parris was ineffective for failing to inform him that the State did not have the victim in custody on a

²To the extent Rodgers' claim could be construed as a claim alleging district court error for failing to grant relief, Rodgers failed to allege specific facts demonstrating how the district court's decision affected the validity of his guilty plea, nor does the claim allege his plea was entered without the effective assistance of counsel. This claim was thus outside the scope of claims permissible in a postconviction petition for a writ of habeas corpus arising from a guilty plea. NRS 34.810(1)(a); *Gonzales v. State*, 137 Nev. 398, 403, 492 P.3d 556, 562 (2021). Therefore, we conclude the district court did not err by denying this claim.

material witness warrant. Rodgers contended that had he known the victim was not in custody, he would have proceeded to trial. The district court determined that while the victim was not in custody, she was available and would have testified if the trial went forward. These findings are supported by substantial evidence in the record. At a postsentence hearing, Mr. Parris stated he had met with the State, discussed the availability of the victim, and believed the victim's availability issues had been resolved. Mr. Parris further states that he never told Rodgers that the victim was refusing to testify. Accordingly, Rodgers failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial had counsel informed him that the victim was not in custody on a material witness warrant. Therefore, we conclude the district court did not err by denying this claim.

Third, Rodgers claimed that Mr. Parris was ineffective for attempting to rush the plea-bargaining process and proceed to sentencing without reviewing the presentence investigation report (PSI) or allowing Rodgers time to review it. Rodgers had previously pleaded guilty in this case and, after a PSI was prepared, was allowed to withdraw his guilty plea. Upon the entry of Rodgers' second guilty plea, the State sought to have him sentenced on the same day he entered his plea because a PSI had previously been prepared. Rodgers identified an error in the PSI and initially wanted a new PSI prepared prior to sentencing but ultimately agreed to be sentenced using the existing PSI. In light of these circumstances, Rodgers failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial based

on counsel's alleged errors. Therefore, we conclude the district court did not err by denying this claim.

Fourth, Rodgers claimed that Mr. Parris was ineffective for misleading him about the availability of a defense expert for trial. In support of his claim, Rodgers alleged that around the commencement of trial, Mr. Parris told Rodgers that the defense expert could not be found "so the trial will be pushed back until December." Rodgers further claimed that Mr. Parris left and then returned to Rodgers' holding cell and told Rodgers that the court would not continue the trial and that there was a new plea offer from the State. Rodgers failed to allege specific facts that demonstrate how counsel's information was misleading. Accordingly, Rodgers failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial absent counsel's alleged error. Therefore, we conclude the district court did not err by denying this claim.

Fifth, Rodgers claimed that Mr. Parris was ineffective for failing to investigate convictions that were erroneously labeled as felonies in the State's notice of intent to seek habitual criminal adjudication. Rodgers claimed that of the three prior felonies listed in the State's notice, the 2001 felony was dismissed and the 2006 conviction was actually a misdemeanor. Rodgers alleged that had Mr. Parris investigated the disposition of these convictions, the prosecutor would not have been able to use habitual criminal adjudication as a bargaining chip. Rodgers' PSI reflected that the 2006 case had been resolved as a misdemeanor, and the State extended the second plea offer nearly one year after the PSI had been prepared. Mr. Parris was aware approximately six months prior to the

entry of Rodgers' plea that the 2001 conviction should have been dismissed. In light of these circumstances, Rodger failed to demonstrate that inaccuracies regarding his prior convictions contained in the State's notice affected the plea bargaining process. Further, we note that the State extended the guilty plea offer, and Rodgers accepted it, after the start of Rodgers' trial. Accordingly, Rodgers failed to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial absent counsel's alleged inaction. Therefore, we conclude the district court did not err by denying this claim.

Sixth, Rodgers claimed that Mr. Parris was ineffective for failing to challenge the second amended plea agreement. Rodgers alleged the plea agreement contained a new and improper charge because the pandering count was not charged in the original complaint and involved a different victim. As part of his plea agreement, Rodgers agreed to plead guilty to a single count of pandering from a separate case. The district court canvassed Rodgers on this charge, and Rodgers stated he committed the offense. Accordingly, Rodgers failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial absent counsel's inaction. Therefore, we conclude the district court did not err by denying this claim.

Seventh, Rodgers claimed that Mr. Parris was ineffective for erroneously advising him that good time credits would apply toward his eligibility for parole. The district court found any alleged error to be harmless because Rodgers stipulated to his sentence and understood he could not be promised a particular sentence or leniency. However, Rodgers alleged that counsel misrepresented the application of the law to Rodgers'

stipulated sentence, the misrepresentation was outside the record, and the misrepresentation affected Rodgers' decision to plead guilty. Rodgers thus supported his argument 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 erred by denying this claim without conducting an evidentiary hearing. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Accordingly, we reverse the district court's denial of this claim and remand for the district court to conduct an evidentiary hearing on this ineffective-assistance-of-counsel claim.

Eighth, Rodgers claimed that Mr. Parris was ineffective for failing to timely file a direct appeal when requested to do so. The district court found that counsel filed Rodgers' notice of appeal late but denied this claim on the ground that the claims Rodgers alleged counsel should have raised on direct appeal would not have resulted in reversal of his conviction. Counsel's duty to file a notice of appeal when one is requested is not affected by the merits of the defendant's claims on appeal. *See Garza v. Idaho*, 586 U.S. ___, 139 S. Ct. 738, 747 (2019). Rodgers thus supported his argument 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 erred by denying this claim without conducting an evidentiary hearing. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Accordingly, we reverse the district court's denial of this claim and remand for the district court to conduct an evidentiary hearing on this appeal-deprivation claim.

Other claims raised in Rodgers' postconviction petition

Rodgers contends the district court erred by denying other claims raised in his amended petition. First, Rodgers raised claims challenging the validity of his guilty plea. "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). A guilty plea is presumptively valid, and a petitioner carries the burden of establishing the plea was not entered knowingly and intelligently. *Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

Rodgers claimed his guilty plea was invalid because counsel failed to inform him the victim was not in custody, rushed the plea-bargaining process and sentencing without proper review of the PSI, and misled Rodgers about the availability of the defense expert. As previously discussed, Rodgers failed to demonstrate that counsel’s alleged errors affected his decision to plead guilty. Rodgers thus failed to demonstrate that counsel’s alleged errors rendered his plea unknowing or involuntary.

Rodgers also appeared to claim that his plea was invalid because he was unaware the State would be able to use the facts from Rodgers’ separate case to convict him of pandering. In exchange for Rodgers’ guilty plea, which included a pandering count not charged in the original complaint, the State agreed to dismiss Rodgers’ separate case upon rendition of his sentence. The district court canvassed Rodgers on this charge, Rodgers admitted he committed the offense, and he acknowledged that the separate case has in fact been dismissed. Rodgers thus failed to demonstrate that the State’s actions rendered his plea unknowing or involuntary. Having considered the totality of the circumstances, we conclude Rodgers did not overcome the presumption that his guilty plea was valid. Therefore, we conclude the district court did not err by denying these claims.

Second, Rodgers claimed the district court erred by failing to toll the time period for filing a direct appeal. Rodgers' claim neither challenged the validity of his guilty plea nor alleged his plea was entered without the effective assistance of counsel. This claim was thus outside the scope of claims permissible in a postconviction petition for a writ of habeas corpus arising from a guilty plea. NRS 34.810(1)(a); *Gonzales*, 137 Nev. at 403, 492 P.3d at 562. Therefore, we conclude the district court did not err by denying this claim.

Remaining claims raised on appeal

Rodgers contends the district court erred by denying his claims despite the fact that the State did not respond to or appear at the hearing on Rodgers' amended petition. The provisions of NRS Chapter 34 do not specify a consequence relating to the disposition of a petitioner's claims for failure to respond or appear in postconviction habeas proceedings and the Nevada Supreme Court has observed "that default judgments in habeas corpus proceedings are not available," *Warden v. O'Brian*, 93 Nev. 211, 212, 562 P.2d 484, 485 (1977). Therefore, we conclude that Rodgers is not entitled to relief based on this claim.

Next, Rodgers contends that the district court erred by denying his motion for postconviction counsel. The appointment of counsel in this matter was discretionary. See NRS 34.750(1). Because it appears from the record that Rodgers is indigent and his petition was a first petition not subject to summary dismissal, see NRS 34.745(1), (4), Rodgers met the threshold requirements for the appointment of counsel. See NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 760-61 (2017). In light of this court's disposition, we direct the district court to reconsider whether the appointment of counsel is warranted.


Next, Rodgers contends that the State's response to his informal brief on appeal should be stricken as untimely. The State's response was timely filed. Therefore, Rodgers is not entitled to relief based on this claim.

Finally, Rodgers raises a number of claims for the first time on appeal. Because these claims were not raised below, we decline to consider them on appeal in the first instance. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

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.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Susan Johnson, District Judge
Craig Allen Rodgers
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk