

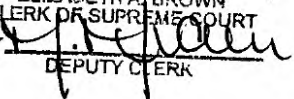
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

XIAO YE BAI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86218-COA

FILED

APR 29 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Xiao Ye Bai appeals from a district court order denying identical postconviction petitions for a writ of habeas corpus filed on December 2, 2021; December 3, 2021; and December 16, 2021, and a supplemental petition filed on May 12, 2022. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Bai argues the district court erred by denying his claim that his plea was not knowingly and voluntarily entered due to the ineffective assistance of counsel. “A guilty plea entered on advice of counsel may be rendered invalid by showing a manifest injustice through ineffective assistance of counsel. Manifest injustice may also be demonstrated by a failure to adequately inform a defendant of the consequences of his plea.” *Rubio v. State*, 124 Nev. 1032, 1039, 194 P.3d 1224, 1228-29 (2008) (footnote and internal quotation marks omitted).

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 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), 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).


Bai claimed he pleaded guilty in order to reduce his charge of escape, which he believed would affect his disciplinary proceedings in prison and reduce his prison classification. Bai jumped over a wall of the prison. The Nevada Department of Corrections (NDOC) disciplined him for escape, and he was criminally charged with escape as well as other charges not relevant to our decision. Bai pleaded guilty to attempted unauthorized absence by a prisoner because he believed that by pleading guilty to a lesser charge, his disciplinary finding of guilt of escape would also be reduced to a lower disciplinary charge. He claimed that counsel failed to explain to him that his pleading guilty would not affect his disciplinary proceedings. Bai also claimed counsel affirmatively misled him in this regard.

Counsel's failure to inform a defendant about collateral consequences of a guilty plea generally does not constitute ineffective assistance of counsel sufficient to invalidate that plea. *Rubio*, 124 Nev. at 1040, 194 P.3d at 1230. However, an affirmative misrepresentation of a collateral consequence may constitute ineffective assistance of counsel and grounds to withdraw the plea. *See id.* at 1043, 194 P.3d at 1232.


The parties do not dispute that Bai's concern regarding the effect of his conviction on his prison disciplinary proceedings would be a collateral consequence of the conviction. Further, the district court did not find that counsel affirmatively misrepresented the collateral consequence.

Instead, after holding an evidentiary hearing, the district court found that counsel discussed the differences between criminal proceedings and administrative disciplinary proceedings and counsel did not promise any specific outcome with respect to the disciplinary proceedings. These findings are supported by the record. At the evidentiary hearing, counsel testified he agreed to send a letter to the prison on Bai's behalf but explained to him that he had no power over NDOC and their administrative disciplinary proceedings. Counsel also testified he did not promise Bai any specific outcome in regard to the letter. Thus, Bai failed to demonstrate by a preponderance of the evidence that counsel affirmatively misrepresented a collateral consequence and, therefore, failed to demonstrate counsel's performance was deficient. Accordingly, we conclude the district court did not err by denying this claim, and we

ORDER the judgment of the district court AFFIRMED.¹


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Eric Johnson, District Judge
Monique A. McNeill
Attorney General/Carson City
Clark County District Attorney
Attorney General/Las Vegas
Eighth District Court Clerk

¹To the extent Bai argues that his plea was not knowingly and voluntarily entered because counsel misled him about his possible defense, this claim was not raised below, and we decline to consider it for the first time on appeal. See *McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).