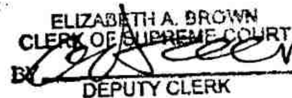
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KHAYREE AMEEN SAAFIR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86965-COA

FILED

MAY 28 2024



ORDER OF AFFIRMANCE

Khayree Ameen Saafir appeals from a district court order dismissing a postconviction petition for a writ of habeas corpus filed on October 23, 2021, and a supplemental petition filed on August 25, 2022. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Saafir argues the district court erred in dismissing grounds three and four of his supplemental petition without holding an evidentiary hearing. In his petition, Saafir contended his guilty plea was invalid due to the ineffective assistance of counsel. In particular, Saafir contended that counsel erroneously advised him that he was eligible for criminal habitual adjudication and that counsel coerced him into entering his guilty plea by telling him that he would "definitely" be sentenced as a habitual criminal if he went to trial and lost and that it "would be the end of the world for [him]" if he withdrew his guilty plea.

After sentencing, a district court may permit a petitioner to withdraw his guilty plea where necessary "[t]o correct manifest injustice." NRS 176.165; *see Harris v. State*, 130 Nev. 435, 448, 329 P.3d 619, 628

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(2014) (stating NRS 176.165 "sets forth the standard for reviewing a post-conviction claim challenging the validity of a guilty plea"). "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). 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 the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Saafir's claims are premised on the contention that he could not be adjudicated as a habitual criminal because the habitual criminal statute,

NRS 207.010, was amended in 2019 through Assembly Bill (A.B.) 236 and these amendments apply to him. We reject this contention. The penalty in effect at the time of the commission of the crime applies absent a clear legislative intent that statutory amendments apply retroactively. *State v. Second Jud. Dist. Ct.* (*Pullin*), 124 Nev. 564, 565, 188 P.3d 1079, 1079 (2008). Saafir pleaded guilty to crimes occurring between January 11, 2020, and May 31, 2020, before the 2019 amendments to the habitual criminal statute took effect on July 1, 2020. *See* 2019 Nev. Stat., ch. 633, §§ 86, 137, at 4441-42, 4488. Saafir points to an exchange between legislators discussing whether the amended statute should be applied retroactively, *see* Hearing on A.B. 236 Before the Assembly Judiciary Comm., 80th Leg., at 20 (Nev., Mar. 8, 2019), but A.B. 236 contains no retroactivity provisions, *see generally* 2019 Nev. Stat., ch. 633. Therefore, the Legislature did not clearly express its intent to apply the 2019 amendments to NRS 207.010 retroactively, and the 2019 amendments do not apply to Saafir.

Saafir contends it is not the penalty in effect at the time of the commission of the crime but the penalty in effect when the State levies a charge of habitual criminality that controls, because the habitual criminal statute does not create a substantive crime but rather is procedural in nature. Saafir does not cite any authority to support the contention that the penalty in effect when the State levies a charge of habitual criminality controls. Moreover, the Nevada Supreme Court has expressly rejected the proposition that the penalty in effect at the time of the commission of the crime only applies to statutes that create substantive offenses and does not apply to procedural statutes that enhance the penalty for a primary

offense.[1] *See Pullin*, 124 Nev. at 571-72, 188 P.3d at 1083-84. Therefore, we reject this argument.

Moreover, the State filed a notice that it would present certified copies of Saafir's prior convictions at sentencing, and the State informed the trial-level court at arraignment that it would have sought habitual criminal adjudication had the case proceeded to trial. As such, Saafir failed to allege specific facts that, if true, would indicate counsel was deficient in advising him that he could, or would, be adjudicated a habitual criminal if he went to trial and lost or if he withdrew his guilty plea.

With respect to Saafir's claim of coercion, the district court found that Saafir had been thoroughly canvassed with respect to his plea and was aware of the alternative courses of action open to him. This finding is supported by the record. And the Nevada Supreme Court has recognized that "a defendant's desire to plead guilty to an original charge in order to avoid the threat of the habitual criminal statute will not give rise to a claim of coercion." *Schmidt v. State*, 94 Nev. 665, 667, 584 P.2d 695, 696 (1978). Thus, counsel does not coerce a defendant into pleading guilty when they accurately advise the defendant regarding the prospects of habitual criminal treatment.

In light of the foregoing, Saafir failed to allege specific facts that, if true, would demonstrate that withdrawal of his plea was necessary

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[1]We note that the habitual criminal statute does not merely enhance a defendant's sentence but also the category of their conviction. *See Doolin v. State, Dep't of Corr.*, 134 Nev. 809, 812-13, 440 P.3d 53, 55-56 (Ct. App. 2018).

to correct a manifest injustice. Therefore, we conclude the district court did not err by dismissing these claims without holding an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_______________, C.J.
Gibbons

_______________, J.
Bulla

_______________, J.
Westbrook

cc: Hon. Barry L. Breslow, District Judge
Oldenburg Law Office
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk