

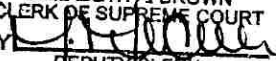
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LARRY SULLIVAN,
Appellant,
vs.
CALVIN JOHNSON, WARDEN; AND
HDSP,
Respondents.

No. 86580-COA

FILED

JUN 13 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Larry Sullivan appeals from a district court order denying postconviction petitions for a writ of habeas corpus filed on March 17, 2021, and August 11, 2021, and a supplemental petition filed on August 26, 2022.¹ Eighth Judicial District Court, Clark County; Danielle K. Pieper, Judge.

Sullivan argues the district court erred by denying his claim that trial-level counsel was ineffective in litigating his presentence motion to withdraw his guilty plea. The State contends that Sullivan's claim was outside the scope of claims permissible in a postconviction habeas petition stemming from a guilty plea because the alleged deficiencies occurred after the entry of Sullivan's plea.

A postconviction habeas petition stemming from a guilty plea must be "based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel." NRS 34.810(1)(a). The Nevada Supreme Court has

¹The district court entered a separate written order on December 16, 2022, granting relief on one of the claims raised in Sullivan's petition. That order is not challenged in this appeal.

declined to interpret NRS 34.810(1)(a) in a manner that would “provide no state-law remedy whatsoever for violations of a defendant’s rights that take place after the entry of a guilty plea.” *Gonzales v. State*, 137 Nev. 398, 401, 492 P.3d 556, 560 (2021). Rather, the supreme court has held that NRS 34.810(1)(a) was intended “to preclude wasteful litigation of certain *pre-plea* violations” and that “[t]he core claims prohibited . . . are independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea” *Id.* at 402-03, 492 P.3d at 561-62 (internal quotation marks omitted). Sullivan’s claim concerns alleged deficiencies that occurred after the entry of his plea. Thus, it is not within the core claims prohibited by NRS 34.810(1)(a).

The State contends *Gonzales* is distinguishable because, in that case, the petitioner could only raise his claim that counsel was deficient at sentencing in a postconviction habeas petition, whereas here, Sullivan could have appealed from the denial of his motion to withdraw his guilty plea but did not. We reject this argument. The trial-level court did not hold an evidentiary hearing on Sullivan’s ineffective-assistance-of-counsel claim prior to Sullivan’s conviction. And in considering Sullivan’s postconviction petition, the district court determined that an evidentiary hearing was warranted on that claim. Thus, it would have been improper for Sullivan to raise his claim of ineffective assistance of counsel on direct appeal. See *Pellegrini v. State*, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001) (stating the Nevada appellate courts “generally decline[] to address claims of ineffective assistance of counsel on direct appeal unless there has already been an evidentiary hearing or where an evidentiary hearing would be unnecessary” (internal footnote omitted)), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018). Like the petitioner

in *Gonzales*, Sullivan did not have a prior opportunity to litigate his ineffective-assistance-of-counsel claim. Therefore, the State fails to demonstrate that *Gonzales* is inapplicable. Accordingly, we conclude NRS 34.810(1)(a) does not preclude Sullivan's claim, and we consider it below.

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).

Sullivan pleaded guilty to three counts of robbery with the use of a deadly weapon. In the plea agreement, the parties retained the right to argue at sentencing with the exception that the State would not seek habitual criminal enhancements. Timothy Treffinger represented Sullivan during plea negotiations. At Sullivan's initial sentencing hearing, Mr.

Treffinger informed the court that there appeared to be “a severe misunderstanding on my client’s part as to what he was pleading to at the time as far as the range of punishment” and that Sullivan wanted to withdraw his plea because he mistakenly believed he was signing a deal that guaranteed a three-to-seven-year prison sentence.

Thereafter, Benjamin Nadig was appointed to represent Sullivan on his motion to withdraw guilty plea. In the motion, Sullivan argued that the totality of the circumstances demonstrated a fair and just reason for withdrawing the plea because he was “confused as to what plea deal he was taking.” In particular, Sullivan argued that four different plea deals had been proposed to him on the same day and that he believed he was signing a deal that stipulated to a prison sentence of three-to-eight years. Sullivan argued that Mr. Treffinger did not review the plea agreement with him before he signed it and that he “was of a confused mind when the plea was entered.” The trial-level court determined that the plea canvass was “pretty thorough in regards [to] the sentence that was on the table,” and that there was nothing in the record to support Sullivan’s claim that he was confused or that he believed he was accepting an offer for a stipulated three-to-eight-year prison sentence.² Therefore, the trial-level court denied the motion without conducting an evidentiary hearing.

In his petition, Sullivan claimed Mr. Nadig was ineffective in litigating his motion to withdraw his guilty plea. In particular, Sullivan contended that counsel only raised bare and naked allegations in litigating the motion and that counsel failed to do the following to support the motion:

²We note the same judge who conducted the plea canvass and accepted Sullivan’s plea also considered Sullivan’s motion to withdraw guilty plea.

(1) present evidence of Sullivan’s mental illness; (2) argue the guilty plea agreement was confusing because it did not specify that the minimum and maximum sentences referenced could be imposed per count; and (3) argue the plea canvass was deficient because the trial-level court failed to advise Sullivan that the potential sentence could be applied per count.

The district court held an evidentiary hearing on this claim, in which Mr. Nadig and Mr. Treffinger testified. Mr. Nadig testified that he did not request Sullivan’s medical records in preparing the motion because that was not the basis for the motion. Rather, Sullivan represented to Mr. Nadig that he was presented with multiple plea offers and that he believed he was signing an agreement that stipulated to a three-to-eight-year prison sentence and he did not realize he had signed the wrong one. Sullivan did not represent to Mr. Nadig that he was confused about the terms of the plea agreement. In addition, Mr. Treffinger testified that he had several discussions with Sullivan regarding the plea negotiations and that Sullivan understood the full range of punishments that he could receive when he signed the plea agreement. The district court implicitly found this testimony credible, and this court will not “evaluate the credibility of witnesses because that is the responsibility of the trier of fact.”³ *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

In support of his petition, Sullivan presented medical records indicating he had reported experiencing auditory and visual hallucinations

³To the extent Sullivan claims the district court’s findings are belied by the record, we reject this argument. The district court accurately represented the witnesses’ testimonies, and the witnesses’ testimonies were not “proven to be false by the record as it existed at the time the claim was made.” *Berry v. State*, 131 Nev. 957, 969, 363 P.3d 1148, 1156 (2015) (quotation marks omitted).

while detained in the Clark County Detention Center. However, Sullivan did not testify in support of his petition, and both Mr. Nadig and Mr. Treffinger testified that Sullivan never expressed that he had mental health issues and that they never observed anything that would lead them to question Sullivan's mental health. Mr. Nadig testified that "[t]here was nothing in my conversations with [Sullivan] that had me doubt his mental health in any way, shape, or form," and Mr. Treffinger testified that he was "fully confident" Sullivan knew what he was doing and understood everything about the plea agreement when he entered his guilty plea. Both attorneys testified that they would have referred Sullivan to competency court had they had any questions regarding Sullivan's competency.

Sullivan presented no evidence indicating that his mental health issues affected his understanding of the plea agreement, that he was confused about whether he could receive a prison sentence for each count of robbery, or that he brought these issues to counsel's attention. Rather, Sullivan represented to counsel only that he believed he had signed a plea agreement different from the one he signed. In light of the foregoing, counsel was not unreasonable for failing to raise these additional arguments in the motion to withdraw guilty plea. *See Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."). Therefore, Sullivan failed to demonstrate counsel was deficient or a reasonable probability of a different outcome had counsel presented additional evidence or argument in support of the motion. Accordingly, we conclude the district court did not err by denying this claim.

Sullivan also argues the district court erred by denying his claim that he did not enter his plea knowingly or voluntarily. A district

court may permit a petitioner to withdraw their guilty plea after sentencing where necessary “[t]o correct manifest injustice.” NRS 176.165; *see Harris v. State*, 130 Nev. 435, 448, 329 P.3d 619, 628 (2014) (stating NRS 176.165 “sets forth the standard for reviewing a postconviction 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).

In his petition, Sullivan claimed the plea agreement was legally deficient and/or confusing because it did not specify that the potential sentence for robbery could be imposed per count. Sullivan also contended that Mr. Treffinger failed to advise him that the minimum and maximum sentence referenced in the plea agreement could be imposed per count. As previously discussed, Sullivan did not testify at the evidentiary hearing, nor did he present any other evidence to support his claim that he did not understand the terms of the plea agreement. Moreover, Mr. Treffinger testified that Sullivan understood the full range of punishments he could receive, including the fact that he could receive a consecutive sentence for each count of robbery, and Sullivan informed the trial-level court during the plea canvass that he had discussed the plea agreement with counsel and that he felt he fully understood the plea agreement. Therefore, Sullivan failed to demonstrate that he did not understand the consequences of his plea or that withdrawal of his plea was necessary to correct a manifest injustice. Accordingly, we conclude the district court did not err by denying this claim.

For the foregoing reasons, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Danielle K. Pieper, District Judge
Karen A. Connolly, Ltd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk