IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TERESA SUE OTERO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86743-COA



*ORDER OF AFFIRMANCE*

Teresa Sue Otero appeals from a district court order granting a motion to dismiss a postconviction petition for a writ of habeas corpus filed on October 8, 2020, and a motion for partial dismissal of a supplemental petition filed on May 23, 2021.[1] Second Judicial District Court, Washoe County; Lynne K. Jones, Chief Judge.

Otero argues the district court erred by denying her claims of ineffective assistance of counsel. 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

[1]The district court issued its written order on May 9, 2023. Although the district court's order states that it grants the State's motion to dismiss the petition and motion for partial dismissal of the supplemental petition, the district court had previously entered an order on November 10, 2021, granting in part and denying in part said motions. The district court's May 9, 2023, order effectively denied Otero's remaining claims.

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). A petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle them to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Otero claimed counsel was ineffective for failing to inform her of the potential consequences of her plea. In particular, Otero contended that counsel did not inform her that she would not be eligible for probation if she were adjudicated a habitual criminal. Counsel has a duty to inform a defendant of the direct consequences of their guilty plea, including whether the defendant would be ineligible for probation with respect to any offense to which they are pleading. *See Nollette v. State*, 118 Nev. 341, 349, 46 P.3d 87, 93 (2002); *Little v. Warden*, 117 Nev. 845, 849-50, 34 P.3d 540, 543 (2001).

The district court held an evidentiary hearing, in which Otero and trial-level counsel testified.[2] Although counsel testified that he could not remember if he specifically told Otero she would not be eligible for probation if adjudicated a habitual criminal, habitual criminal adjudication is not an offense to which Otero pleaded guilty. *See LaChance v. State*, 130 Nev. 263, 276, 321 P.3d 919, 928 (2014) (stating "habitual criminal adjudication is not an offense, it is a status determination"); *see also Little*, 117 Nev. at 849, 34 P.3d at 543 (stating "a defendant must be aware that *an offense* is nonprobational prior to entry of his plea" (emphasis added)). Moreover, Otero testified that counsel informed her that adjudication under the small habitual criminal statute carried a sentence of 5 to 20 years in prison. Otero does not cite, and we have not found, any authority that holds counsel must specifically inform a defendant that they cannot receive probation if the sentencing court adjudicates them as a habitual criminal. Therefore, Otero failed to demonstrate that counsel was deficient or a reasonable probability she would not have pleaded guilty and would have insisted on going to trial but for counsel's alleged errors. Accordingly, we conclude the district court did not err by denying this claim.

Second, Otero claimed counsel was ineffective for failing to review and/or challenge the prior felony convictions that were used to adjudicate her as a habitual criminal. Otero contended that, had counsel reviewed these convictions, counsel would have discovered that 12 of the 14

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[2]Appellate counsel also testified at the evidentiary hearing. Otero does not challenge the denial of her claims on ineffective assistance of appellate counsel on appeal.

convictions were eligible to be reduced to misdemeanors under California Proposition 47.[3]

Even assuming counsel was deficient for failing to review Otero's prior convictions and to research and discover Proposition 47 and its potential application to Otero, Otero failed to demonstrate any resulting prejudice. At the time Otero committed the crimes, only two prior felony convictions were required to adjudicate her a habitual criminal. *See* 2009 Nev. Stat., ch. 156, § 1, at 567; *see also State v. Second Jud. Dist. Ct. (Pullin)*, 124 Nev. 564, 567, 188 P.3d 1079, 1081 (2008) ("It is well established that under Nevada law, the proper penalty is the penalty in effect at the time of the commission of the offense . . . ."). Thus, even crediting Otero's assertion that 12 of the 14 prior felony convictions could have been reclassified as misdemeanors prior to sentencing, Otero failed to demonstrate that she would not have qualified for habitual criminal adjudication had any such applications been successful. Therefore, Otero failed to demonstrate a reasonable probability of a different outcome but for counsel's alleged errors. Accordingly, we conclude the district court did not err by denying this claim.[4]

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[3]Proposition 47, which was passed in California on November 4, 2014, "reduced certain nonviolent crimes . . . from felonies to misdemeanors," *People v. Prudholme*, 531 P.3d 341, 351 (Cal. 2023) (quotation marks omitted), and created procedures to allow persons who have completed their sentences for certain felony convictions to file an application to have their felony convictions designated as misdemeanors, *see* Cal. Penal Code § 1170.18(f).

[4]Otero argues the district court erred by referencing and relying upon prior felony convictions that were not noticed by the State in the amended information. In light of our determination that Otero failed to demonstrate prejudice, we need not consider this claim.

Otero also argues on appeal that the district court erred by denying her claim that she did not enter her plea voluntarily or knowingly. 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 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). A trial-level court's failure to advise a defendant of the direct consequences of their plea does not constitute a manifest injustice where the totality of the circumstances demonstrate the defendant actually understood the direct consequences of their plea. *See Little*, 117 Nev. at 851-52, 34 P.3d at 544.

In her petition, Otero claimed that neither the guilty plea agreement nor the trial-level court at her arraignment informed her of the potential consequences if she were adjudicated under the small habitual criminal statute.[5] This is true. However, the district court found that a preliminary examination waiver stated that the State was free to argue for adjudication under the small habitual criminal statute with a sentence of 5 to 20 years in prison without referencing the possibility of probation. The

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[5]Otero also claimed that her plea was not voluntarily or knowingly entered because counsel failed to advise her that she would not be eligible for probation if she were adjudicated a habitual criminal. Given our prior conclusion that Otero failed to demonstrate counsel was ineffective in this regard, we conclude she is not entitled to relief on this claim.

court further found that counsel thoroughly went through and explained the waiver to Otero, who did not express any concerns regarding her understanding of the document, prior to Otero signing it. Finally, the court found that counsel never advised Otero that she would be eligible for probation if adjudicated a habitual criminal. The district court's findings are supported by the record.[6]

In the plea agreement, Otero pleaded guilty to burglary and grand larceny, and the State retained the right to argue for adjudication under the small habitual criminal statute. Counsel testified that he wrote the terms of the plea deal on the waiver, including the fact that adjudication under the small habitual criminal statute carried a sentencing range of 5 to 20 years in prison. Counsel testified that he wrote "PE," meaning "probation eligible," next to the potential sentences for burglary and grand larceny but not next to the penalty for habitual criminal adjudication. Counsel testified that, although he could not recall exactly how his conversation with Otero went, he did discuss the waiver—including his handwritten notes—with Otero before she signed it and that his general practice was to go through the deal with a client line-by-line. Counsel also testified that he had no concerns about whether Otero understood the consequences of her plea when they discussed the waiver and went over the plea agreement. And Otero represented in the plea agreement that counsel

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[6]Otero did not include the preliminary examination waiver in the record on appeal. Therefore, we presume this document supports the district court's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007); *see also* NRAP 30(b)(3); *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant.").

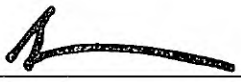
had "carefully explained" the possible penalties to her and that she was satisfied with counsel's advice and representation.

In light of the foregoing, Otero failed to demonstrate that withdrawal of her plea was necessary to correct a manifest injustice. Accordingly, we conclude the district court did not err by denying this claim.[7]

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Bulla

_____, J.
Westbrook

[7]Otero argues the district court failed to make specific findings of fact and conclusions of law with respect to this claim. As discussed above, the district court made several findings of fact that were relevant to this claim. Although the district court erred by failing to make specific conclusions of law with respect to this claim, *see* NRS 34.830(1), for the reasons discussed above, this error did not hinder our ability to review the denial of this claim. Thus, the error did not affect Otero's substantial rights. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

cc: Hon. Lynne K. Jones, Chief Judge
Law Offices of Lyn E. Beggs, PLLC
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk