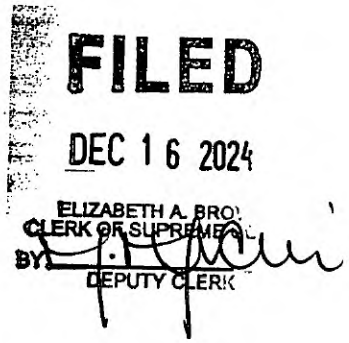
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ERMELINDA CARRILLO,
Appellant,
vs.
WILLIAM REUBART, WARDEN OF THE FLORENCE MCCLURE WOMEN'S CORRECTIONAL FACILITY; AND THE STATE OF NEVADA,
Respondents.

No. 87813-COA



ORDER OF AFFIRMANCE

Ermelinda Carrillo appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on December 6, 2022, and an amended petition filed on January 13, 2023. Fourth Judicial District Court, Elko County; Mason E. Simons, Judge.

In her petition, Carrillo alleged that counsel were ineffective.[1] 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*,

[1]Carrillo pleaded no contest to theft by misrepresentation and attempted theft by misrepresentation. The allegations against Carrillo arose from two separate cases that were joined prior to the entry of her plea. Jeff Kump, Esq., represented Carrillo in the theft case while Sherburne Macfarlan, Esq., and David Lockie, Esq., represented Carrillo in the attempted theft case. Macfarlan was Carrillo's primary attorney for the attempted theft case while Lockie filled in for Macfarlan for sentencing.

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.[2] *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).

First, Carrillo claimed counsel were ineffective by convincing her that she was certain to get probation if she entered a no contest plea and that she would likely receive a lengthy prison sentence if she went to trial. The district court conducted an evidentiary hearing regarding Carrillo's petition where Carrillo, Kump, Macfarlan, and Lockie testified.

Carrillo testified that, contrary to the representations she made at the change of plea hearing, she did not read or understand the plea agreement. She explained that counsel told her to answer "yes" or say she understood every question during the plea canvass and to not ask questions because she would ultimately receive probation. The district court found

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[2]We note that a no contest plea is equivalent to a guilty plea insofar as how the court treats a defendant. *See State v. Lewis*, 124 Nev. 132, 133 n.1, 178 P.3d 146, 147 n.1 (2008), *overruled on other grounds by State v. Harris*, 131 Nev. 551, 556, 355 P.3d 791, 793-94 (2015).

Carrillo to not be credible, and this court will not "evaluate the credibility of witnesses because that is the responsibility of the trier of fact." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

Macfarlan testified that he went over the plea agreement with Carrillo and did not guarantee her she would receive probation. He said he would not be surprised if he had told her that she had a better chance of getting probation if she took the plea agreement in part because the State was not opposing probation. Kump testified that, after Carrillo signed the agreement with Macfarlan but prior to the entry of her plea, Kump went over the agreement with her so he could attest in the plea agreement that he had done so. He also said he did not promise Carrillo that she would receive probation and had discussed with her that "there was a very real likelihood that she could end up going to prison." In light of this testimony, Carrillo failed to demonstrate by a preponderance of the evidence that counsel's actions were sufficient to convince her that she was certain to get probation. As to Carrillo's claim that counsel told her about the severity of the punishment she faced if she proceeded to trial, candid advice about the possible outcome of entering a no contest plea or going to trial is not evidence of deficient performance. *See Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 69, 412 P.3d 56, 62 (2018) (observing that one of the roles of an attorney is to provide candid advice to his client). For these reasons, Carrillo failed to demonstrate that counsel were 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. Therefore, we conclude the district court did not err by denying this claim.

Second, Carrillo claimed that counsel were ineffective by failing to follow up with her on completing the presentence questionnaire and

participating in the presentence interview with the Division of Parole and Probation (the Division). Carrillo contended that her failure to complete these tasks "clearly troubled the court at sentencing" and impacted the court's "determination as to whether Carrillo was suitable for a probationary term that would involve protracted and close supervision by [the Division]."

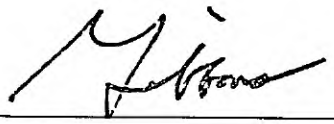
The district court found that Carrillo ignored her obligations. This finding is supported by the record. After accepting Carrillo's plea, the district court informed her that the Division was going to investigate her life and criminal history. The district court also informed Carrillo that there was "going to be a rather lengthy questionnaire" she needed to fill out and that the court would provide her with the questionnaire before she left. Thereafter, the court stated, "Please get that filled out and turned in to [the Division] as soon as possible." The district court then advised Carrillo that her failure to be cooperative with the Division during the interview process "might suggest to the Court that you're not a very good candidate for probation." During the evidentiary hearing, Carrillo testified that she received the questionnaire.

Macfarlan testified that his office mailed Carrillo a letter notifying her of her sentencing date and informing her that she needed to contact the Division to set up an interview. He explained that he was confident Carrillo received a copy of the questionnaire. Lockie testified that he discussed with Carrillo why she had not participated in the process with the Division and that she was "nonresponsive." He explained that, on this subject, Carrillo "seemed noncompliant, uninterested, and unwilling." Kump testified that his staff attempted to contact Carrillo regarding her participation in the process with the Division but it was "very difficult" to

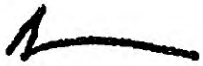
"even get her to come to an appointment." He explained that his impression was that Carrillo "wanted to ignore it and pretend it wasn't happening." Further, Carrillo failed to demonstrate that counsel had a duty to follow up with her on completing the presentence questionnaire and participating in the presentence interview with the Division. Carrillo thus failed to demonstrate counsel were deficient.

With regard to prejudice, the district court found that, while it did consider Carrillo's failure to comply with the Division at sentencing, it also considered other information, including the seriousness of the crime, the amount of money taken from the victims, the vulnerable nature of the victims, Carrillo's failure to make any restitution before sentencing, Carrillo's ability to make restitution after sentencing, and the views of the victims. This finding is supported by the record. Carrillo thus failed to demonstrate a reasonable probability of a different sentence had counsel acted differently. Therefore, we conclude the district court did not err by denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Gibbons



_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Mason E. Simons, District Judge
Ermelinda Carrillo
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk