IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHANIKA YVETTE SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 88912-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Shanika Yvette Smith appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on November 20, 2023.[1] Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Smith argues the district court erred by denying her claim that counsel was ineffective for failing to take action regarding Smith's assertion that the Honorable Joseph T. Bonaventure, who conducted the settlement conference, had history with the victim. Smith contended counsel's inaction

[1]Smith has filed a motion for an extension of time to file a reply to the State's answering brief and has submitted her proposed reply along with attached exhibits. We grant the motion in part and direct the clerk of the court to file Smith's reply but to return unfiled the exhibits. *See* NRAP 30(i) (providing that pro se parties are not permitted to file an appendix unless ordered by the court). We have considered Smith's reply in resolving this appeal.

25-36915

deprived her of her right to a fair and impartial judge.[2] 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 the 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).

The district court found Smith's claim was bare in that she failed to identify in her petition the nature of the history or relationship between Senior Judge Bonaventure and the victim. This finding is supported by the record. Further, the record reflects that, before the start of the settlement conference, Smith acknowledged her participation was voluntary and knew Senior Judge Bonaventure would be conducting the settlement conference. Smith alleged she knew Senior Judge Bonaventure had history or a relationship with the victim prior to the settlement conference yet Smith participated in the conference nonetheless. Smith

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[2]We note that the Honorable Tierra Jones presided over the entry of plea proceedings and the Honorable Michelle Leavitt entered the judgment of conviction and imposed Smith's sentence.

reaffirmed during her entry of plea hearing that her participation in the settlement conference was voluntary. In light of these circumstances, Smith failed to demonstrate counsel was deficient or a reasonable probability she would not have entered her plea and would have insisted on going to trial but for counsel's alleged error. Therefore, we conclude the district court did not err by denying this claim.

Smith next argues the district court erred by denying her claims that her plea was not knowingly and voluntarily entered. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing the plea was not entered knowingly and intelligently. *Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). In determining the validity of a guilty plea, this court looks to the totality of the circumstances. *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). "A court must be able to conclude from the oral canvass, any written plea memorandum and the circumstances surrounding the execution of the memorandum (i.e., did the defendant read it, have any questions about it, etc.) that the defendant's plea was freely, voluntarily and knowingly made." *Id.* at 1106, 13 P.3d at 448.

First, Smith claimed her plea was not knowingly and voluntarily entered with regard to count 2. Count 2 alleged Smith committed child abuse, neglect, or endangerment by allowing J. Roger (the victim for count 1, voluntary manslaughter with the use of a deadly weapon) to point a shotgun at N.R. without attempting to remove N.R. from the situation or call for assistance. In her petition, Smith contended she told counsel to seek dismissal of count 2 in plea negotiations because Roger had

severely injured her a week before the crime and her injuries rendered her incapable of stopping Roger's actions toward N.R. Smith further alleged counsel told her she had to plead guilty to count 2 "because [her] children were in the home at the time of the crime." Smith explained she did not know the extent of what count 2 alleged until the district court read the factual basis for count 2 into the record during the plea canvass and, at that time, counsel whispered to her to "just plea to it."

During the plea canvass, the district court read the factual basis for count 2 as alleged in the amended information and asked Smith whether she was pleading guilty to count 2 because she committed the offense based on those facts. Unlike what occurred when the district court employed a similar procedure regarding count 1, Smith was not the first to respond to the district court's inquiry. Instead, her attorney responded, "Yes." Thereafter, Smith stated, "Am I supposed to say – yes."

Considering Smith's allegations regarding her interactions with counsel and her response regarding count 2 during the plea canvass, we cannot say that Smith's claim was belied by the record and if true she would not be entitled to relief. Accordingly, we conclude Smith was entitled to an evidentiary hearing on this claim. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, we reverse the district court's decision as to this claim and remand this matter to the district court to conduct an evidentiary hearing on this claim.

Second, Smith claimed her plea was not knowingly and voluntarily entered because she was pressured into accepting the plea deal despite the fact that there were significant mitigating circumstances

warranting a plea deal that included a lesser sentence. Smith did not allege she was unaware of these mitigating circumstances prior to entering her plea, and she failed to explain how she was pressured. *See Stevenson v. State*, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015) (recognizing "time constraints and pressure from interested parties exist in every criminal case"); *see also Miles v. Dorsey*, 61 F.3d 1459, 1470 (10th Cir. 1995) ("Although deadlines, mental anguish, depression, and stress are inevitable hallmarks of pretrial plea discussions, such factors considered individually or in aggregate do not establish that [a defendant's] plea was involuntary."). Therefore, we conclude the district court did not err by denying this claim.

Third, Smith claimed her plea was not knowingly and voluntarily entered because she did not know she agreed to a plea deal with a stipulated prison sentence. This claim is belied by the record. Smith acknowledged in both the written plea agreement and her plea canvass that she agreed to a stipulated sentence.[3] Smith argued the fact that she wrote Judge Leavitt prior to sentencing, asking for count 2 to be served concurrently to count 1, demonstrated her lack of understanding regarding

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[3]The written plea agreement, which Judge Jones read nearly verbatim during the entry of plea hearing, provided:

> The parties stipulate to a sentence of four (4) to ten (10) years on Count 1, plus an additional and consecutive term of four (4) to ten (10) years for the deadly weapon. As to Count 2, the parties further stipulate to a sentence of one (1) to three (3) years, to run consecutive to Count 1, for a total aggregate sentence of nine (9) to twenty-three (23) years in the Nevada Department of Corrections."

the stipulated sentence. However, the letter supports the conclusion that Smith understood the stipulated punishment she faced and the court's sentencing discretion. In the letter, Smith acknowledged that Judge Jones discussed the "stipulations of my plea agreement" during the entry of plea hearing. The letter further stated that the State initially offered a plea deal that carried a 10-25-year prison term but that, despite counsel's negotiation, "I'm still getting nine years." Further, the letter stated that Smith sought leniency: "I am writing today to ask for [leniency] as far as my sentencing . . . I ask you, Honorable Judge [Leavitt], for [leniency] in sentencing, or to allow my sentence to run concurrent, so I can get back to my two children . . . ." In light of these circumstances, we conclude the district court did not err by denying this claim.[4]

Smith next argues the district court erred by denying her claims that her sentence amounts to cruel and unusual punishment and violates her right to due process because it does not comport to the sentence discussed in the court minutes of the sentencing hearing. These claims were waived because they could have been raised on direct appeal. *See Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 150, 979 P.2d 222, 223-24 (1999). Further, these claims did not challenge the validity of Smith's guilty plea or allege that Smith entered her plea without the effective assistance of counsel. Accordingly, they were outside the scope of claims permissible in

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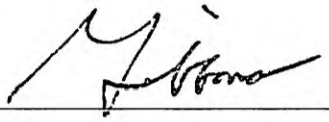
[4]While we are affirming the denial of this claim, we note that if Smith is granted relief after an evidentiary hearing regarding her claim discussed above, such relief would necessarily impact Smith's sentence.

a postconviction petition for a writ of habeas corpus challenging a judgment of conviction based on a guilty plea. *See* NRS 34.810(l)(a). For these reasons, we conclude that the district court did not err in denying these claims.

Finally, Smith raises a number of arguments for the first time on appeal. Because these arguments were not raised in Smith's petition below, we decline to consider them on appeal in the first instance. *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989). Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Bulla



_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Michelle Leavitt, District Judge
Shanika Yvette Smith
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk