

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE HECTOR CORTEZ,
Appellant,

vs.

WARDEN, NEVADA STATE PRISON,
BILL DONAT AND THE STATE OF
NEVADA,
Respondents.

No. 55064

FILED

SEP 10 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

In his petition, filed on June 24, 2008, appellant raised several claims of ineffective assistance of counsel, only two of which are raised on appeal.¹ To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) resulting prejudice such "that there is 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, 987-88, 923 P.2d 1102, 1107 (1996). Both components of the inquiry must be shown. Strickland v. Washington, 466 U.S. 668,

¹Appellant's remaining claims are therefore abandoned.

697 (1984). The petitioner had the burden at his evidentiary hearing of establishing the facts underlying his claims by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). This court will defer to the district court's factual findings if supported by substantial evidence and not clearly erroneous, but it reviews the district court's application of the law to those facts de novo. See Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

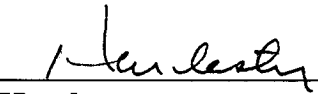
First, appellant argues that counsel was ineffective for advising him to plead guilty without first challenging the level of crime with which appellant was charged. Appellant fails to demonstrate deficiency or prejudice. Appellant was charged with and ultimately pleaded guilty to a gross misdemeanor for damaging jail property, and he now argues he was ineligible to be convicted of more than a simple misdemeanor. Appellant's information referenced both NRS 193.155, a general statute setting out different levels of offense depending on the value of damage inflicted, and NRS 212.190, a specific statute mandating a minimum level of offense (gross misdemeanor) for damage to jail property. As specific statutes control over general statutes, Lader, 121 Nev. at 687, 120 P.3d at 1167, appellant was charged with and convicted of the minimum level of offense possible for his crime. Accordingly, he fails to demonstrate a reasonable probability of a different outcome had trial counsel done as he requested.

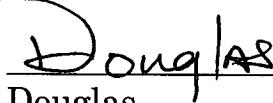
Second, appellant argues that counsel was ineffective pursuant to Cuyler v. Sullivan, 446 U.S. 335 (1980), because counsel had a conflict of interest. Appellant fails to demonstrate that "an actual conflict of interest adversely affected his lawyer's performance." Id. at 350. The district court found trial counsel to be credible when he testified that he


was not aware until he read appellant's presentence investigation report that appellant was involved in a crime with which counsel had had a personal connection several years prior. The district court's finding is supported by substantial evidence. Further, the record reveals that immediately upon learning of the potential conflict, counsel successfully moved to continue the sentencing hearing to allow another attorney to substitute in. As counsel removed himself from the case as soon as he learned of a potential conflict, it could not have adversely affected counsel's performance.

For the foregoing reasons, we conclude that the district court did not err in denying appellant's petition. We therefore

ORDER the judgment of the district court AFFIRMED.

, J.
Hardesty

, J.
Douglas

, J.
Pickering

cc: Hon. Jerome Polaha, District Judge
Mary Lou Wilson
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk