IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KATHY MICHELLE FINSTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73195-COA

ORDER OF AFFIRMANCE

Kathy Michelle Finster appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on February 10, 2017. Eighth Judicial District Court, Clark County; David Barker, Senior Judge.

Finster argues the district court abused its discretion by denying her claim that her plea was not entered knowingly, voluntarily, and intelligently. Specifically, she claimed her plea was invalid because one clause of the plea agreement stated if she paid $10,000 in restitution by the sentencing hearing the State would recommend a sentence of 22 to 75 months in prison. Finster claimed this would be an illegal sentence recommendation because the minimum sentence she could serve under NRS 193.167(1)(i) and NRS 205.380(1)(a), was 24 months. Therefore, she did not understand the consequences of her plea and she should be allowed to withdraw it.

Finster failed to provide the district court with a copy of the change of plea transcript which was a necessary document to support her claim that her plea was unknowing and involuntary. Therefore, Finster failed to demonstrate her plea was unknowing and involuntary, and the district court did not err by denying this claim.

Next, Finster claims the district court erred by denying her claim counsel was ineffective for advising her to accept the invalid plea agreement. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability, 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 must be shown. *Strickland v. Washington*, 466 U.S. 668, 697 (1984). We give deference to the 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 Finster could not "demonstrate that the minimum possible sentence was of any concern or a motivating factor for her entering a guilty plea." We conclude the district court did not err by finding there was no prejudice, and, therefore, the district court did not err by denying this claim. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver

_____, J.
Tao

GIBBONS, J., concurring:

I concur with the majority of the court and agree with the detailed findings reached by the district court in concluding that Finster's petition should be denied for the following reasons.

Finster pleaded guilty to a felony theft offense against an older person with a joint recommendation in the guilty plea agreement of 30 to 75 months in prison. There was also an agreement for an O.R. release and a much more severe joint recommended sentence if she committed any new offenses or failed to appear for court.

Finally, Finster agreed to a restitution amount of more than $150,000 to be paid to the victim. If she paid $10,000 in restitution by the time of sentencing, the agreement provided that both parties would recommend 22 to 75 months in prison, not the originally agreed amount of 30 to 75 months in prison.

The "CONSEQUENCES OF THE PLEA" section in the guilty plea agreement recited that Finster understood that the court must sentence her to not less than 1 year, nor more than 6 years' imprisonment, plus a consecutive term of 1 to 6 years for the age enhancement. Further, in this same section of the plea agreement, Finster indicated that she understood that she was not promised or guaranteed any particular sentence and the court was not obligated to accept the recommended sentence. The guilty plea agreement reflects that it was voluntarily signed.

Therefore, under the terms of the plea agreement, the absolute minimum sentence Finster faced was 24 months in prison. The minimum recommended sentence was 30 months in prison, unless she paid $10,000 in restitution by the sentencing date. Finster, however, did not pay the $10,000 in partial restitution, and the district court chose to impose the

more severe stipulated sentence of 56 to 140 months in prison after she initially failed to appear for sentencing.

The apparent discrepancy in the guilty plea agreement to recommend 22 months in prison is of little consequence in this situation. That term of the agreement was based upon a condition subsequent: paying $10,000 in restitution. The condition was not satisfied, so the alternative recommendation in the guilty plea agreement never sprang into existence. Therefore, the error is immaterial.

Furthermore, the terms of the guilty plea agreement rebut the claims Finster now makes. She signed the agreement voluntarily with the consequences clearly identified. She acknowledged the district court could not impose a minimum sentence of less than one year with a mandatory consecutive sentence of one year, which results in a total of 24 months, not 22 months. NRS 174.035(2) requires the district court to personally address the defendant and determine if the plea is made voluntarily and with an understanding of the consequences. Here Finster did not submit on appeal the record of the plea canvass to demonstrate the court did not follow the statutory mandate and advise her of the 24-month minimum prison sentence.

Finally, the error in the agreement worked to her benefit, not her detriment. She was released from custody on her own recognizance. She then had the chance to acquire the partial restitution payment and get her affairs in order as stated in the plea agreement. Having a lesser recommended minimum sentence of 22 months would have only encouraged her to try even harder to acquire the funds so she could fully benefit from the agreement. It is hard to imagine a scenario in which the district court could find her plea was involuntary or her counsel

ineffective since the mistake inured to her benefit, she ultimately did not pay the $10,000 in restitution by sentencing, and she failed to appear for sentencing.

For these reasons, I concur with the majority.

_____, J.
Gibbons

cc: Chief Judge, Eighth Judicial District Court
Hon. David Barker, Senior Judge
The Law Office of Travis Akin
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk