

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN ANDREW KELLY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74268-COA

FILED

JAN 17 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART
AND REMANDING*

Kevin Andrew Kelly appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Kelly argues the district court erred by denying the claims of ineffective assistance of counsel raised in his May 10, 2017, petition. 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*, 466 U.S. at 697, 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 court's factual findings if supported by substantial evidence and not clearly erroneous but review the

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

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, Kelly claimed his counsel was ineffective for forcing him to plead guilty. Kelly asserted his counsel met with the trial-level judge without him and also threatened him in an effort to coerce him into pleading guilty. Kelly failed to demonstrate his counsel's performance was deficient or resulting prejudice. In the written plea agreement and at the plea canvass, Kelly acknowledged he did not enter a guilty plea due to coercion. In addition, counsel testified at the evidentiary hearing that he did not meet with the trial-level judge as Kelly had alleged. Kelly also testified at the evidentiary hearing that he was not forced to plead guilty. Accordingly, Kelly failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial had counsel performed differently. Therefore, we conclude the district court did not err by denying this claim.

Second, Kelly claimed his counsel was ineffective for failing to obtain a security video recording depicting the incident. Kelly failed to demonstrate his counsel's performance was deficient or resulting prejudice. Kelly asserted he believed the Home Depot would have recorded the incident with its security cameras, but he made a mere assumption that such a recording existed. Kelly's unsupported claim was insufficient to demonstrate he was entitled to relief. *See Means*, 120 Nev. at 1012, 103 P.3d at 33. Moreover, the record in this matter showed that Kelly admitted his codefendant held the victim at gunpoint while Kelly took items from the victim's vehicle. Given the record, Kelly failed to demonstrate a reasonable probability he would have refused to plead guilty and insisted on proceeding to trial had counsel attempted to obtain security video of the incident. Therefore, we conclude the district court did not err by denying this claim.

Next, Kelly claimed his guilty plea was not voluntarily entered because the trial-level court improperly threatened that he would receive a lengthy sentence if he did not accept a plea offer. The district court did not consider this claim at the evidentiary hearing, but rather denied relief because it found the claim was belied by the record. However, Kelly alleged that the threats concerning his guilty plea occurred during an off-the-record discussion. Given the potential coercive effect of judicial participation in plea negotiations and Kelly's allegation of an improper off-the-record discussion concerning his guilty plea, *see Cripps v. State*, 122 Nev. 764, 768, 770, 137 P.3d 1187, 1190, 1191 (2006), Kelly's claim, if true, would warrant relief. Therefore, an evidentiary hearing is necessary to ascertain whether the trial-level court improperly participated in an off-the-record discussion concerning Kelly's guilty plea and potential sentence. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Accordingly, we reverse the district court's denial of this claim and remand for an evidentiary hearing concerning these issues.²

Next, Kelly claimed the trial-level court improperly forced the State to pursue a sentence under the habitual criminal enhancement. This claim was not based upon an allegation that Kelly's plea was involuntarily

²Kelly also argues Judge Ellsworth erred by considering this claim because he alleged that she, as the trial-level judge, improperly participated in the discussion concerning his guilty plea. Given our conclusion that an evidentiary hearing concerning this claim is warranted and because Kelly's allegations involve Judge Ellsworth's trial-level actions, we conclude this matter should be considered by a different district court judge and direct this matter to be transferred to a different judicial department. *See Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (2011); *see also Williams v. Pennsylvania*, 579 U.S. ___, ___, 136 S. Ct. 1899, 1905 (2016) ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." (internal quotation marks omitted)).

or unknowingly entered or that his plea was entered without the effective assistance of counsel, and, therefore, was not permissible in a postconviction petition for a writ of habeas corpus stemming from a guilty plea. *See* NRS 34.810(1)(a). Accordingly, the district court did not err by denying relief for this claim.

Finally, Kelly argues the district court erred by denying his request for the appointment of postconviction counsel. The appointment of postconviction counsel was discretionary in this matter. *See* NRS 34.750(1). After a review of the record, we conclude the district court did not abuse its discretion in this regard as this matter was not sufficiently complex so as to warrant the appointment of postconviction counsel. *See Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 760-61 (2017). Accordingly, 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.


_____, A.C.J.
Douglas


_____, J.
Tao


_____, J.
Gibbons

cc: Chief Judge, Eighth Judicial District Court
Hon. Carolyn Ellsworth, District Judge
Kevin Andrew Kelly
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk