

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRIT FANULE AUGBORNE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76255-COA

FILED

JUN 11 2019

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

ORDER OF AFFIRMANCE

Brit Fanule Augborne appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 5, 2017. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Augborne contends the district court erred by denying claims that he received ineffective assistance from trial-level counsel. 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*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). To demonstrate prejudice where a petitioner challenges counsel's actions leading up to a guilty plea, he must demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. To warrant an evidentiary hearing, a petitioner

must raise claims supported by specific factual allegations that, if true and not repelled by the record, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Augborne argued counsel failed to file a written motion to withdraw Augborne's guilty plea to robbery with the use of a deadly weapon.¹ Augborne claimed he should have been allowed to withdraw his guilty plea because the written agreement wrongly stated he was eligible for probation. Augborne failed to demonstrate prejudice. Even if he hoped the district court would impose probation,² Augborne hedged his bet and bargained for consecutive terms of 4 to 12 years in prison. Augborne received the sentence he bargained for. He thus could not demonstrate a reasonable probability that, but for the error in the guilty plea agreement, he would not have pleaded guilty and would have insisted on going to trial. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

¹After entry of Augborne's plea, the district court appointed alternate counsel for the limited purpose of determining whether Augborne had meritorious grounds to withdraw his guilty plea. Augborne argues the district court erred by relying on the determination of appointed alternate counsel to determine whether Augborne's request to withdraw his guilty plea had merit. We agree that the district court erred by assigning its duty to evaluate and rule on motions to alternate appointed counsel and then deferring to counsel's opinion that there were no grounds to withdraw. We nevertheless affirm for the reasons stated above. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

²Augborne's suggestion that he was promised probation is repelled by the written plea agreement and the plea canvass. In both, Augborne acknowledged he had not been promised any particular sentence and the district court was free to sentence him as it saw fit.

Second, Augborne argued counsel failed to object to the State's evidence at the preliminary hearing. Augborne's bare claim failed to demonstrate deficiency or prejudice. He did not indicate what evidence counsel should have objected to, on what grounds counsel should have objected, what the outcome would have been, or how it would have affected his decision to plead guilty. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Augborne argued counsel failed to communicate with him. Augborne claimed counsel failed to meet with him throughout the case, resulting in Augborne not being provided an opportunity to participate in and help create an effective defense. Augborne failed to demonstrate deficiency or prejudice. Notably, Augborne appeared with counsel at numerous hearings leading up to the guilty plea. And Augborne's bare claim did not indicate what additional meetings or communications were necessary, what would have resulted from them, *see Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (petitioner claiming counsel did not conduct adequate investigation must specify what a more thorough investigation would have yielded), or how it would have affected his decision to plead guilty. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.


Augborne also argued his guilty plea was invalid because the district court denied his motion to dismiss pretrial counsel and appoint alternate counsel. Augborne claimed the previously described communication issues reflected a total breakdown in his communication with counsel such that he had no choice but to enter a guilty plea when the

district court would not allow him to change counsel or represent himself.³ However, for the reasons discussed above, Augborne failed to demonstrate a breakdown in communication. We therefore conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.⁴

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Michelle Leavitt, District Judge
Matthew D. Carling
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³It was not until the week before trial that Augborne asked the district court about representing himself and whether the court would continue trial to give him time to prepare.

⁴To the extent Augborne challenged the district court's disposition of his motion to dismiss counsel, the claim is outside the scope of claims permitted in a postconviction petition for a writ of habeas corpus arising out of a guilty plea. See NRS 34.810(1)(a).