

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARK SIOSON ENRIQUEZ,
Appellant,
vs.
DWIGHT NEVEN,
Respondent.

No. 70386

FILED

MAY 16 2017

CHRISTOPHER L. BROWN
CLERK OF THE COURT
BY *Milcap*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Mark Enriquez appeals from an order of the district court denying the postconviction petition for a writ of habeas corpus he filed on November 3, 2014, and the supplemental petition he filed on January 13, 2015. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Enriquez claims the district court erred by denying his claims of ineffective assistance of counsel without conducting an evidentiary hearing. To prove ineffective assistance of counsel, a petitioner must demonstrate that 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, the outcome of the proceedings would have been different. *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*). 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 district court's factual findings if supported by

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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). To warrant an evidentiary hearing, a petitioner must allege specific facts not belied by the record that, if true, would entitle him to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Enriquez claimed counsel was ineffective for failing to inquire whether the sentencing judge was inclined to follow the sentencing recommendation in the guilty plea agreement. Enriquez claims counsel also erred by telling him the plea judge would more than likely follow the recommendation in the plea agreement. The district court concluded counsel was not deficient because there is no mandatory obligation for counsel to inquire whether the sentencing judge was going to follow the sentencing recommendation. Further, the district court concluded Enriquez was informed in the plea agreement and at the change of plea hearing that sentencing was up to the district court's discretion and he acknowledged no one had promised him a particular sentence. Substantial evidence supports the decision of the district court, and we conclude the district court did not err by denying this claim without holding an evidentiary hearing.

Second, Enriquez claims counsel should have requested a continuance of sentencing so the original judge could preside over sentencing. Enriquez failed to demonstrate counsel was deficient or resulting prejudice. Enriquez did not have the right to a sentencing hearing before a particular judge, *see Dieudonne v. State*, 127 Nev. 1, 8, 245 P.3d 1202, 1207 (2011), and therefore, Enriquez failed to demonstrate a reasonable probability the motion for continuance would have been

granted. Therefore, we conclude the district court did not err by denying this claim without holding an evidentiary hearing.

Third, Enriquez claimed counsel was ineffective for failing to present mitigation evidence at sentencing. Specifically, he claimed counsel should have informed the district court he cooperated with the police, took responsibility for his actions, his crimes were motivated by his addiction, and his convictions violated double jeopardy because they arose from the same conduct. The district court found counsel was not deficient for failing to present this information because the information was presented in the presentence investigation report. The district court also found Enriquez's double jeopardy claim was without merit because his convictions for establishing or possessing a financial forgery laboratory and obtaining and/or using the personal identification of another each required proof of an element which the other did not.¹ See NRS 205.463; NRS 205.46513; *Jackson v. State*, 128 Nev. 598, 612, 291 P.3d 1274, 1284 (2012); see also *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Further, the district court found Enriquez failed to demonstrate prejudice because the district court based its sentencing on Enriquez's extensive criminal history, and therefore, Enriquez failed to demonstrate a reasonable probability of a different outcome at sentencing. Substantial evidence supports the decision of the district court, and we conclude the district court did not err by denying this claim without holding an evidentiary hearing.

¹Enriquez was convicted pursuant to guilty pleas entered in two related cases.

Fourth, Enriquez claimed counsel was ineffective for failing to file a post-sentencing motion to withdraw his plea. Enriquez failed to demonstrate counsel was deficient or resulting prejudice. Enriquez failed to demonstrate he requested counsel to file a post-sentence motion to withdraw his plea, counsel had a duty to file a post-sentence motion to withdraw his plea, or the failure to file a post-sentence motion to withdraw his plea somehow prejudiced his rights. Enriquez was able to file all the claims he could have filed in his post-sentence motion to withdraw his guilty plea in the instant postconviction proceeding. See *Harris v. State*, 130 Nev. ___, ___, 329 P.3d 619, 628 (2014) (“a postconviction petition for a writ of habeas corpus provides the exclusive remedy for a challenge to the validity of the guilty plea made after sentencing”). Therefore, we conclude the district court did not err by denying this claim without holding an evidentiary hearing.

Fifth, Enriquez claimed his convictions violated double jeopardy. This claim fell outside the scope of claims permissible to be raised in a postconviction petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea. See NRS 34.810(1)(a). Therefore, we conclude the district court did not err by denying this claim.


Finally, Enriquez claimed his plea was not knowing and voluntary. A guilty plea is presumptively valid, and a petitioner (defendant) carries the burden of establishing that the plea was not entered knowingly and intelligently. *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also *Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). Further, this court will not reverse a district court’s determination concerning the validity of a plea absent a clear abuse of discretion. *Hubbard*, 110 Nev. at 675, 877 P.2d at 521. 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); *Bryant*, 102 Nev. at 271, 721 P.2d at 367.

Enriquez claims he was not informed, either in the guilty plea agreement or during his plea canvass, his sentence could be run consecutive to a sentence in another case. We conclude Enriquez's claim is without merit. Enriquez pleaded guilty to the instant charge before he pleaded guilty to a charge in the other case. Therefore, the instant case would not run concurrent or consecutive to his other case. Accordingly, Enriquez failed to demonstrate his plea was not entered knowingly and intelligently. Thus, the district court did not abuse its discretion by denying this claim without holding an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
Oldenburg Law Office
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk