


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN SWISHER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 77395-COA

**FILED**

JAN 14 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

John Swisher appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on May 31, 2017. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Swisher claims the district court erred by denying his petition because he should have been allowed to withdraw his guilty plea. He argues that his guilty plea was not knowingly, intelligently, or voluntarily entered because it was induced by defense counsel's guarantee that he would not serve more than four years in prison.

After sentencing, a district court may permit a petitioner to withdraw a guilty plea where necessary "[t]o correct manifest injustice." NRS 176.165. "A guilty plea entered on advice of counsel may be rendered invalid by showing a manifest injustice through ineffective assistance of counsel. Manifest injustice may also be demonstrated by a failure to adequately inform a defendant of the consequences of his plea." *Rubio v. State*, 124 Nev. 1032, 1039, 194 P.3d 1224, 1228-29 (2008) (footnote and internal quotation marks omitted). We review a district court's manifest injustice determination for abuse of discretion but review claims of ineffective assistance of counsel de novo. *Id.* at 1039, 194 P.3d at 1229.

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The district court found that Swisher had acknowledged in his written guilty plea agreement, and in open court, that he understood he could be sentenced to two to fifteen years in prison, sentencing was strictly up to the district court, and no one could guarantee him a particular sentence. The record on appeal supports the district court's findings. We conclude Swisher failed to demonstrate manifest injustice and the district court did not err by rejecting his challenge to the validity of his guilty plea.

Swisher also claims the district court erred by denying his petition because he was deprived of effective assistance of counsel. He argues that defense counsel was ineffective for falsely guaranteeing he would not serve more than four years in prison. And he asserts he would not have entered a guilty plea if he had known that defense counsel could not make such a guarantee.

To prevail on a claim of ineffective assistance of counsel, a petitioner must show (1) counsel's performance was deficient because it fell below an objective standard of reasonableness and (2) the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate prejudice sufficient to invalidate a judgment of conviction based on a guilty plea, the petitioner must show, but for trial counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components of the ineffective-assistance inquiry—deficiency and prejudice—must be shown. *Strickland*, 466 U.S. at 697. We review the district court's resolution of ineffective-assistance claims de novo, giving deference to the court's factual findings if they are supported by substantial evidence and are not clearly wrong. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

The district court conducted an evidentiary hearing and made the following findings. Defense counsel testified credibly that he carefully explained the guilty plea agreement to Swisher. Swisher was not credible. Swisher's claim that defense counsel promised him a maximum prison sentence of four years is belied by the record. And Swisher failed to prove that defense counsel's performance was deficient. The district court's findings are supported by substantial evidence and are not clearly wrong. We conclude Swisher failed to demonstrate counsel was ineffective and the district court did not err by rejecting this claim. *See Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (petitioner bears the burden of proving ineffective assistance of counsel).

Having concluded that Swisher is not entitled to relief, we  
ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Carolyn Ellsworth, District Judge  
Law Offices of Ernest A. Buche, Jr.  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk