

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ARIC E. JOHNSON, A/K/A ERIC E.
JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76313-COA

FILED

FEB 11 2020

ELIZABETH L. BROWN
CLERK OF SUPREME COURT

BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Aric E. Johnson appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on July 3, 2017, and a supplement filed on November 20, 2017. Eighth Judicial District Court, Clark County; Mark B. Bailus, Judge.

First, Johnson claims the district court erred by denying his claim that his plea was not knowingly and intelligently entered. After sentencing, a district court may permit a petitioner to withdraw his guilty plea where necessary “[t]o correct a manifest injustice.” NRS 176.165. A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently. *Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994). 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). We review a district court’s manifest injustice determination for

abuse of discretion. *Rubio v. State*, 124 Nev. 1032, 1039, 194 P.3d 1224, 1229 (2008).

Johnson claimed his plea was invalid because he was not informed that, if he failed to appear at sentencing, he was facing a sentence enhanced under the habitual criminal statute. He also claimed counsel was ineffective for failing to inform him of the potential habitual criminal sentence. He claimed that had he known his failure to appear would trigger the habitual criminal enhancement he would have appeared at sentencing. Johnson stated he believed he would only receive a sentence of 19 to 48 months in prison if he did not appear for sentencing as this was stated in the guilty plea agreement.

Although the guilty plea agreement stated Johnson would be subject to a stipulated sentence of 19 to 48 months in prison if he failed to appear at sentencing or for his presentence investigation report interview, the plea agreement also stated in a separate clause that, if a magistrate found probable cause by affidavit against Johnson for new crimes committed after he pleaded guilty, Johnson was facing any legal sentence. Any legal sentence included the habitual criminal enhancement and Johnson was informed of the possible consequences of the habitual criminal enhancement in his guilty plea agreement. At the change of plea hearing, Johnson informed the district court he read and understood the plea agreement and he had discussed it with counsel. At the evidentiary hearing, counsel testified he informed Johnson that, if he committed new

crimes, he was facing the habitual criminal enhancement. Here, Johnson committed at least two more criminal acts after pleading guilty, and a magistrate found probable cause by affidavit. Therefore, Johnson was eligible to receive the habitual criminal enhancement based on his criminal activity after pleading guilty and not because he failed to appear for his sentencing hearing. The district court found Johnson was aware that his commission of new crimes subjected him to habitual criminal treatment and concluded Johnson failed to demonstrate his plea was not knowing and voluntarily entered. We conclude the district court did not abuse its discretion by denying this claim.

Second, Johnson claims the district court erred by denying his claims that counsel was ineffective. 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).

Below Johnson claimed counsel was ineffective for failing to file a motion to suppress the U-Haul key that was found on his person on the basis that the key could not start the U-Haul he was accused of possessing. Johnson now claims counsel was ineffective for failing to investigate whether the U-Haul key found in his pocket could actually start the U-Haul. Because this claim was not raised below, we decline to consider it for the first time on appeal. See *McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

Below, Johnson also claimed counsel was ineffective for failing to inform the sentencing judge that counsel promised Johnson a thirty-day continuance of sentencing. Johnson claimed that had counsel so informed the district court, he would not have been eligible to receive the habitual criminal enhancement. After holding an evidentiary hearing, the district court concluded Johnson failed to demonstrate counsel promised him a thirty-day continuance. Further, the district court found that Johnson was on notice of his continued sentencing date and that counsel made every effort to request the district court for more time. Therefore, the district court found Johnson failed to demonstrate deficiency or prejudice. These findings are supported by the record, and we conclude the district court did not err by denying this claim.

Johnson further claimed counsel was ineffective for failing to explain the consequences of failing to appear at sentencing. The district court found that counsel fully informed Johnson of the consequence of not appearing at sentencing. The district court also found counsel informed Johnson regarding the consequences of engaging in new criminal activity. Therefore, the district court found that Johnson did not demonstrate deficiency or prejudice. These findings are supported by the record, and we conclude the district court did not err by denying this claim.

Having concluded Johnson is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.¹


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

¹The State argues that this court should not consider the arguments made in Johnson's opening brief because counsel failed to cite to the record in the argument portion of the opening brief. While counsel should have cited to the record to support its arguments, counsel did cite to the record in the procedural history and fact sections of the brief. Therefore, we conclude the State failed to demonstrate counsel failed to cite to the record such that the opening brief should be disregarded.

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