

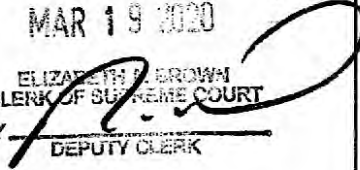
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CORY BREWER,
Appellant,
vs.
TIMOTHY FILSON, WARDEN, STATE
OF NEVADA,
Respondent.

No. 77949-COA

FILED

MAR 19 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Cory Brewer appeals from an order of the district court dismissing a postconviction petition for a writ of habeas corpus filed on May 3, 2017, and a supplemental petition filed on April 20, 2018. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

First, Brewer claims the district court erred by denying his claims that he received ineffective assistance of counsel. He also claims the district court erred by failing to conduct an evidentiary hearing.

To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a plea of nolo contendere, 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 nolo contendere 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). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Justice Court Proceedings

Brewer claimed counsel was ineffective for postponing the preliminary hearing without his consent. Brewer claimed had counsel not caused his preliminary hearing to be postponed, the State would not have had the coroner's report before trial and he would not have pleaded nolo contendere. Brewer failed to allege specific actions counsel took that caused the preliminary hearing to be postponed; and therefore, failed to allege specific facts to support his claim that counsel was deficient.¹ Further, his claim regarding prejudice was speculative. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Brewer also claimed counsel was ineffective for failing to file a motion challenging the justice court proceedings because he did not appear in front of the magistrate within 48 hours of arrest. Brewer claimed had

¹Brewer was represented by counsel below and Brewer failed to make the justice court records part of the record in the district court.

counsel filed this motion, the charges would have been dismissed and he would not have pleaded nolo contendere. "Failure to bring a defendant before a magistrate without unnecessary delay does not warrant reversal absent a showing of prejudice to the defendant's constitutional rights." *Elvik v. State*, 114 Nev. 883, 895, 965 P.2d 281, 289 (1998) (citing *Huebner v. State*, 103 Nev. 29, 32, 731 P.2d 1330, 1333 (1987)). Brewer failed to demonstrate any delay was unnecessary and he failed to identify any prejudice that stemmed from any delay. Therefore, Brewer failed to demonstrate counsel was deficient or any resulting prejudice from counsel's failure to file a motion. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Investigation and Trial Preparation

Brewer claimed counsel was ineffective for failing to file a motion for the production of discovery within the time frames of the statute, and had counsel filed a timely motion, he would not have pleaded nolo contendere. Brewer failed to demonstrate he was unable to receive discovery based on counsel's failure to file a timely discovery motion. Therefore, he failed to demonstrate counsel was deficient. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Brewer next claimed counsel was ineffective for failing to research or investigate the case or to provide any defense to the case. Further, he claimed counsel was ineffective for failing to use an investigator to question the State's witnesses or witnesses for the defense and for failing to have the witnesses against him undergo a polygraph examination.

Brewer claimed that had counsel taken these actions, he would not have pleaded nolo contendere. A petitioner alleging that an attorney should have conducted a better investigation must demonstrate what a more thorough investigation would have revealed. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Brewer failed to demonstrate what a more thorough investigation would have revealed. Further, he failed to demonstrate any witnesses would have agreed to undergo a polygraph examination or that those results would have been admissible at trial. *Santillanes v. State*, 102 Nev. 48, 50, 714 P.2d 184, 186 (1986). Therefore, we conclude the district court did not err by denying these claims without first conducting an evidentiary hearing.

Brewer claimed counsel was ineffective for failing to research Brewer's mental health history to establish a defense that would show there was no premeditation. Brewer claimed that had counsel researched his mental health history, he would not have pleaded nolo contendere. A petitioner alleging that an attorney should have conducted a better investigation must demonstrate what a more thorough investigation would have revealed. *See Molina*, 120 Nev. at 192, 87 P.3d at 538. Brewer failed to allege what his mental health history was and how that would have provided a defense to the charges. Therefore, Brewer failed to support this claim with specific facts that, if true, would entitle him to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Accordingly, the district court did not err by denying his claim without first conducting an evidentiary hearing.

Brewer also claimed counsel was ineffective for failing to secure a defense expert to do an autopsy or produce a coroner's report that would have proven his innocence. Further, he claimed counsel was ineffective for allowing the victim's body to be cremated before a defense expert could examine the body. Brewer claimed that, had counsel done these actions, he would not have pleaded nolo contendere. Other than speculation, Brewer failed to demonstrate an expert's report or a review of the victim's body would have supported his claim that he was actually innocent. Therefore, Brewer failed to demonstrate counsel was deficient or a reasonable probability he would not have pleaded nolo contendere had counsel secured a defense expert. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Brewer claimed counsel was ineffective for failing to check whether the medical examiner's report was reliable. Brewer claimed the medical examiner had made mistakes in other cases and no investigation was made into these allegations. Brewer claimed that had counsel reviewed the medical examiner's report, Brewer would not have pleaded nolo contendere. Brewer failed to allege there were any mistakes in the medical examiner's report and, therefore, failed to support this claim with specific facts that, if true, entitled him to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Accordingly, he failed to demonstrate counsel was deficient or a reasonable probability he would not have pleaded nolo contendere. Thus, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Brewer claimed counsel was ineffective for failing to investigate whether he was under the influence of drugs at the time of the offense to show that he was not in his right mind during the incident or during the interrogation. He claimed that had counsel done this investigation, he would not have pleaded nolo contendere. The district court found that Brewer failed to support this claim with specific facts that, if true, would entitle him to relief. Brewer failed to allege how his drug use actually impaired his mind during the incident or during the interrogation. The record supports the district court's findings, *see Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225, and we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Brewer claimed counsel was ineffective for failing to review the discovery documents the State intended to use. Specifically, he claimed counsel should have noticed the State was using the domestic violence record of someone else. Brewer claimed that had counsel reviewed this discovery and objected, he would not have pleaded nolo contendere. Brewer failed to demonstrate the State was going to use the domestic violence record of someone else at trial; therefore, he failed to demonstrate counsel was deficient. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Brewer also claimed counsel was ineffective for improperly informing Brewer that he had to prove his innocence rather than the State having to prove each element of the crime. Specifically, he claimed counsel told him "it is not the truth that is important, but it's what you can prove." Brewer claimed that had counsel properly informed him, he would not have

pleaded nolo contendere. The district court found that frank advice about the realities of trial was not evidence of deficient performance. Further, Brewer was informed in the plea agreement and at the plea canvass that the State had the burden of proof at trial. The record supports the decision of the district court, *see Dezzani v. Kern and Associates, Ltd.*, 134 Nev. 61, 69, 412 P.3d 56, 62 (2018) (noting that one of the roles of an attorney is to provide candid advice to his or her client), and we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Brewer claimed counsel was ineffective for failing to file a motion to suppress his statement to the police. Specifically, Brewer claimed the police officers who questioned him never read him his *Miranda*² rights. He claimed had counsel filed a motion to suppress, he would not have pleaded nolo contendere. The district court found that Brewer failed to support this claim with specific facts that, if true, would entitle him to relief. The record supports the decision of the district court. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Brewer failed to demonstrate he was in custody for purposes of *Miranda*. *See Rosky v. State*, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005) (“‘Custody’ for *Miranda* purposes means a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.”). Therefore, we conclude the district court did not err by denying this claim without first holding an evidentiary hearing.

Plea Claims

²*Miranda v. Arizona*, 384 U.S. 436 (1966).

Brewer claimed counsel was ineffective by coercing his nolo contendere plea to conceal he was not prepared for trial. Brewer failed to demonstrate he was coerced because he failed to demonstrate counsel was not prepared for trial. As stated above, Brewer failed to allege, with specificity, what counsel could have done to prepare for trial. Further, Brewer, in the plea agreement and at the change of plea hearing, informed the district court he was not coerced into pleading nolo contendere. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Brewer claimed counsel was ineffective for coercing him into pleading nolo contendere by threatening him with unwarranted charges if he did not accept the plea offer, and promising a lesser sentence and other charges would be dismissed if he did accept the plea offer. Candid advice about the likely outcome of accepting a plea offer is not evidence of deficient performance. *See Dezzani*, 134 Nev. at 69, 412 P.3d at 62. Here, Brewer did receive a lesser sentence than he could have had he been convicted of first-degree murder. Further, the State dropped charges of possession of a firearm by a prohibited person and battery by a prisoner. Finally, Brewer failed to allege what unwarranted charges he was being threatened with. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Brewer claimed counsel was ineffective because he was actually innocent and counsel should not have told him to accept the plea offer. Further, he claimed that counsel was ineffective for failing to understand his legal and factual claims. Brewer failed to demonstrate he was actually

innocent; therefore, counsel was not deficient for recommending he accept the plea offer. Further, he failed to demonstrate counsel did not understand his legal and factual claims. Therefore, we conclude the district court did not err by denying these claims without first conducting an evidentiary hearing.

Brewer claimed counsel was ineffective for failing to discuss the autopsy report with him prior to entry of his nolo contendere plea. Brewer informed the district court at the change of plea hearing that he had reviewed all of the discovery with counsel prior to pleading nolo contendere. Therefore, he failed to demonstrate counsel was deficient. Further, Brewer failed to demonstrate a reasonable probability he would not have pleaded nolo contendere had counsel reviewed the autopsy report with him. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Brewer claimed he was coerced into pleading nolo contendere because there was an actual conflict of interest between counsel and him. Specifically, Brewer claimed counsel required Brewer to pay his fee before he would continue to trial. An actual conflict exists "when an attorney is placed in a situation conducive to divided loyalties." *Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992). Brewer failed to demonstrate counsel was placed in a situation conducive to divided loyalties. Further, Brewer stated in his petition that he knew if he did not pay, his choices were to have the public defender or accept the plea offer. Therefore, because Brewer knew he could have proceeded to trial with the public defender, Brewer failed to demonstrate he was coerced into pleading nolo contendere.

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

Brewer claimed counsel was ineffective for failing to challenge the factual summary attached to the plea agreement. There is no prohibition against attaching a factual summary to the plea agreement. *Cf.* NRS 174.063. Further, because this was a nolo contendere plea and Brewer specifically maintained his innocence, when accepting the plea, the district court had to “determine not only that there [was] a factual basis for the plea but . . . also inquire into and seek to resolve the conflict between the waiver of trial and the claim of innocence.” *State v. Gomes*, 112 Nev. 1473, 1481, 930 P.2d 701, 706-07 (1996) (internal quotation marks omitted). The factual summary could have assisted the district court in meeting this obligation. Therefore, Brewer failed to demonstrate such a challenge would have been successful. Further, counsel is not deficient for failing to make futile objections. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Involuntary Plea Claims

Brewer claims the district court erred by denying his claims that his plea was not knowingly and voluntarily entered. 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). Further, this court will not reverse a district court’s determination concerning the validity of a plea absent a clear abuse of discretion. *Id.* In determining the validity of a plea,

this court looks to the totality of the circumstances. *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000).

Brewer claimed his plea was not entered knowingly and voluntarily because he did not know what rights he was waiving. Brewer was properly informed of his rights in the plea agreement and at the plea canvass. Brewer indicated he understood these rights by signing the plea agreement. Further, he informed the district court he understood these rights at the change of plea hearing. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Brewer also claimed his plea was not knowing and voluntary because he did not fully understand the consequences of the plea and he felt coerced. Brewer failed to allege what consequences he did not understand and, therefore, Brewer failed to support this claim with specific facts that, if true, would entitle him to relief. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Further, Brewer stated at the change of plea hearing he was not coerced into taking the plea. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Sentencing Claims

Next, Brewer claims the district court erred by denying his claims that counsel was ineffective at sentencing. To prove ineffective assistance of counsel at sentencing, a petitioner must demonstrate 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*, 466 U.S. at 687-88; *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 substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader*, 121 Nev. at 686, 120 P.3d at 1166.

Brewer claimed counsel was ineffective at sentencing because counsel failed to provide the court with evidence of Brewer's mental health issues and "his ability to garner the correct medications." Brewer failed to support this claim with specific facts that, if true, would entitle him to relief because he failed to allege what mental health issues he suffered from or explain what he meant by "his ability to garner the correct medications." Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Brewer also claimed counsel was ineffective at sentencing because counsel failed to have Brewer exercise his right to allocution. However, at sentencing, Brewer specifically declined to speak and counsel did not prevent him from doing so. Therefore, Brewer failed to demonstrate counsel was deficient and we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Brewer further claimed counsel was ineffective at sentencing because counsel failed to object to the people in the courtroom dressed in purple shirts in support of victims of domestic violence. Brewer claimed the presence of these people pressured the district court into imposing the maximum sentence. Brewer failed to demonstrate an objection to the presence of the people in the purple shirts would have been successful. *See Donovan*, 94 Nev. at 675, 584 P.2d at 711. Further, he failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel objected. The district court based its sentence on the increasing severity of Brewer's violent crimes. Accordingly, we conclude the district court did not err by denying this claim without first holding an evidentiary hearing.

Finally, Brewer claimed counsel was ineffective for failing to file a direct appeal because there were potential appealable issues. When a petitioner is convicted pursuant to a plea agreement, "counsel has a constitutional duty to file a direct appeal in two circumstances: when requested to do so and when the defendant expresses dissatisfaction with his conviction." *Toston v. State*, 127 Nev. 971, 978, 267 P.3d 795, 800 (2011). Brewer did not allege he requested counsel to file an appeal or that he expressed dissatisfaction with his conviction. Therefore, he failed to demonstrate counsel was deficient for failing to file an appeal. Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Other Claims

Next, Brewer claimed the district court lacked jurisdiction over his case because the Nevada Revised Statutes were not properly enacted.

Specifically, he claims they do not have enacting clauses, power was improperly given to the Nevada Supreme Court to create the Nevada Revised Statutes, and there is no reference in the Nevada Revised Statutes to the actual statutes.

To the extent Brewer claimed he could raise this claim at any time because it is a jurisdictional claim, Brewer's claim lacked merit. Brewer failed to demonstrate these claims implicated the jurisdiction of the district court. *See Nev. Const. art. 6, § 6; NRS 171.010.* The Statutes of Nevada contain the laws with the enacting clauses required by the constitution. The Nevada Revised Statutes simply reproduce those laws as classified, codified, and annotated by the Legislative Counsel. *See NRS 220.120.* Further, the Nevada Revised Statutes include citations to the Statutes of Nevada at the bottom of each statute. Finally, Brewer failed to demonstrate the Nevada Supreme Court improperly participated in the creation of the Nevada Revised Statutes. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Finally, Brewer claimed: he did not receive discovery for 13 months, he was not advised of his *Miranda* rights, the judgment of conviction was null and void because of due process violations, his right to secure exculpatory evidence was violated when the victim's body was cremated, and his due process rights were violated because he was denied a preliminary hearing for 13 months. "By entering his *nolo* plea [], however, [Brewer] waived all constitutional claims based on events occurring prior to entry of the plea [], except those involving the voluntariness of the plea []

[itself].” *Lyons*, 100 Nev. at 432, 683 P.2d at 505. Accordingly, we conclude the district court did not err by denying these claims without first conducting an evidentiary hearing.

Having concluded Brewer is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Connie J. Steinheimer, District Judge
Cory Brewer
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

³On February 11, 2020, Brewer filed a “Judicial Notice of Appellant Concerning Order Directing Transmission of Supplemental Record on Appeal.” Brewer requests this court to impose sanctions on the district court clerk for not transmitting the entire record previously. We deny this request. Further, to the extent Brewer has attempted to present claims or facts in this notice that were not previously presented in the proceedings below, we decline to consider them in the first instance.