

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JACK FERM,
Appellant,

vs.

STATE OF NEVADA, DIVISION OF
PAROLE AND PROBATION;
ATTORNEY GENERAL OF THE STATE
OF NEVADA; AND THE EIGHTH
JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA, IN AND FOR THE
COUNTY OF CLARK,
Respondents.

No. 84002-COA

FILED

FEB 15 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Jack Ferm appeals from an order of the district court denying an amended postconviction petition for a writ of habeas corpus filed on January 31, 2020. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Chief Judge.¹

Ferm argues the district court erred by denying his claims of ineffective assistance of counsel. To demonstrate ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a plea of no contest, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that, but for counsel's errors, there is a reasonable probability petitioner would not have pleaded no contest and would have insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996); *see also State v.*

¹We direct the clerk of this court to amend the caption of this court's docket to conform with the caption on this order.

Smith, 131 Nev. 628, 630, 356 P.3d 1092, 1094 (2015) (noting that courts treat no-contest pleas as guilty pleas). Both components of the inquiry must be shown, *Strickland v. Washington*, 466 U.S. 668, 687 (1984), 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 v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, Ferm argued counsel was ineffective for failing to file a petition for a writ of mandamus challenging the trial-level court's denial of his pretrial petition for a writ of habeas corpus (pretrial petition). Ferm argued that the district court manifestly abused its discretion by denying his pretrial petition and, thus, a mandamus petition had a reasonable probability of success.

A writ of mandamus is available to control a manifest abuse or arbitrary or capricious exercise of discretion. *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). Mandamus is an extraordinary remedy, and it is the petitioner's burden to demonstrate extraordinary relief is warranted. See *Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982). Generally, an appellate court will not consider a petition for writ of mandamus that challenges a district court's probable cause determination. See, e.g., *Hardin v. Griffin*, 98 Nev. 302, 304, 646 P.2d 1216, 1217 (1982); *Kussman v. Eighth Judicial Dist. Court*, 96 Nev. 544, 545-46, 612 P.2d 679, 680 (1980). The supreme court has, on occasion, entertained such petitions where they presented purely legal issues. See *Ostman v. Eighth Judicial Dist. Court*, 107 Nev. 563, 565,

816 P.2d 458, 459-60 (1991). However, “[b]ecause writ relief is an extraordinary remedy, consideration of [a] petition is entirely within the discretion of [the appellate] court.” *Solid v. Eighth Judicial Dist. Court*, 133 Nev. 118, 121, 393 P.3d 666, 670 (2017). For the reasons discussed below, Ferm cannot show that the trial-level court manifestly abused its discretion by denying his pretrial petition, and thus, he cannot show that a petition for writ of mandamus would have had a reasonable probability of success.

In his pretrial petition, Ferm contended that the original indictment failed to allege a public offense. The indictment charged Ferm with ten counts of theft—obtaining money by material misrepresentation. An indictment “must be a plain, concise and definite written statement of the essential facts constituting the offense charged.” NRS 173.075(1). A person commits theft if he or she knowingly obtains the personal property of another “by a material misrepresentation with intent to deprive that person of the property.” NRS 205.0832(1)(c).

Ferm claimed none of the counts alleged his representations were false or that he did not intend to perform the services promised. Each count alleged Ferm was doing business as the U.S. Justice Foundation (USJF), USJF had represented that it could help the victim avoid home foreclosure by preparing legal documents for a lawsuit against the victim’s lender and/or by obtaining a loan modification, the victim paid USJF for its services, USJF did not perform as promised, and the victim did not receive a refund. Each count also stated that USJF had made “a material misrepresentation with intent to deprive [the victim] of the property.” We conclude the original indictment alleged the facts and circumstances necessary to constitute the offenses charged. Therefore, Ferm failed to

demonstrate that the trial-level court manifestly abused its discretion by rejecting this claim.

Ferm also contended in his pretrial petition that the evidence presented to the grand jury did not demonstrate he had no intent to perform or that he had misrepresented a material fact and, thus, the State failed to establish probable cause that he had committed the thefts alleged. To establish probable cause to support an indictment, the State need only “present slight or marginal evidence to support a reasonable inference that the defendant committed the crime charged.” *Sheriff v. Burcham*, 124 Nev. 1247, 1250, 198 P.3d 326, 328 (2008); *see also Sheriff v. Hodes*, 96 Nev. 184, 187, 606 P.2d 178, 180 (1980) (recognizing that intent is “seldom susceptible of proof by direct evidence” and that a grand jury may infer the requisite intent from the evidence presented).

Each victim testified before the grand jury in support of the factual allegations contained in the original indictment.² Moreover, the State presented evidence that none of the lawsuits filed by USJF had been successful, USJF did not seek any loan modifications on behalf of its clients, USJF had mismanaged client files and cases, and Ferm was made aware of serious problems concerning USJF’s operation and did not take sufficient action to remedy them.

The grand jury could reasonably infer from the evidence presented that Ferm did not intend to perform the services promised to the victims, and the State presented substantial evidence to support a determination of probable cause on the ten counts of theft. Therefore, Ferm

²The husband of one of the named victims, who retained USJF’s services with the named victim, testified before the grand jury in lieu of the named victim.

failed to demonstrate that the trial-level court manifestly abused its discretion by rejecting this claim. *See Rugamas v. Eighth Judicial Dist. Court*, 129 Nev. 424, 436, 305 P.3d 887, 895 (2013) (holding a district court manifestly abuses its discretion by denying a pretrial habeas petition when there is insufficient evidence to support the probable-cause determination).

Ferm also contended in his pretrial petition that the State failed to present evidence to the grand jury that USJF had issued \$80,000 in refunds and that USJF closed down because Ferm was held in contempt by a federal judge for practicing law without a license. The State is required to present any evidence it is aware of that “will explain away the charge” to the grand jury. NRS 172.145(2); *Mayo v. Eighth Judicial Dist. Court*, 132 Nev. 801, 805-06, 384 P.3d 486, 489 (2016).

The State presented evidence that USJF made approximately \$765,000 in profit and issued approximately \$60,000 in refunds over the course of its operation. The alleged discrepancy in the total amount of refunds issued does not explain away the charges of theft. Likewise, the fact that Ferm closed down USJF because he was held in contempt for practicing law without a license does not explain away the charges of theft. Ferm also failed to demonstrate a reasonable probability that the grand jury would not have found probable cause to support the indictment had this allegedly exculpatory evidence been presented. *See Lay v. State*, 110 Nev. 1189, 1198, 886 P.2d 448, 454 (1994) (holding governmental misconduct does not warrant dismissal of an indictment unless a defendant shows a reasonable probability that the outcome would have been different absent the misconduct). Therefore, we conclude Ferm failed to demonstrate that the trial-level court manifestly abused its discretion by rejecting this claim.

Ferm also contended in his pretrial petition that a witness improperly testified as to his guilt and that the grand jury relied on this inadmissible evidence to reach its probable-cause determination. “[A]n indictment will be sustained if there has been presented to the grand jury the slightest sufficient legal evidence and best in degree even though inadmissible evidence may also have been adduced” *Franklin v. State*, 89 Nev. 382, 387, 513 P.2d 1252, 1256 (1973). As previously discussed, the State presented substantial evidence to support the indictment. Apart from this challenged testimony, Ferm did not contend that the additional evidence presented in support of the indictment did not constitute legal evidence. *See Gathrite v. Eighth Judicial Dist. Court*, 135 Nev. 405, 408, 451 P.3d 891, 894 (2019) (defining “legal evidence” as “evidence that is admissible under the law”). Therefore, the State presented sufficient legal evidence to support the indictment, and Ferm failed to demonstrate that the challenged testimony warranted dismissal of the indictment. Accordingly, Ferm failed to demonstrate that the trial-level court manifestly abused its discretion by rejecting this claim.

Because Ferm failed to demonstrate that the trial-level court manifestly abused its discretion by denying his pretrial petition, Ferm failed to demonstrate that a petition for a writ of mandamus challenging the denial of his pretrial petition would have had a reasonable probability of success. Therefore, Ferm failed to demonstrate counsel’s performance fell below an objective standard of reasonableness or a reasonable probability he would not have pleaded no contest and would have insisted on going to trial but for counsel’s failure to file a petition for a writ of mandamus. Accordingly, we conclude the district court did not err by denying this claim.

Second, Ferm argued counsel was ineffective for failing to argue in his pretrial petition that the State prevented a witness from disclosing the fact that some USJF lawsuits had been successful. The State asked the witness, a former USJF employee, whether he knew if any lawsuits brought by USJF were successful, and the witness stated he did not think so. The State then asked the witness whether he knew of any particular lawsuit that was successful, and the witness stated that “he ran into a lady the other night at Green Valley who said I’m still in my house.” After the State asked the grand jurors to disregard the statement, the witness reaffirmed he did not know of any particular case that was successful.

The State properly asked the grand jury to disregard the witness’s statement as it constituted inadmissible hearsay. *See* NRS 172.135(2) (stating “the grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence”). Moreover, the witness’s statement did not explain away the charges of theft, nor did it suggest that the State failed to investigate or present exculpatory evidence. Therefore, Ferm failed to demonstrate counsel’s performance fell below an objective standard of reasonableness or a reasonable probability he would not have pleaded no contest and would have insisted on going to trial but for counsel’s failure to raise this claim in the pretrial petition. *See* NRS 172.145(2). Accordingly, we conclude the district court did not err by denying this claim.

Third, Ferm argued counsel was ineffective for failing to argue in his pretrial petition that the State failed to disclose a conflict of interest to the grand jury. In particular, Ferm contended that a witness had left USJF to start a similar business and that the witness stood to benefit from Ferm’s prosecution.

The district court found that the grand jury was informed that the witness left USJF on bad terms and that the witness and Ferm were competitors. The district court's determination is supported by substantial evidence. The State asked this witness how his business relationship with Ferm ended, and the witness responded "[r]ather badly." The witness testified that several other employees also left USJF to work with him and that Ferm had falsely accused him of taking client files and soliciting clients from USJF. The witness also testified that his current work focused on obtaining loan modifications rather than pursuing litigation.

Ferm failed to demonstrate by a preponderance of the evidence that the State failed to disclose a conflict of interest to the grand jury. Therefore, Ferm failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability he would not have pleaded no contest and would have insisted on going to trial but for counsel's failure to raise this claim in the pretrial petition. Accordingly, we conclude the district court did not err by denying this claim.

Fourth, Ferm argued counsel was ineffective for failing to argue in his pretrial petition that the State presented bad act evidence to the grand jury. In particular, Ferm contended that a witness improperly testified that Ferm had had "legal problems" with other businesses in the past.

As previously discussed, the grand jury heard sufficient legal evidence to support a true bill on the ten counts of theft. Thus, even assuming the contested evidence constituted bad act evidence, Ferm failed to demonstrate dismissal of the indictment was warranted. *See Franklin*, 89 Nev. at 387, 513 P.2d at 1256; *see also Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) ("Trial counsel need not lodge futile objections

to avoid ineffective assistance of counsel claims.”). Therefore, Ferm failed to demonstrate counsel’s performance fell below an objective standard of reasonableness or a reasonable probability he would not have pleaded no contest and would have insisted on going to trial but for counsel’s failure to raise this claim in the pretrial petition. Accordingly, we conclude the district court did not err by denying this claim.

Fifth, Ferm argued counsel was ineffective for failing to argue in his pretrial petition that the State failed to present the following exculpatory evidence: USJF employed some 22 people and had filed over 300 lawsuits on behalf of its clients, Ferm had invested approximately \$158,000 of his own money into USJF, USJF’s expenditures were approximately \$100,000 a month, and an attorney had drafted the initial complaint used by USJF.

As previously discussed, the grand jury heard substantial evidence to support a true bill on the ten counts of theft, and Ferm failed to demonstrate a reasonable probability that the grand jury would not have found probable cause to support the indictment had the State presented this allegedly exculpatory evidence.³ *See Lay*, 110 Nev. at 1198, 886 P.2d at 454; *see also State v. Eddington*, 83 Nev. 359, 363, 432 P.2d 87, 89 (1967) (recognizing a grand jury may indict someone even if presented with exculpatory evidence). Therefore, Ferm failed to demonstrate counsel’s performance fell below an objective standard of reasonableness or a reasonable probability he would not have pleaded no contest and would have insisted on going to trial but for counsel’s failure to raise this claim in

³We note that the State presented some of the allegedly exculpatory evidence: that USJF had 436 clients during the course of its operation and that it had filed complaints on behalf of 312 clients.

the pretrial petition. Accordingly, we conclude the district court did not err by denying this claim.

Sixth, Ferm argued counsel was ineffective for failing to challenge the State's characterization of a witness's testimony in its return to his pretrial petition. The statement of facts in the State's return has no bearing on the grand jury's probable-cause determination. Moreover, Ferm failed to demonstrate the trial-level court would have granted his pretrial petition and dismissed the indictment had counsel challenged this aspect of the State's return. Therefore, Ferm failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability he would not have pleaded no contest and would have insisted on going to trial but for counsel's failure to challenge the State's return.

Seventh, Ferm argued counsel was ineffective for failing to give two declarations to the State and for failing to secure the declarants' testimonies for the grand jury hearing. The district court found that counsel's failure to provide the declarations to the State and to secure the declarants' testimonies for the grand jury hearing were matters of trial strategy. The district court's determination is supported by substantial evidence. At the evidentiary hearing on the amended petition, counsel testified that he could not remember if he had been given the declarations but that if he had received them, he would not have been inclined to provide them to the State. Counsel further testified that asking the State to call a defense witness before a grand jury would be the "height of foolishness" because defense counsel cannot guide the witness's testimony or lodge objections and it allows the State to receive testimony that it may use against the witness at trial.

Ferm failed to demonstrate extraordinary circumstances to warrant challenging counsel's strategic decision. *See Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (stating counsel's strategic decisions are "virtually unchallengeable absent extraordinary circumstances" (quotation marks omitted)). Therefore, Ferm failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability he would not have pleaded no contest and would have insisted on going to trial but for the alleged errors. Accordingly, we conclude the district court did not err by denying these claims.

Eighth, Ferm argued counsel was ineffective for failing to inform him that the original plea agreement had been invalidated and that he could have rejected the amended plea agreement and proceeded to trial. The district court implicitly found that the original plea agreement had not been invalidated. The district court's determination is supported by substantial evidence. Under the original plea agreement, the Division of Parole and Probation (P&P) was to determine the amount Ferm had to pay each month toward his restitution obligation while his adjudication was stayed. Approximately one and a half years after Ferm entered his plea, the trial-level court determined that this term was not legally valid because P&P did not have jurisdiction to determine a monthly payment amount until after there has been an adjudication and Ferm had been placed on probation.

The trial-level court did not state the original plea agreement was invalid in its entirety and set a status check to allow the parties to correct the invalid term. The parties negotiated an amended plea agreement, the trial-level court asked Ferm at a hearing if he was "asking [the court] to allow [him] to withdraw the plea previously entered to the old

negotiations,” and Ferm responded in the affirmative. The court then withdrew Ferm’s plea and canvassed Ferm on the amended plea agreement.

Ferm failed to demonstrate by a preponderance of the evidence that the original plea agreement had been invalidated. Therefore, Ferm failed to demonstrate counsel’s performance fell below an objective standard of reasonableness or a reasonable probability he would not have pleaded no contest and would have insisted on going to trial but for counsel’s failure to inform him that the original plea agreement had been invalidated. Accordingly, we conclude the district court did not err by denying this claim.

Ninth, Ferm argued counsel was ineffective for misleading him by representing that the amended plea agreement was more beneficial to him than the original plea agreement. In each of the plea agreements and at separate hearings, Ferm indicated that he had read the original and amended plea agreements, he understood their terms, and he believed the agreements were in his best interest. Ferm also indicated that counsel had answered his questions regarding the plea agreements and that he was satisfied with counsel’s services.

In his amended petition, Ferm did not identify any specific provisions of the original or amended plea agreements that he was unaware of or that he did not understand.⁴ Moreover, the district court found that any representation that the amended plea agreement was more beneficial

⁴On appeal, Ferm argues counsel did not advise him that paying the minimum amounts required in the amended plea agreement would be insufficient to pay his restitution obligation in full within the specified time frame. Ferm also suggests counsel told him to provide false answers to the district court’s questions during the plea canvass. These arguments were not raised in Ferm’s petition below; therefore, we decline to consider them on appeal in the first instance. See *McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

to Ferm than the original plea agreement was likely a matter of opinion. The district court's determination is supported by substantial evidence. The record indicates Ferm struggled to make payments under the original plea agreement. The amended plea agreement requires Ferm to pay a certain amount toward his restitution obligation yearly instead of monthly and grants Ferm discretion in arranging the amount and date of payments. Thus, the amended plea agreement can reasonably be construed as more beneficial to Ferm.

Ferm failed to demonstrate by a preponderance of the evidence that his counsel misled him or that the original plea agreement was more beneficial to him. Therefore, Ferm failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability he would not have pleaded no contest and would have insisted on going to trial but for counsel's alleged representation of the amended plea agreement. Accordingly, we conclude the district court did not err by denying this claim.

Tenth, Ferm argued counsel was ineffective for failing to object to the plea canvass as insufficient. A court may not accept a plea of no contest "without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and consequences of the plea." NRS 174.035(2); *see also State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 447-48 (2000) (recognizing that "the requirement that a court personally address a defendant before accepting a plea of guilty is not simply a creature of statute").

Here, the trial-level court personally addressed Ferm and asked him if he had "thoroughly read through" the amended plea agreement and if he "fully [understood] all of its contents"; Ferm answered in the

affirmative. The court also asked Ferm if counsel had been available to assist him, if he believed the amended plea agreement was in his best interest, and if he was entering his plea freely and voluntarily. Ferm answered in the affirmative and indicated that he had no questions for the court regarding the agreement. The trial-level court determined that Ferm understood the nature of the offense charged and the consequences of his plea and that he was freely, voluntarily, and knowingly entering his plea.

Ferm failed to demonstrate that the plea canvass was legally insufficient. Therefore, Ferm failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability he would not have pleaded no contest and would have insisted on going to trial but for counsel's failure to object to the plea canvass. Accordingly, we conclude the district court did not err by denying this claim.

Eleventh, Ferm argued counsel was ineffective for failing to raise additional contract defenses in support of his presentence motion for specific enforcement of the plea agreement. In particular, Ferm argued that counsel should have asserted the contract defenses of impossibility or impracticality and equitable estoppel because (1) the Attorney General's office erroneously informed the media that he had been convicted of felony theft; (2) the media published this false information; and (3) employers refused to hire him based on the mistaken belief that he had been convicted of felony theft. Ferm contended that these issues prevented him from fulfilling his restitution obligation.

The district court determined that the evidence was insufficient to establish that the State's actions prevented Ferm from fulfilling his restitution obligation. The district court's determination is supported by the record. Ferm provided evidence that he believed the State's actions

interfered with his ability to obtain employment. The only evidence supporting this belief appears to be an email indicating a client declined to hire Ferm. However, the email indicates that Ferm's plea of no contest to a felony was itself sufficient to preclude his employment. Thus, Ferm failed to demonstrate by a preponderance of the evidence that the State's actions prevented him from fulfilling his restitution obligation.

Moreover, counsel testified that he did not consider raising additional contract defenses as a "serious viable path[] toward relief" and that he made a strategic decision to pursue having the plea withdrawn because that was "by far the more standout, meritorious viable issue." Ferm failed to demonstrate extraordinary circumstances to warrant challenging counsel's strategic decision. *See Lara*, 120 Nev. at 180, 87 P.3d at 530. Therefore, Ferm failed to demonstrate counsel's performance fell below an objective standard of reasonableness or a reasonable probability the result of the proceedings would have been different but for counsel's failure to raise these contract defenses in support of his motion for specific enforcement. Accordingly, we conclude the district court did not err by denying these claims.

Twelfth, Ferm argued counsel was ineffective for failing to challenge the State's assertion that Ferm was doing business as USJF. Ferm argued that the State had to pierce the corporate veil in order to hold him accountable for USJF's actions and that the State could not demonstrate USJF was Ferm's alter ego. Ferm argued that there was a reasonable probability of a different outcome had counsel raised this claim pretrial because liability would have fallen on USJF as a corporation rather than on Ferm.

Ferm entered a plea of no contest, and Ferm did not claim this alleged deficiency affected the entry of his plea. Therefore, this claim was outside the scope of those permitted in a postconviction petition for a writ of habeas corpus. See NRS 34.810(1)(a) (stating a court must dismiss a habeas petition if “the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without the effective assistance of counsel”); *Gonzales v. State*, 137 Nev. 398, 403, 492 P.3d 556, 562 (2021) (stating NRS 34.810(1)(a) prohibits “independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea that do not allege that the guilty plea was entered involuntarily or unknowingly or without the effective assistance of counsel” (internal quotation marks omitted)). Accordingly, we conclude the district court did not err by denying this claim.

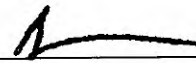
Ferm also argues on appeal that the district court erred by denying his claims challenging the validity of his plea. In his amended petition, Ferm claimed that he entered his plea unknowingly, involuntarily, and unintelligently due to several instances of ineffective assistance of counsel. As previously discussed, the district court did not err by denying Ferm’s ineffective-assistance-of-counsel claims. Therefore, Ferm failed to demonstrate that counsel’s ineffectiveness caused his plea to be entered unknowingly, involuntarily, or unintelligently or that withdrawal of his plea was necessary to correct a manifest injustice. See NRS 176.165 (stating a postsentence motion to withdraw plea may be granted “to correct manifest injustice”); *Rubio v. State*, 124 Nev. 1032, 1039, 194 P.3d 1224, 1228 (2008) (“A guilty plea entered on advice of counsel may be rendered invalid by showing a manifest injustice through ineffective assistance of counsel.”).

Accordingly, we conclude the district court did not err by denying these claims.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Jerry A. Wiese, Chief Judge
Gaffney Law
Attorney General/Carson City
Attorney General/Ely
Eighth District Court Clerk