

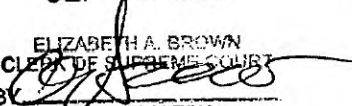
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN HAROLD MCCULLOUGH,
Appellant,
vs.
ISIDRO BACA, WARDEN; AND THE
STATE OF NEVADA,
Respondents.

No. 85414-COA

FILED

SEP 13 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

John Harold McCullough appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on July 19, 2017,¹ and later-filed supplements. Eleventh Judicial District Court, Pershing County; Steven R. Kosach, Senior Judge.

Ineffective assistance of trial-level counsel

McCullough claimed that his trial-level counsel was ineffective. To demonstrate ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, 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 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, 987-88, 923 P.2d 1102, 1107 (1996). Both components of the inquiry must be shown, *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and the petitioner must demonstrate

¹The district court's order erroneously states that McCullough's petition was filed on January 19, 2017. We note the petition was dated July 14, 2017.

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).

McCullough claimed that his counsel was ineffective for failing to seek disqualification of the trial-level judge. McCullough asserted that the judge should have been disqualified because the judge had a conflict of interest as he was the district attorney when McCullough was criminally charged in this matter.

At the arraignment, the trial-level judge informed McCullough that although he had not been involved in McCullough's case, he was the district attorney when McCullough was charged. The trial-level judge therefore informed McCullough that he would recuse himself from this matter and the case would be transferred to a different judge if McCullough wished. McCullough and trial-level counsel discussed that issue in private, and when they returned, McCullough informed the trial-level judge that he did not wish for the judge to recuse himself from this matter and waived any conflict of interest stemming from the judge's prior employment as the district attorney.

At the evidentiary hearing during the postconviction proceedings, counsel testified that he explained the issue to McCullough and that McCullough decided to waive the conflict. McCullough also testified that multiple persons told him that the trial-level judge was fair and that he waived the conflict of interest because he felt that it was the best decision for him at the time.

In light of McCullough's waiver of any conflict of interest on the part of the trial-level judge, McCullough failed to demonstrate his counsel's performance fell below an objective standard of reasonableness.

McCullough also failed to demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial had counsel performed different actions.² Therefore, we conclude that the district court did not err by denying this claim.

District court's order

McCullough argues on appeal that the district court's initial order should not be considered a final order because it did not specifically address several claims raised in his pro se petition and pro se supplements.

The district court's initial order denying McCullough's petition did not contain specific findings of fact or conclusions of law regarding the claims McCullough raised in his pro se petition and his pro se supplements. Therefore, this court entered an order of limited remand directing the district court to resolve the issues McCullough raised in the aforementioned documents. *McCullough v. Baca*, Docket No. 85414-COA (Order of Limited Remand, May 12, 2023).

The district court subsequently conducted a hearing on June 28, 2023, and at that hearing, McCullough informed the district court that he had decided to abandon the claims he raised in his pro se petition and pro se supplements and that he wished for the district court to only consider the issues raised in the supplement filed by postconviction counsel. The district court later entered an order finding that McCullough abandoned the claims raised in his pro se petition and pro se supplements. The district court also concluded that McCullough's remaining claims lacked merit. Because the

²McCullough appeared to claim that he did not need to demonstrate prejudice stemming from any alleged errors committed by his counsel concerning his judicial-conflict-of-interest claim. However, McCullough's argument lacks merit. Prejudice under *Strickland* is presumed in limited circumstances, see *United States v. Cronin*, 466 U.S. 648, 659-60, 661 n.28 (1984), which are not presented in this case.

district court's recent order specifically addresses McCullough's claims and provides sufficient findings of fact to permit this court's review on appeal, we conclude that McCullough is not entitled to relief based on this issue.

Transcript

Finally, McCullough appears to argue that the district court erred by denying his request for a copy of the transcript of the evidentiary hearing that occurred on September 9, 2021. At the June 28, 2023, hearing, the district court agreed to permit McCullough to have a copy of the transcript of the evidentiary hearing. As the district court granted McCullough's request for a copy of the transcript of the evidentiary hearing, we conclude that McCullough is not entitled to relief based on this issue.³ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

³If McCullough has not received a copy of the transcript of the September 9, 2021, evidentiary hearing, he must make a request for a copy of the transcript through a motion properly filed in the district court. See *Peterson v. Warden*, 87 Nev. 134, 135-36, 483 P.2d 204, 204-05 (1971), superseded by statute on other grounds as stated in *Renteria-Novoa v. State*, 133 Nev. 75, 77, 391 P.3d 760, 762 (2017).

cc: Hon. Steven R. Kosach, Senior Judge
John Harold McCullough
Attorney General/Carson City
Pershing County District Attorney
Clerk of the Court/Court Administrator