IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN EDWARD KIRBY, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 85327-COA
JOHN EDWARD KIRBY, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 85328-COA
JOHN EDWARD KIRBY, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 85329-COA

ORDER OF AFFIRMANCE

John Edward Kirby appeals from orders of the district court dismissing in part and denying in part identical postconviction petitions for a writ of habeas corpus filed on December 13, 2019, and identical supplemental petitions filed on October 9, 2020, in district court case numbers CR18-0091 (Docket No. 85327), CR18-0089 (Docket No. 85328), and CR17-2061 (Docket No. 85329). These cases were consolidated on

appeal. *See* NRAP 3(b). Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Whether Kirby's guilty pleas were entered knowingly, voluntarily, and intelligently

Kirby first argues the district court erred by denying his claims challenging the validity of his guilty pleas. "This court will not invalidate a plea as long as the totality of the circumstances, as shown by the record, demonstrates that the plea was knowingly and voluntarily made and that the defendant understood the nature of the offense and the consequences of the plea." *State v. Freese*, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). A guilty plea is presumptively valid, and a petitioner carries the burden of establishing the plea was not entered knowingly and intelligently. *Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

Kirby claimed that his pleas were not entered knowingly, intelligently, or voluntarily because his mental status was compromised shortly before entering his pleas. Kirby claimed he had been prescribed powerful medications for his clinical depression. During his plea canvass, Kirby stated that he had read the plea agreement and was able to recite the plea agreement in his own words, including that he would be granted probation if he completed the Salvation Army program but would face prison time if he did not.

The district court conducted an evidentiary hearing concerning some of Kirby's claims. Kirby testified that he was being medicated for depression but missed his medication on the day he entered his pleas. He believed this affected his understanding of the proceedings. Counsel

testified she was aware that Kirby was on suicide watch prior to entry of his pleas and suffered from depression but that she had no reason to believe he did not understand the plea negotiations or that his pleas were not voluntarily and intelligently entered. The district court found counsel's testimony to be credible and Kirby's testimony to not be credible. This court will not "evaluate the credibility of witnesses because that is the responsibility of the trier of fact." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). In light of these circumstances, Kirby failed to demonstrate that his mental health condition affected his understanding of his pleas.

Kirby also claimed that his pleas were not entered knowingly, intelligently, or voluntarily because information he learned after the entry of his pleas supported his claim of innocence regarding the motor home at issue in case number CR18-0091. At the evidentiary hearing, Kirby testified that he rejected prior plea deals because he did not steal the motor home, but he presented no other evidence regarding his innocence. Counsel testified that Kirby rejected prior plea offers but finally agreed to an offer that included the possibility of probation if Kirby completed a program with the Salvation Army. Counsel explained that the State's "all-or-nothing" plea offer was contingent on Kirby pleading guilty in all three cases, including CR18-0091. In light of these circumstances, Kirby failed to demonstrate that a lack of information related to his claim of innocence affected his understanding or the voluntariness of his pleas. Having considered the totality of the circumstances, we conclude Kirby did not

overcome the presumption that his guilty pleas were valid. Therefore, we conclude the district court did not err by denying this claim.

Whether Kirby received ineffective assistance of counsel

Kirby next argues the district court erred by denying his claims of ineffective assistance of counsel. To demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). To demonstrate prejudice regarding the decision to enter a guilty plea, a petitioner must show a reasonable probability that, 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—deficiency and prejudice—must be shown, *Strickland*, 466 U.S. at 687, 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, Kirby claimed that counsel was ineffective at sentencing for failing to object to the sentencing court's inference that Kirby would receive a harsher sentence if the matter were continued to allow counsel to

obtain mitigating information. The parties agreed during the entry of plea hearing that if Kirby failed to complete the Salvation Army program but turned himself in to Washoe County authorities, the parties would jointly recommend specific sentences that were below the maximum. However, if Kirby left the program without turning himself in to Washoe County authorities the parties were free to argue at sentencing. Kirby later left the program and did not turn himself in to Washoe County authorities.

At the evidentiary hearing, counsel testified that she had expected the sentencing court to "max Mr. Kirby out" and, in an effort to try and prevent that, she tried to obtain the records Kirby sought to present in mitigation but they did not arrive before sentencing. Counsel initially sought a continuance to present those records. However, after the court stated it was inclined to impose the sentence jointly recommended by the parties in the plea agreement, counsel had a discussion with Kirby whereafter Kirby decided to not seek a continuance and was "adamant" to proceed with sentencing.

At the sentencing hearing, Kirby told the court that he was withdrawing his request for a continuance after the court allowed him additional time to consult with his attorney, and the court imposed the jointly recommended sentence. In light of these circumstances, Kirby failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different result at sentencing but for counsel's alleged errors. Therefore, we conclude the district court did not err by denying this claim.

Second, Kirby claimed that counsel was ineffective at sentencing for failing to address the issue of restitution. Kirby contended that counsel should have disputed the valuation of the motor home, which Kirby claimed was a 2004 model year and not a 2005 as testified to by the victim. At the evidentiary hearing, counsel testified that she researched this issue and determined that the difference in value between the two model years was "negligible," "a couple hundred dollars." She explained that she and Kirby discussed the issue and Kirby concluded it was not worth disputing. In light of this testimony, Kirby failed to demonstrate his counsel's performance fell below an objective standard of reasonableness or a reasonable probability of a different result at sentencing but for counsel's alleged errors. Therefore, we conclude the district court did not err by denying this claim.

Third, Kirby claimed that counsel was ineffective at sentencing for proceeding on the previously prepared presentence investigation report. Kirby presents no cogent argument on appeal regarding the district court's alleged error in deciding this claim, and we therefore decline to address it. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

Finally, Kirby argues on appeal that the district court erred by failing to make specific findings of fact and conclusions of law. We conclude the district court's orders addressing Kirby's claims contain findings with sufficient specificity to permit this court to appropriately review the district

court's decision on appeal. Therefore, we conclude Kirby fails to demonstrate he is entitled to relief based upon this claim. Accordingly, we ORDER the judgments of the district court AFFIRMED.[1]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. David A. Hardy, District Judge
Law Offices of Lyn E. Beggs, PLLC
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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[1]Kirby argues on appeal that his pleas were not entered knowingly, voluntarily, and intelligently and that his counsel rendered ineffective assistance because he was not informed that the Salvation Army program did not provide mental health treatment. Kirby raised these claims for the first time at the evidentiary hearing, and they were not properly before the district court. *See Barnhart v. State*, 122 Nev. 301, 303-04, 130 P.3d 650, 651-52 (2006). We therefore decline to consider these arguments on appeal. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).