IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAINE ANTON CRAWLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85884-COA



*ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING*

Daine Anton Crawley appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on June 4, 2020, and later filed supplemental petitions. Eighth Judicial District Court, Clark County; David Barker, Senior Judge.

Crawley argues the district court erred by denying his petition without first conducting an evidentiary hearing. 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).

First, Crawley claimed that his plea was not knowingly, voluntarily, and intelligently entered because counsel failed to provide effective assistance during the guilty plea process. After sentencing, a district court may permit a petitioner to withdraw his guilty plea where necessary "[t]o correct manifest injustice." NRS 176.165; *see Harris v. State*, 130 Nev. 435, 448, 329 P.3d 619, 628 (2014) (stating NRS 176.165 "sets forth the standard for reviewing a post-conviction claim challenging the validity of a guilty plea"). "A guilty plea entered on advice of counsel may be



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rendered invalid by showing a manifest injustice through ineffective assistance of counsel. Manifest injustice may also be demonstrated by a failure to adequately inform a defendant of the consequences of his plea." *Rubio v. State*, 124 Nev. 1032, 1039, 194 P.3d 1224, 1228-29 (2008) (footnote and internal quotation marks omitted). "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).

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 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).

Crawley alleged counsel was ineffective for failing to adequately explain the plea agreement to him and, thus, his plea was not knowingly, voluntarily, and intelligently entered. Specifically, he claimed that counsel did not explain that out-of-state convictions could be used to enhance his

sentence under the habitual criminal statute or that felony convictions in another state that would be misdemeanors in Nevada could be used. Further, he claimed that he believed, based on statements made to him by counsel and the State, that the habitual criminal enhancement would not apply to him as long as he was seeking treatment. He also claimed he would not have pleaded guilty and would have insisted on going to trial had he known this information.

Crawley's claim is not belied by the record. Rather, we note that Crawley's claim is supported by the record. Crawley expressed confusion at hearings that were set for sentencing, wherein he stated he did not understand that the State could seek to enhance his sentence under the habitual criminal statute. Crawley sufficiently alleged that his claim, if true, demonstrated that he did not understand the consequences of his plea. Thus, under the totality of the circumstances, we conclude this claim is not belied by the record and, if true, would entitle Crawley to relief. Therefore, we conclude the district court erred by denying this claim without first conducting an evidentiary hearing.

Second, Crawley claimed that counsel was ineffective for failing to present mitigating evidence at sentencing. Specifically, he claimed that counsel should have presented his mental health issues to the district court and should have provided his mental health records to the district court and to the Division of Parole and Probation for use in creating the presentence investigation report (PSI). Crawley argued this would have reduced the sentencing recommendation in the PSI and would have resulted in a lesser sentence. Crawley and counsel mentioned Crawley's mental health issues to the district court at sentencing. Moreover, Crawley's criminal history includes nine prior felony convictions, and Crawley was arrested and

convicted of committing a new crime while out on release in this case. In light of the foregoing, Crawley failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel presented the medical records. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Crawley claimed that counsel was ineffective at sentencing for failing to object to statements made by the State that Crawley had an almost 20-year felony criminal history and that Crawley's prior convictions were violent. Crawley argued an objection would have resulted in the district court imposing a lesser sentence. Counsel should have objected because Crawley's felony criminal history was only 10 years and most of his prior convictions were nonviolent. However, the district court had that information in the PSI. Further, given Crawley's criminal history and the fact that Crawley was arrested and convicted of committing a new crime while out on release in this case, Crawley failed to demonstrate a reasonable probability of a different outcome at sentencing. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Crawley also appears to argue on appeal that the district court erred by denying his claim that counsel was ineffective when attempting to withdraw his plea prior to sentencing. Crawley's opening brief fails to provide this court with cogent argument or citation to relevant authority to support this claim; therefore, we decline to consider it on appeal.[1] *See*

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[1]Crawley attempts to add argument and citation to authority in his reply brief. Because this argument and these citations were not in the opening brief, we decline to consider them. *See LaChance v. State*, 130 Nev. 263, 277 n.7, 321 P.3d 919, 929 n.7 (2014); *see also Elvik v. State*, 114 Nev.

*Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

Finally, Crawley appears to argue his appellate counsel was ineffective for failing to provide the appellate court with the appropriate transcripts to support the claims raised on appeal. This claim was not raised below, and we decline to consider it for the first time on appeal. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999). Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

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883, 888, 965 P.2d 281, 284 (1998) (explaining that arguments made for the first time in a reply brief prevent the respondent from responding to the appellant's contentions with specificity).

cc: Chief Judge, Eighth Judicial District Court
Hon. David Barker, Senior Judge
Lowe Law LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk