


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LUDIN ALEXANDER AGUILAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86454-COA

FILED
JAN 30 2024

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

ORDER OF AFFIRMANCE

Ludin Alexander Aguilar appeals from a judgment of conviction, entered pursuant to a guilty plea, of attempted battery with substantial bodily harm and battery constituting domestic violence. Eighth Judicial District Court, Clark County; Danielle K. Chio, Judge.

Aguilar contends the district court erred by denying his presentence motion to withdraw his guilty plea. A defendant may move to withdraw a guilty plea before sentencing, NRS 176.165, and “a district court may grant a defendant’s motion to withdraw his guilty plea before sentencing for any reason where permitting withdrawal would be fair and just,” *Stevenson v. State*, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015). In considering the motion, “the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just.” *Id.* at 603, 354 P.3d at 1281. We give deference to the district court’s factual findings if they are supported by the record. *Id.* at 604, 354 P.3d at 1281. The district court’s ruling on a presentence motion to withdraw a guilty plea “is discretionary and will not be reversed unless there has been a clear abuse of that discretion.” *State v.*

Second Judicial Dist. Court (Bernardelli), 85 Nev. 381, 385, 455 P.2d 923, 926 (1969).

In his motion, Aguilar claimed his plea was not made knowingly, intelligently, and voluntarily due to the ineffective assistance of trial-level counsel. Ineffective assistance of counsel could constitute a fair and just reason for withdrawing a guilty plea. See *Sunseri v. State*, 137 Nev. 562, 566, 495 P.3d 127, 132 (2021). 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). We give deference to the district court's factual findings regarding a claim of ineffective assistance of counsel 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, Aguilar claimed counsel was ineffective for failing to inform him that he faced mandatory deportation by pleading guilty to attempted battery with substantial bodily harm and stipulating to felony treatment. A criminal defense attorney has a duty to give correct advice regarding the immigration consequences of a guilty plea when it is clear that deportation is presumptively mandatory. See *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010). Aguilar filed an affidavit in support of his motion

acknowledging that counsel advised him that he “would likely be deported” and should speak to an immigration attorney. In addition, the plea agreement contained a certificate of counsel providing that counsel explained to Aguilar that his conviction will “most likely result” in serious negative immigration consequences, including deportation.

Aguilar failed to argue that counsel’s advice was incorrect or how any distinction between being advised he “likely” or “most likely” faced deportation, rather than that he faced presumptively mandatory deportation, affected his decision to plead guilty. *See State v. Shata*, 868 N.W.2d 93, 113, 115 (Wis. 2015) (collecting cases and determining that counsel satisfied *Padilla* “by correctly advising Shata that his guilty plea carried a ‘strong chance’ of deportation” and that counsel “was *not* required to tell him that his guilty plea would absolutely result in deportation”). Therefore, Aguilar failed to demonstrate counsel’s performance was deficient or a reasonable probability he would not have pleaded guilty and would have insisted on proceeding to trial but for counsel’s alleged error.

Second, Aguilar claimed counsel was ineffective for failing to investigate the victim, who has indicated that Aguilar struck her inadvertently. At the time Aguilar entered his plea, the evidence available to counsel was that the victim gave a statement to police indicating that Aguilar hit her in the face after she asked him to leave her home; Aguilar and an ex-boyfriend of the victim’s who was there then began fighting; and when the victim tried to separate them, Aguilar hit her again and pushed her to the ground. Aguilar failed to allege specific facts demonstrating that counsel’s failure to investigate the victim was objectively unreasonable based on what counsel knew about the circumstances of the offense at the time Aguilar entered his plea.

Rather, in support of his claim, Aguilar points to an affidavit prepared several months after the entry of his guilty plea in which the victim states that Aguilar struck her inadvertently during a confrontation with her ex-boyfriend and that she never told police that Aguilar intentionally punched her twice in the face.¹ However, “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. In light of what counsel knew at the relevant times, Aguilar failed to demonstrate counsel’s performance was deficient or a reasonable probability that Aguilar would not have pleaded guilty and would have insisted on proceeding to trial but for counsel’s alleged error.

Third, Aguilar claimed counsel was ineffective for failing to advise him about the defenses of accident or inadvertence. As stated above, at the time counsel rendered advice, the evidence did not suggest that Aguilar’s actions were accidental or inadvertent. And Aguilar failed to allege specific facts demonstrating that counsel should have known otherwise. Therefore, Aguilar failed to demonstrate counsel’s performance

¹The district court found not only that the affidavit was executed well after the entry of the guilty plea but also that it was contradicted by both her statement to police and the body camera footage. Aguilar did not provide the body camera footage for our review on appeal. Accordingly, we presume the footage supports the district court’s finding. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007); *see also* NRAP 30(b)(3) (requiring an appellant to include in his appendix “any . . . portions of the record essential to determination of issues raised in [the] appeal”); NRAP 30(d) (providing for when exhibits cannot be reproduced in the appendix).


was deficient or a reasonable probability he would not have pleaded guilty and would have insisted on proceeding to trial but for counsel's alleged error. *See id.*

Fourth, Aguilar appeared to argue that counsel was ineffective because Aguilar stipulated to felony treatment for the attempted battery count when there was no evidence to support a conviction for attempted battery with substantial bodily harm where officers observed no redness or swelling on the victim's face. We first note that the charge of attempted battery with substantial bodily harm was the result of a negotiation that reduced Aguilar's potential felony exposure from a category B felony to a category D felony and dismissed a second misdemeanor charge.² Moreover, an attempted crime is "[a]n act done with the intent to commit a crime, and tending *but failing to accomplish it.*" NRS 193.153(1) (emphasis added). Because the plea reflected that Aguilar merely attempted to batter the victim but did not actually accomplish the battery, one would not expect to see any visible injury. Therefore, Aguilar failed to demonstrate counsel's performance was deficient or a reasonable probability he would not have pleaded guilty and would have insisted on proceeding to trial but for counsel's alleged error.

²Aguilar was initially charged with residential burglary, a category B felony that carried a possible penalty of 1 to 10 years in prison, *see* NRS 205.060(2)(d); battery constituting domestic violence, a misdemeanor that carried a possible penalty of up to 6 months imprisonment, *see* NRS 200.485(1)(a)(1); and battery, another misdemeanor that carried a possible penalty of up to 6 months imprisonment, *see* NRS 193.150(1). His guilty plea to attempted battery with substantial bodily harm was, at most, a category D felony that carried a possible penalty of 1 to 4 years in prison, *see* NRS 193.130(2)(d) (providing punishment for a category D felony); NRS 193.153(1)(a)(4) (providing punishment for an attempt to commit a category C felony); NRS 200.481(2)(b) (defining and categorizing battery).

For the foregoing reasons, we conclude the district court did not err by denying Aguilar's claims of ineffective assistance of trial-level counsel and, thus, his claim that the ineffective assistance of counsel provided a fair and just reason to withdraw his plea. Therefore, we conclude that the district court did not abuse its discretion by denying Aguilar's presentence motion to withdraw his guilty plea, and we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Danielle K. Chio, District Judge
Xavier Gonzales
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk