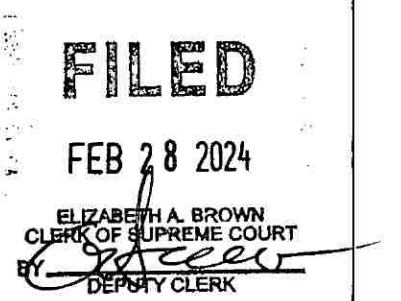
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DANIEL CHRISTOPHER BECKER,
Appellant,
vs.
THE STATE OF NEVADA
DEPARTMENT OF CORRECTIONS,
Respondent.

No. 86125-COA



ORDER OF AFFIRMANCE

Daniel Christopher Becker appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on May 22, 2020, and a supplemental petition filed on October 15, 2020. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Becker 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

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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, Becker claimed counsel was ineffective for failing to file (1) a motion to suppress statements he made to the police and then (2) a motion to suppress the results of a blood test because the search warrant for the blood draw relied on the statements Becker made to the police. Becker killed three individuals and injured another in a car accident. After the accident, Becker was transported to a hospital, where he informed police officers that he smoked marijuana regularly and had smoked marijuana that morning. The police telephonically applied for and received a search warrant for Becker's blood, and subsequent testing revealed a marijuana (delta-9-tetrahydrocannabinol) concentration of 18.6 nanograms per milliliter of blood.[1] Becker contended that counsel should have sought to suppress his statements at the hospital because the police failed to inform him of his *Miranda*[2] rights. Becker also contended that the blood draw violated his Fourth Amendment rights because the search warrant was based on his statements and was not otherwise supported by probable cause.

"When an ineffective assistance of counsel claim is based upon counsel's failure to file . . . a motion to suppress evidence allegedly obtained

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[1]This amount was well above the legal limit. *See* NRS 484C.110(4) (2017).

[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

in violation of the Fourth Amendment, the prejudice prong must be established by a showing that the claim was meritorious and that there was a reasonable likelihood that the exclusion of the evidence would have changed the result of a trial." *Doyle v. State*, 116 Nev. 148, 154, 995 P.2d 465, 469 (2000) (internal quotation marks omitted).

"The proper standard for determining probable cause for the issuance of a warrant is whether, under the totality of the circumstances, there is probable cause to believe that contraband or evidence is located in a particular place." *In re Search Warrants (Little Darlings)*, 139 Nev., Adv. Op. 23, 535 P.3d 673, 677 (Ct. App. 2023) (quotation marks and internal punctuation omitted). In determining whether there is probable cause to support a telephonic search warrant, a reviewing court must consider "the transcribed sworn statement upon which the warrant was issued." *State v. Gameros-Perez*, 119 Nev. 537, 541, 78 P.3d 511, 514 (2003). "The duty of a reviewing court is simply to determine whether there is a substantial basis for concluding that probable cause existed." *In re Search Warrants (Little Darlings)*, 139 Nev., Adv. Op. 23, 535 P.3d at 677 (quotation marks omitted).

After holding an evidentiary hearing, the district court determined that a motion to suppress the blood test results would not have been meritorious. The district court found that there was probable cause sufficient to support the search warrant even if Becker's statements were not considered. Specifically, the district court found that (1) Becker had driven over a median and into multiple vehicles and several pedestrians, (2) Becker had attempted to flee the scene, and (3) Becker had failed two field sobriety tests at the hospital. The district court's findings are supported by substantial evidence.

Officer R. Goslar telephonically applied for a search warrant to test Becker's blood for alcohol and/or drugs. In the application, Officer Goslar testified it was his opinion that Becker was impaired "based on personal experience having worked as a police officer for the past 25 years and having attended training regarding drinking and drug driving investigations." Officer Goslar testified that Becker was driving a vehicle when he hit another vehicle, failed to stop, drove over a center median, and collided into pedestrians at a crosswalk. Officer Goslar also testified that another officer observed Becker attempting to flee the scene. Although Officer Goslar informed the court that the other officer could not articulate any signs of impairment "at that time," Officer Goslar testified that he subsequently contacted Becker at the hospital and that (1) Becker had a lack of convergence in his right eye, (2) the officers did a time test and Becker's 30-second estimation was around 10 to 11 seconds, (3) Becker had a slow reaction to light, and (4) Becker's blood pressure and heart rate were elevated.[3]

Officer Goslar's sworn statement demonstrates a substantial basis for concluding that probable cause existed even without considering Becker's admission. Therefore, Becker failed to demonstrate that a motion to suppress the blood test results would have been meritorious. And because the blood test results would have been admissible, he failed to demonstrate that a motion to suppress his statements would have resulted in a different outcome. Accordingly, Becker failed to demonstrate a reasonable probability he would not have pleaded guilty and would have

[3]Officer Goslar informed the court that he had considered the fact that Becker was laying down in a hospital bed looking up toward light fixtures in determining that Becker was impaired.

insisted on going to trial but for counsel's errors, and we conclude the district court did not err by denying this claim.[4]

Second, Becker claimed counsel was ineffective for failing to obtain an independent expert to retest his blood. Becker contended that retesting was warranted because (1) the person who tested his blood, S. Wilkinson, was not qualified to do so because her curriculum vitae (CV) did not indicate she had the necessary training or experience to adequately analyze his blood; and (2) his blood test results were likely erroneous because he had not smoked marijuana for three days prior to the test.

The district court found that Wilkinson's qualifications did not render the blood test results suspect. The district court's finding is supported by the record. Wilkinson's CV indicates that she had been working for the Las Vegas Metropolitan Police Department (LVMPD) as a Forensic Lab Aide since 2011 and that she obtained a Master of Science degree in Criminalistics from California State University, Los Angeles. The toxicology report also indicates that Wilkinson is a "Forensic Scientist II" with the LVMPD, that she is a chemist as defined in NRS 50.320,[5] and that

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[4]The district court also determined that (1) the police were not required to read Becker his *Miranda* rights because Becker was not "in custody" when he was questioned and (2) Becker had consented to the blood draw. Becker challenges these determinations on appeal. In light of our determination that, even without considering Becker's statements, there was a substantial basis for concluding probable cause existed to support the search warrant, we need not address these arguments.

[5]NRS 50.320(5) defines a "chemist" as

> any person employed in a medical laboratory, pathology laboratory, toxicology laboratory or forensic laboratory whose duties include, without limitation: (a) The analysis of the breath, blood or

she was "first qualified in the Justice Court of Clark County, Nevada, as an expert witness, to testify regarding the presence and amount of controlled substances in a biological fluid" on November 10, 2016.

The district court further found that Becker's claim that he had not smoked marijuana for three days prior to the test was not credible because (1) he informed police officers that he had smoked marijuana the morning of the accident; (2) he changed his story after the blood test results showed a marijuana concentration well over the legal limit; and (3) counsel confirmed at the entry of plea hearing and at sentencing that Becker had smoked marijuana the morning of the accident, and Becker never corrected counsel. The district court's findings are supported by the record, and 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 the foregoing, Becker failed to demonstrate by a preponderance of the evidence that his blood test results were inaccurate or that retesting his blood would have yielded materially different results. Therefore, Becker failed to demonstrate that counsel's performance was deficient or that there was a reasonable probability he would not have pleaded guilty and would have insisted on going to trial but for counsel's errors. Accordingly, we conclude the district court did not err by rejecting this claim.

> urine of a person to determine the presence or quantification of alcohol or a controlled substance, chemical, poison, organic solvent or another prohibited substance; or (b) Determining the identity or quantity of any controlled substance.

Becker also argues on appeal that the district court erred by denying his claim that counsel was ineffective for failing to challenge the restitution award without conducting an evidentiary hearing.[6] 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 the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

In his petition, Becker explicitly did not dispute the amount of restitution awarded. Rather, Becker contended only that his insurance would have paid for the funerals of the three victims if counsel had obtained itemized receipts and that counsel's failure to obtain these receipts rendered him personally liable for the restitution award. Becker did not demonstrate that counsel had a duty to obtain documentation to help him mitigate his personal financial liability. Therefore, Becker failed to allege specific facts that, if true, would demonstrate counsel was deficient in failing to obtain itemized receipts, and we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Finally, Becker argues the district court erred by denying his claims that his plea was invalid. 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

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[6]The district court determined that two of Becker's ineffective-assistance-of-counsel claims did not warrant an evidentiary hearing: this claim and Becker's claim that counsel was ineffective for failing to object to the sentencing recommendation in the presentence investigation report. Becker does not challenge on appeal the district court's denial of the latter claim.

reviewing a postconviction claim challenging the validity of a guilty plea"). "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). Moreover, "[a] guilty plea entered on advice of counsel may be rendered invalid by showing a manifest injustice through ineffective assistance of counsel." *Rubio v. State*, 124 Nev. 1032, 1039, 194 P.3d 1224, 1228-29 (2008).

Becker first claimed his plea is invalid because he never admitted to the factual basis of his plea. Specifically, Becker contended that he did not admit to facts that satisfied the elements of the offenses because he told the court that the deaths were caused by a seizure, not by his marijuana use. Becker pleaded guilty to three counts of driving and/or being in actual physical control of a motor vehicle while under the influence resulting in death (DUI resulting in death) under NRS 484C.430. Contrary to Becker's assertion, a charge of DUI resulting in death does not require that a defendant's alcohol or drug use cause the death of another person. Rather, as relevant to this matter, the State was only required to prove that (1) Becker was under the influence of marijuana or had marijuana in his blood in an amount equal to or greater than 2 ng/mL; (2) Becker performed an act, or neglected a duty imposed by law, while driving a vehicle; and (3) the act or neglect of duty proximately caused the death of another person. *See* NRS 484C.430(1)(d), (1)(f); *see also* NRS 484C.110(4).

At the plea canvass, Becker admitted the following facts: he suffers from seizures, he previously had a seizure that caused an accident, his driver's license was revoked due to that prior accident, he had prior

knowledge of his medical episodes and knew he posed a risk to others when driving, he used marijuana to assist with his seizures, he smoked marijuana the day the accident occurred, and he had a seizure while driving that resulted in an accident that killed three people. The trial-level court had an adequate factual basis from which to accept Becker's plea. Therefore, Becker failed to demonstrate that his plea was invalid because he did not admit to the factual basis of his plea.

Becker also claimed his plea was invalid because counsel was ineffective for visiting him for a total of only three hours, spending only two minutes reviewing the plea agreement with him, not providing him with a copy of the discovery, and never reviewing body camera video with him. The district court found that Becker failed to explain why meeting with counsel more would have changed his decision to plead guilty and that Becker failed to identify any specific discovery he did not have that would have changed his decision to plead guilty. The district court's findings are supported by the record.[7] Moreover, Becker did not explain why reviewing the body camera video with counsel would have changed his decision to plead guilty, nor did he contend that he did not understand any specific provision of the plea agreement.

Becker also confirmed at the plea canvass that (1) counsel went over all the discovery with him and answered all of his questions regarding the discovery, (2) counsel went over the plea agreement with him and answered all of his questions regarding the plea agreement, and (3) he was

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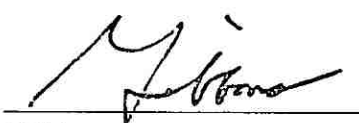
[7]To the extent Becker contended that additional time and/or discovery would have enabled him to challenge his blood test results, as discussed above, Becker failed to demonstrate that a motion to suppress the blood test results would have been meritorious or that his blood test results were inaccurate.

satisfied with counsel's services. Although Becker testified at the evidentiary hearing that counsel told him "to keep [his] mouth shut and just agree and go along with the proceedings," counsel was not questioned on this purported statement, and no additional evidence was presented to support this claim. Therefore, Becker failed to demonstrate that he would not have pleaded guilty and would have insisted on going to trial but for counsel's errors. *See Rubio*, 124 Nev. at 1038, 194 P.3d at 1228 (stating "a defendant may generally not repudiate [their] assertions, made in open court, that the plea is voluntary"). Accordingly, Becker failed to demonstrate that withdrawal of his plea was necessary to correct a manifest injustice, and 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: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. 17
Pitaro & Fumo, Chtd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk