

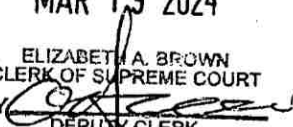
IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK ANTHONY KENNEDY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85956

FILED

MAR 19 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

Appellant Mark Anthony Kennedy argues that the district court erred in denying claims that 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 that 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 that the 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).

Kennedy argues that counsel should have asked the sentencing court to apply the amended sentencing provisions in A.B. 236, which reduced the sentencing range for the trafficking offense, NRS 453.3385, to which Kennedy pleaded guilty.

Kennedy did not demonstrate deficient performance or prejudice. On April 13, 2020, Kennedy pleaded guilty to crimes occurring on or about January 2, 2020. The provisions of A.B. 236 did not go into effect until July 1, 2020. 2019 Nev. Stat., ch. 633, §§ 119, 137, at 4474, 4488. The penalty in effect at the time of the commission of the crime applies absent a clear legislative intent that statutory amendments apply retroactively. *State v. Second Judicial Dist. Court (Pullin)*, 124 Nev. 564, 565, 188 P.3d 1079, 1079 (2008). Kennedy points to an exchange between legislators discussing whether the amended statute should be applied retroactively, *see* Hearing on A.B. 236 Before the Assembly Judiciary Comm., 80th Leg., at 20 (Nev., Mar. 8, 2019), but A.B. 236 contains no retroactivity provisions. *See generally* 2019 Nev. Stat., ch. 633. Thus, even if counsel had argued that the new provisions applied or had delayed the sentencing until after the effective date of A.B. 236, the new provisions could not have been applied to Kennedy's sentence. Therefore, Kennedy has not shown that counsel neglected a meritorious argument or that the argument would have been successful at sentencing.

Next, Kennedy contends that counsel misrepresented material consequences of the plea agreement. Specifically, Kennedy contends that counsel represented that the guilty plea removed the life sentence from consideration and that good time credits would apply to the sentence imposed. Kennedy failed to demonstrate deficient performance or prejudice for the reasons discussed below.

First, Kennedy was not misled about the risk of receiving a life sentence under the plea agreement. The plea agreement, which Kennedy read and signed, indicated that the State agreed to recommend a sentence of 25 years with the possibility of parole after 10 years. But the agreement also clearly stated that the district court was not bound by this recommendation and could impose a sentence of life with the possibility of parole after ten years. At the change-of-plea hearing, Kennedy acknowledged that the district court could impose a sentence of life with the possibility of parole after ten years and affirmed that, other than as stated in the plea agreement, no one had promised a particular sentence. Trial counsel also testified that he would never tell any defendant that a joint recommendation could prevent a court from imposing a more severe sentence.

Second, Kennedy failed to demonstrate that counsel performed deficiently in advising him about how good time credits would apply to his potential sentence and that, but for counsel's misadvice about the applicability of good time credits, he would not have pleaded guilty and would have insisted upon going to trial. The applicability of good time credits to a defendant's sentence constitutes a collateral consequence to a guilty plea. *Johnson v. Puckett*, 930 F.2d 445, 448 n.2 (5th Cir. 1991); *People v. Barella*, 975 P.2d 37, 41 (Cal. 1999). And generally, counsel's failure to inform the defendant about collateral consequences of a guilty plea does not constitute ineffective assistance of counsel sufficient to invalidate that plea. *Rubio v. State*, 124 Nev. 1032, 1040, 194 P.3d 1224, 1230 (2008); see *Palmer v. State*, 118 Nev. 823, 826, 59 P.3d 1192, 1194 (2002) ("A defendant's awareness of a collateral consequence is not a prerequisite to a valid plea and, consequently, may not be the basis for vitiating it."). The district court

also found that Kennedy's testimony as to this claim was not credible. That conclusion is supported by the record and therefore entitled to deference. *See Lader*, 121 Nev. at 686, 120 P.3d at 1166.

Having considered Kennedy's contentions and concluding that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Stiglich, J.
Stiglich

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

cc: Hon. Leon Aberasturi, District Judge
Doyle Law Office, PLLC
Attorney General/Carson City
Lyon County District Attorney
Third District Court Clerk