

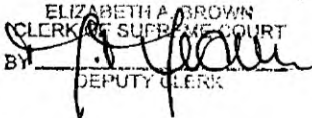
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

OSCAR GOMEZ, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86247-COA

FILED

JAN 08 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Oscar Gomez, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on May 14, 2020, and supplemental pleadings. Eighth Judicial District Court, Clark County; Carli Lynn Kierny.

Gomez argues the district court erred by denying his claims of ineffective assistance of counsel. 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).

First, Gomez claimed counsel was ineffective for failing to adequately explain that his sentences would run consecutively instead of concurrently. Gomez was sentenced to a prison term of 10 years to life for second-degree murder and to a consecutive prison term of 8 to 20 years for the use of a deadly weapon. The district court held an evidentiary hearing as to this claim, at which counsel testified that (1) she explained to Gomez multiple times that the deadly weapon enhancement was consecutive to the murder charge; (2) she wrote down the potential sentences for Gomez and quizzed Gomez on the mandatory and consecutive nature of the deadly weapon enhancement; and (3) she had gone over the sentencing ranges with Gomez more than usual because Gomez had never been to prison. Counsel also testified that Gomez “absolutely understood” that the deadly weapon enhancement would run consecutively to the underlying sentence.

The district court found counsel’s testimony credible, 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). Moreover, the record indicates the trial-level court explained to Gomez that the sentence for the deadly weapon enhancement would run consecutively to the underlying sentence during the plea canvass. Therefore, Gomez failed to demonstrate counsel’s performance was deficient or a reasonable probability he would not have pleaded guilty and would have insisted on going to trial but for counsel’s alleged error. Accordingly, we conclude the district court did not err by denying this claim.

Second, Gomez claimed counsel was ineffective for failing to investigate an “alternate suspect” who was present at the time of the

shooting. Gomez contended that this individual can be seen on surveillance video from the mini mart where the shooting took place. At the evidentiary hearing, counsel testified that Gomez admitted he “snapped” after the victim said “something about his mother” and that the victim’s statement triggered him because his mother had been suicidal. And at the preliminary hearing, the victim’s coworker—who was at the mini mart with the victim—testified that he stood two feet away from Gomez for approximately five minutes prior to the shooting, he saw Gomez pull a gun out of his pants, and he saw Gomez shoot the victim. The victim’s coworker also identified Gomez in the aforementioned surveillance video.

In light of the foregoing, Gomez failed to allege specific facts indicating counsel’s performance was deficient or a reasonable probability he would not have pleaded guilty and would have insisted on going to trial had counsel investigated the individual shown in the surveillance video. *See Strickland*, 466 U.S. at 691 (stating defense counsel’s failure to pursue certain investigations is not unreasonable if “a defendant has given counsel reason to believe that pursuing [those] investigations would be fruitless”). Accordingly, we conclude the district court did not err by denying this claim.

Third, Gomez claimed counsel was ineffective for failing to investigate an eyewitness who had provided a voluntary statement to the police indicating the shooter was wearing a T-shirt. Gomez contended this witness was critical to his case because surveillance video showed Gomez wearing a tank top. Gomez did not specify who this witness was or what additional information counsel would have gained by investigating this witness. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (stating a petitioner alleging that an attorney should have conducted a better investigation must demonstrate what the results of a better

investigation would have been and how it would have affected the outcome of the proceedings). Moreover, given Gomez's admission to counsel, Gomez's knowledge of the witness information prior to entering his guilty plea, and the evidence presented at the preliminary hearing, Gomez failed to allege specific facts indicating counsel's performance was deficient or a reasonable probability he would not have pleaded guilty and would have insisted on going to trial had counsel investigated this eyewitness. Accordingly, we conclude the district court did not err by denying this claim.

Fourth, Gomez claimed counsel was ineffective for failing to challenge a photographic lineup as impermissibly suggestive. Gomez contended that the lineup was prejudicial because the photographs "were not remotely close in resembling [him]." Gomez did not specify how the photographs contained in the lineup were impermissibly suggestive.¹ Moreover, the evidence presented at the preliminary hearing identifying Gomez as the shooter indicates Gomez's identification in the photographic lineup was reliable. Therefore, Gomez failed to allege specific facts indicating counsel's performance was deficient or a reasonable probability he would not have pleaded guilty and would have insisted on going to trial but for counsel's failure to challenge the photographic lineup. See *Thompson v. State*, 125 Nev. 807, 813, 221 P.3d 708, 713 (2009) ("In reviewing the propriety of a pretrial identification, this court considers (1) whether the procedure is unnecessarily suggestive, and (2) if so, whether, under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure." (internal quotation

¹Gomez also did not include a copy of the lineup in the record on appeal.

marks omitted)). Accordingly, we conclude the district court did not err by denying this claim.

Fifth, Gomez claimed counsel was ineffective for failing to file a motion to suppress shell casings found at Gomez's residence. Gomez contended that no shell casings were found at the crime scene and, thus, the shell casings found at his residence were not related to the crime. Even assuming such a motion would have been meritorious, *see Kirksey*, 112 Nev. at 990, 923 P.2d at 1109, Gomez did not explain how this failure influenced his decision to plead guilty, especially in light of the evidence of Gomez's guilt presented at the preliminary hearing. Therefore, Gomez failed to allege specific facts indicating he would not have pleaded guilty and would have insisted on going to trial but for counsel's failure to file a motion to suppress.

Sixth, Gomez claimed counsel was ineffective for failing to file a pretrial motion to withdraw his guilty plea. Gomez contended that the motion would have been based on counsel's failure to explain the consecutive nature of his sentences. As previously discussed, Gomez failed to demonstrate that counsel did not adequately explain the consecutive nature of his sentences. Therefore, Gomez did not allege a fair and just reason for withdrawing his plea, *see Stevenson v. State*, 131 Nev. 598, 603, 354 P.3d 1277, 1281 (2015), and he failed to allege specific facts indicating counsel's performance was deficient or a reasonable probability that his motion would have been granted, *cf. Kirksey*, 112 Nev. at 990, 923 P.2d at 1109. Accordingly, we conclude the district court did not err by denying this claim.

Gomez also argues the district court erred by denying his claims that the deadly weapon enhancement violated his constitutional rights.

These claims did not allege that Gomez's plea was involuntarily or unknowingly entered or that it was entered without the effective assistance of counsel. Therefore, these claims were outside the scope of claims permissible in a postconviction habeas petition stemming from a guilty plea. See NRS 34.810(1)(a). Accordingly, 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: Hon. Carli Lynn Kierny, District Judge
Law Office of Jim Hoffman
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk