

DA 17-0043

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 170N

JUSTIN WESLEY DELACRUZ,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DC 14-0563
Honorable Mary Jane Knisely, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Justin Wesley Delacruz, self-represented, Shelby, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, C. Mark Fowler, Assistant
Attorney General, Helena, Montana

Scott D. Twito, Yellowstone County Attorney, Ed Zink, Deputy County
Attorney, Billings, Montana

Submitted on Briefs: May 9, 2018

Decided: July 10, 2018

Filed:



Clerk

Justice Dirk Sandefur delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Justin Delacruz appeals the dismissal of his petition for postconviction relief by the Thirteenth Judicial District Court, Yellowstone County. We affirm.

¶3 On July 6, 2014, at about 8:15 a.m., Delacruz fired a handgun at a young employee of the Sonic Restaurant in downtown Billings, in the presence of numerous witnesses. The Billings Police responded quickly and a gunfight ensued, leaving one person injured and many others terrorized. Arrested at the scene, Delacruz was subsequently charged with five felony counts: robbery (§ 45-5-401(1)(b), MCA), criminal endangerment (§ 45-5-207, MCA), possession of dangerous drugs (§ 45-9-102, MCA), and two counts of attempted deliberate homicide (§§ 45-4-103 and 45-5-102(1)(a), MCA), with additional sentence for use of a dangerous weapon (§ 46-18-211, MCA).

¶4 On October 22, 2014, Delacruz changed his plea to guilty on all counts pursuant to a plea agreement, which contained a joint recommendation for a 55-year sentence to the Montana State Prison. The terms of the agreement allowed Delacruz to withdraw his guilty plea if the District Court did not follow the agreement's sentencing recommendation. Prior to accepting the change of plea, the District Court engaged Delacruz in a colloquy to

ascertain that he was satisfied with his attorney's representation and that he was entering his guilty pleas voluntarily, knowingly, and intelligently. The District Court sentenced Delacruz in accordance with the joint recommendation, and Delacruz did not appeal his conviction.

¶5 On April 15, 2016, Delacruz timely filed a petition for postconviction relief (PCR) and memorandum in support, which claimed that he had involuntarily entered guilty pleas due to defense counsel's coercion and failure to effectively bargain for a better deal from the prosecution. The District Court denied Delacruz's motion to withdraw his guilty plea on May 26, 2016, holding that Delacruz completely failed to support his argument with any objective evidence of coercion, misrepresentation, bribe, or other misconduct on the part of trial counsel. However, the court ordered the State to respond to Delacruz's other allegations of ineffective assistance and, on June 9, 2016, issued a *Gillham*¹ order directing defense counsel to address Delacruz's various assertions of error.

¶6 Upon consideration of Delacruz's petition, defense counsel's affidavit, and the State's response, the District Court ultimately dismissed the petition without a hearing on the grounds that Delacruz's conclusory assertions of deficit performance by defense counsel failed to provide sufficient evidentiary support to sustain a postconviction claim.

¶7 This Court reviews a district court's denial of a postconviction petition to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of

¹ See *Petition of Henry J. Gillham*, 216 Mont. 279, 281-82, 704 P.2d 1019, 1020 (1985).

law are correct. *Hamilton v. State*, 2010 MT 25, ¶ 7, 355 Mont. 133, 226 P.3d 588. We review a district court’s decision regarding whether to hold an evidentiary hearing in a postconviction proceeding for an abuse of discretion. *Herman v. State*, 2006 MT 7, ¶ 13, 330 Mont. 267, 127 P.3d 422. This Court reviews de novo mixed questions of law and fact presented by claims of ineffective assistance of counsel. *Heath v. State*, 2009 MT 7, ¶ 13, 348 Mont. 361, 202 P.3d 118.

¶8 In assessing claims of ineffective assistance of counsel, this Court applies the two-prong test from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). The petitioner must show that counsel’s performance was deficient and that the deficient performance prejudiced the defendant by depriving him of a fair trial. *Hamilton*, ¶ 12. Under the first prong, the question is “whether counsel’s conduct fell below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances.” *Whitlow v. State*, 2008 MT 140, ¶ 20, 343 Mont. 90, 183 P.3d 861. The petitioner bears “a heavy burden” to overcome the presumption that counsel’s conduct falls within the wide range of sound trial strategy based on objectively reasonable professional norms. *Whitlow*, ¶ 21; *see also Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Under the second prong, the petitioner must show that a reasonable probability exists that the trial result would have been different but for counsel’s error. *Hamilton*, ¶ 12.

¶9 A petition for postconviction relief must “identify all facts supporting the [asserted] grounds for relief . . . and have attached affidavits, records, or other evidence establishing

the existence of those facts.” Section 46-21-104(1)(c), MCA. The petition must show, by a preponderance of the evidence, that the facts justify the relief. *Hamilton*, ¶ 10 (citing *Heath*, ¶ 16). The petition must “be accompanied by a supporting memorandum including appropriate arguments and citations and discussions of authorities.” Section 46-21-104(2), MCA. “Mere conclusory allegations are insufficient to support the petition.” *Hamilton*, ¶ 10 (quoting *Beach v. State*, 2009 MT 398, ¶ 16, 353 Mont. 411, 220 P.3d 667). The district court may deny a petition on the pleadings for failure to state a claim when the petition and supporting memorandum and evidentiary showing fail to present a prima facie postconviction claim. Section 46-21-201(1)(a), MCA; *Herman*, ¶ 15.

¶10 Delacruz first argues that defense counsel failed to object to the District Court’s oral pronouncement of sentence, which sentenced him to prison for ten years more than the written order.² Second, Delacruz asserts that defense counsel abandoned him after sentencing and failed to assist him on appeal. It is well established that this Court will not address issues raised for the first time on appeal and will not fault a district court on issues the court was never given an opportunity to consider. *State v. Wetzel*, 2005 MT 154, ¶ 13, 327 Mont. 413, 114 P.3d 269. Delacruz raises these two claims for the first time on appeal

² Delacruz failed to submit a transcript of the sentencing hearing for this PCR appeal, which precludes this Court from ascertaining his unusual claim of error. In any event, the District Court’s written sentence conforms to the joint recommendation of the plea agreement and Delacruz experienced no prejudice as a result of the sentencing court’s alleged misstatement.

of the District Court's denial of his postconviction petition. Delacruz offers no evidence in support of either claim and, therefore, we decline further review of these issues.

¶11 Delacruz next argues that defense counsel provided ineffective assistance by failing to negotiate a more favorable plea deal. As the District Court noted, Delacruz faced a maximum sentence of 275 years at the Montana State Prison if convicted on all five felony counts, with the sentence enhancement due to use of a weapon in the commission of the crimes. During Delacruz's pretrial incarceration, defense counsel arranged for the defendant to view the comprehensive video footage from several security cameras at the Sonic Restaurant, the police officer's dashboard video, and other photographic evidence. Counsel noted that "[t]here was no legal theory that would allow us to suppress this video evidence." Defense counsel explained by affidavit that, if convicted at trial, Delacruz likely would be sentenced to at least 110 years in prison because the video clearly showed Delacruz shooting multiple rounds from a handgun at a teenaged restaurant employee and a Billings police officer.

¶12 Delacruz authorized counsel to engage in plea negotiations with the Yellowstone County prosecutors and the State initially offered a total sentence of 80 years. Further negotiations between defense counsel and the State resulted in a joint recommendation of 55 years. Delacruz now argues that counsel should have argued during plea negotiations for the lesser included offenses of attempted negligent homicide or assault with a weapon. By affidavit, counsel explained that Delacruz likely "would not have been sentenced to less than 55 years" even had charges been reduced. In addition, counsel noted that the

pre-sentence investigative report set forth Delacruz's criminal history, which included eight prior felony convictions in California, which were described as "drug and weapons offenses dating back 20 years." Counsel further stated that, given Delacruz's prior convictions, a lesser sentence would have been highly unlikely.

¶13 Delacruz failed to substantiate his claim that defense counsel's performance was deficient with any evidence of error or omission. Indeed, the evidence before this Court shows that counsel performed competently and reasonably in assisting Delacruz through the plea-bargaining process, and nothing indicates deficient representation or a realistic possibility that counsel could have achieved a more favorable outcome for Delacruz. Therefore, we conclude the District Court was correct to dismiss Delacruz's postconviction claims without a hearing.

¶14 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. We affirm.

/S/ DIRK M. SANDEFUR

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ JIM RICE