

IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAN DANIEL BERGER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55212

FILED

MAY 12 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

On appeal from the denial of his May 11, 2006, petition, appellant claims that the district court erred in denying his claim of ineffective assistance of trial counsel. Specifically, appellant argues that counsel was ineffective in advising him to enter a guilty plea despite both the initial and pleaded-to charges having been unequivocally barred by the statute of limitations. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) resulting prejudice such that there is 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, 987-88, 923 P.2d 1102, 1107 (1996). Both components of the inquiry must be shown. Strickland v. Washington, 466 U.S. 668, 697 (1984). This court will defer to the district court's factual findings if

supported by substantial evidence and not clearly erroneous, but it reviews the district court's application of the law to those facts de novo. See Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Counsel's advice fell below an objective standard of reasonableness. Objectively reasonable counsel would have fully informed himself of the law surrounding the statute of limitations and would have provided appellant with "a candid estimate of the probable outcome." ABA Standards of Criminal Justice: Prosecution and Defense Function, 4-5.1(a) (3d. ed. 1993), cited with approval in Padilla v. Kentucky, 559 U.S. ___, ___, 130 S. Ct. 1473, 1482 (2010). Although the record reflects that counsel did inform appellant that he had a statute-of-limitations defense, when appellant asked what would happen if he fought the charges, counsel replied, "You'll probably spend the rest of your life in prison." However, because the victim was 22 years old when the complaint and information were filed, the statute of limitations had run, resulting in counsel's advice of the probable outcome having been incorrect. See NRS 171.095(1)(b)(1); Bailey v. State, 120 Nev. 406, 409, 91 P.3d 596, 598 (2004) (holding that where NRS 171.095(1)(b) governs, NRS 171.085 is inapplicable). Accordingly, we conclude that the district court erred in holding that appellant failed to demonstrate deficiency.

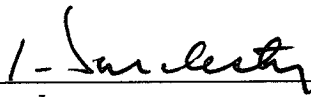
We are unable to affirm the district court's no-prejudice conclusion at this time. The district court applied the wrong standard of proof, requiring appellant to prove the facts underlying his claim by clear and convincing evidence. However, appellant only has the burden of establishing the facts underlying his claims by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Accordingly, we remand this case to the district court to reconsider, using

the correct standard, whether appellant was prejudiced by counsel's deficient advice regarding the statute-of-limitations defense.¹

For the foregoing reasons, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Douglas



_____, J.
Hardesty

cc: Hon. Jerome Polaha, District Judge
Mary Lou Wilson
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

¹We express no opinion as to whether another evidentiary hearing would be required.

PICKERING, J., dissenting:

To prevail under the prejudice requirement of Strickland v. Washington, 466 U.S. 668, 694 (1984), Berger was required to demonstrate “a reasonably probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Hill v. Lockhart, 474 U.S. 52, 59 (1985). The district court found, based on the evidence adduced in support of Berger’s petition, that Berger was so risk averse that he would have pleaded guilty to the lesser charge to avoid the greater charge, without regard to the statute of limitations defense—which Berger was told was available. On this record, I would affirm the judgment of the district court and therefore respectfully dissent.


_____, J.
Pickering