

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCIS L. MATTINGLY, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55510

FILED

NOV 05 2010

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; David Wall, Judge.

Appellant Francis Mattingly, III, contends that the district court erred by determining that his claims of ineffective assistance of counsel relating to the juvenile certification proceedings were procedurally barred. The district court found that the claims were untimely submitted and Mattingly failed to allege good cause and prejudice sufficient to overcome the procedural bar. See NRS 34.726(1); Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003). We review the district court's determination regarding good cause for an abuse of discretion. Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

Mattingly filed his petition approximately three years after entry of the judgment of conviction, see Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004) (explaining when the entry of an amended judgment of conviction may provide good cause for the filing of an untimely petition), and he did not plead or demonstrate in the district court that an impediment external to the defense prevented him from

complying with procedural default rules, see NRS 34.726(1), or make a colorable showing of actual innocence, see Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

Mattingly contends for the first time on appeal that trial counsel's "complete ineffectiveness" excuses the procedural default. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Because Mattingly did not raise this claim in the district court we need not consider it here. See State v. Powell, 122 Nev. 751, 756, 138 P.3d 453, 456 (2006). Moreover, this claim is itself untimely made and Mattingly has failed to demonstrate good cause to overcome the procedural bar. See Sullivan, 120 Nev. at 541, 96 P.3d at 764. Accordingly, Mattingly has not demonstrated that the district court abused its discretion by determining that the claims alleging ineffective assistance during the juvenile certification proceedings were time barred.¹

Mattingly next contends that the district court abused its discretion by denying his claims that probation revocation counsel was ineffective² for (1) not explaining to the court that Mattingly was using his

¹Because the district court correctly determined that these claims were procedurally barred, we need not consider their merits.

²We note that this court has recognized that an ineffective-assistance-of-counsel claim will lie only where the defendant has a constitutional or statutory right to the appointment of counsel. McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996). In the context of probation revocation proceedings, counsel is constitutionally required if the probationer requests counsel and makes a colorable claim that (1) he did not commit the alleged violations, or (2) that there are justifying or

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fantasies as a coping mechanism so that he would not act out on them, (2) failing to resolve the discrepancy as to whether Mattingly was a moderate to high or a high risk to reoffend, and (3) failing to file a direct appeal as requested. When reviewing the district court's resolution of an ineffective-assistance claim, we give deference to the 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). Here, the district court found that probation revocation counsel was not ineffective, Mattingly did not suffer any prejudice due to the representation of counsel and Mattingly was not deprived of his right to appeal. See Strickland v. Washington, 466 U.S. 668, 687 (1984); Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992) (strategic choices of counsel are virtually unchallengeable); Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994). The district court's findings are supported by substantial evidence

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mitigating circumstances which make revocation inappropriate and these circumstances are difficult or complex to present. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973); Fairchild v. Warden, 89 Nev. 524, 525, 516 P.2d 106, 107 (1973) (adopting the approach set forth in Gagnon). It appears that the district court conceded that Mattingly was entitled to the effective assistance of counsel because the district court reviewed his claims without any reference as to whether he was entitled to the effective assistance of counsel. We also note that Mattingly's petition was timely filed within one year of entry of the amended judgment of conviction and order revoking probation. See NRS 34.726(1); NRS 178.472. Therefore, Mattingly's ineffective-assistance-of-counsel claims are reviewed on the merits.

and are not clearly erroneous and Mattingly has not demonstrated that the district court erred as a matter of law.

Finally, Mattingly contends that the district court abused its discretion by revoking his probation. This claim should have been raised in an appeal from the order revoking probation and is therefore outside the scope of a post-conviction petition for a writ of habeas corpus. See NRS 34.810(1)(a). Therefore, the district court did not err in denying this claim. See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (this court will affirm the decision of the district court if it reached the correct result for an incorrect reason). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

1. Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. David Wall, District Judge
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk
Kristina Wildeveld