

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SABRINA ANNE MCCOLGAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70044

FILED

AUG 17 2016

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Appellant Sabrina McColgan argues the district court erred by denying her claims of ineffective assistance of counsel. Specifically, she claims counsel was ineffective for failing to investigate the value of the prescriptions, coercing her into pleading guilty, being unprepared for sentencing, failing to present mitigation evidence regarding McColgan's mental health history, failing to present an expert on mental health or substance abuse, failing to review and correct errors in the presentence investigation report, failing to argue the prior convictions from California were all based on one case, and failing to advise her regarding filing a direct appeal from her judgment of conviction. McColgan also claims the district court should have construed her claim that the district court was biased against her at sentencing as a motion to recuse, her sentence was excessive, and the district court erred by enhancing her sentence because three of her prior California convictions were all based on one case.

McColgan filed her petition on April 18, 2014, more than one year after entry of the judgment of conviction on March 12, 2013.¹ Thus, McColgan's petition was untimely filed. See NRS 34.726(1). McColgan's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. See *id.*

The district court failed to make any findings regarding the application of the procedural bar and did not make a determination as to whether good cause existed in this case. Instead, the district court reached the merits of the petition. Application of the procedural bars is mandatory, *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005), and the district court erred by failing to apply the procedural bar. Nevertheless, we conclude the district court reached the right result, albeit for the wrong reason. See *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (this court will affirm the judgment of a district court if it reached the correct result for the wrong reason).

McColgan alleged below she had good cause to overcome the procedural bars because she received erroneous advice from a prison law librarian regarding filing a motion for an extension of time to file a postconviction petition. McColgan did not raise this good cause claim on appeal. Even were this court to consider the claim, McColgan fails to demonstrate an impediment external to the defense prevented her from filing a timely petition. See *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); *Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding lack of legal knowledge and relying on inmate law clerks do not constitute an impediment external to the

¹No direct appeal was taken.

defense). Further, McColgan failed to support this claim with sufficient facts that, if true, would entitle her to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). McColgan failed to allege when she received this erroneous advice and we note she filed her motion for extension of time five days after the deadline for filing a timely postconviction petition. Accordingly, McColgan fails to demonstrate good cause to overcome the procedural bar.

Even assuming McColgan demonstrated good cause to overcome the procedural bar, she fails to demonstrate the district court erred by denying her petition. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability, 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, 988, 923 P.2d 1102, 1107 (1996). To demonstrate prejudice sufficient to invalidate a sentencing hearing, a petitioner must demonstrate a reasonable probability of a different outcome at sentencing. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. 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).

First, McColgan claims counsel was ineffective for failing to investigate the value of the prescription drugs in the tote. McColgan fails to demonstrate counsel was deficient or resulting prejudice. Counsel testified at the evidentiary hearing she had her investigator look into the valuation provided by the State. Her investigator was unable to find any information to dispute the valuation provided by the State. McColgan failed to demonstrate a reasonable probability she would not have pleaded guilty and would have insisted on going to trial had counsel done further investigation. McColgan fails to demonstrate the valuation provided by the State was incorrect. The burden is on the petitioner to demonstrate what further investigation would have revealed. *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Therefore, the district court did not err in denying this claim.

Second, McColgan claims counsel was ineffective for coercing her into pleading guilty by telling to her "take or leave" the deal and if she did not take the deal she could be sentenced to life in prison. McColgan fails to demonstrate counsel was deficient because she failed to demonstrate counsel coerced her into pleading guilty. At the evidentiary hearing, counsel testified she spent a substantial amount of time explaining the guilty plea agreement and McColgan was relieved the negotiations prevented her from exposure to sentencing under the large habitual criminal statute. The district court found counsel to be credible. Further, candid advice about the potential sentence is not evidence of deficient performance. Therefore, the district court did not err in denying this claim.

Third, McColgan claims counsel was ineffective because her absence from work prior to the sentencing hearing caused her to be

unprepared to effectively represent McColgan at sentencing. McColgan also claims counsel should have done more to present her mental health history to the district court.² McColgan fails to demonstrate counsel was deficient or resulting prejudice. Counsel prepared a lengthy sentencing memorandum prior to sentencing and argued extensively at sentencing regarding McColgan's criminal history, mental health history, and family and community support. McColgan fails to demonstrate a reasonable probability of a different outcome at sentencing had counsel not been on absent from work prior to the sentencing hearing. Therefore, the district court did not err in denying this claim.

Fourth, McColgan claims counsel was ineffective for failing to review and correct inaccurate information in the presentence investigation report. McColgan fails to demonstrate counsel was deficient or resulting prejudice because this claim is belied by the record. At sentencing, counsel advised there were several errors in the report and attempted to correct them with the court. Therefore, the district court did not err in denying this claim.

Fifth, McColgan claims counsel was ineffective for failing to argue three of her prior convictions arose out of the same transaction. McColgan fails to demonstrate counsel was deficient or resulting prejudice. McColgan fails to demonstrate the three convictions arose out of the same transaction. The record provided by the State on appeal

²To the extent McColgan claims counsel was ineffective for failing to present an expert on mental health and substance abuse at sentencing, this claim was not raised in her petition filed in the district court below, and we decline to address it for the first time on appeal. See *Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 1013, 103 P.3d 25, 33 (2004).

demonstrates at least two of the three convictions arose out of different judgments of convictions. Further, McColgan fails to demonstrate a reasonable probability of a different outcome at sentencing had the three convictions been only one conviction because she still would have had the requisite number of felony convictions to qualify for the small habitual enhancement. See NRS 207.010(1)(a). Therefore, the district court did not err by denying this claim.

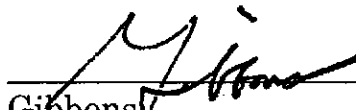
Sixth, McColgan claims counsel was ineffective for failing to notify her of her right to appeal and for failing to file an appeal. McColgan fails to demonstrate counsel was deficient. Counsel testified at the evidentiary hearing that she explained the right to appeal to McColgan, but McColgan never requested an appeal or gave her any indication she wished an appeal to be filed. The district court found counsel's testimony credible. Because counsel had no duty to file an appeal absent a request from McColgan or an expression of dissatisfaction with her sentence, see *Toston v. State*, 127 Nev. 971, 978, 267 P.3d 795, 800 (2011), the district court did not err in denying this claim.

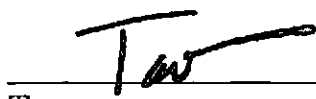
Seventh, McColgan claims the district court should have sua sponte treated her claim that the district court was biased against her at sentencing as a motion to recuse. McColgan fails to demonstrate the district court had a duty to treat her claim as a motion to recuse.

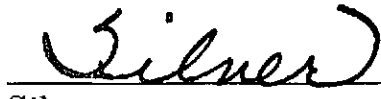
Finally, to the extent McColgan claims her sentence was excessive and the district court erred by enhancing her sentence because three of her prior California convictions were all based on one case, these claims were outside the scope of claims permissible to be raised in a postconviction petition challenging a judgment of conviction based upon a

guilty plea. See NRS 34.810(1)(a). Therefore, the district court did not err in denying these claims. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Janet J. Berry, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk