

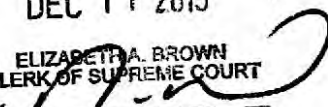
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WILLIAM GAYLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 77897-COA

FILED

DEC 11 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

William Gayler appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; David M. Jones, Judge.

Gayler argues the district court erred by denying the claims of ineffective assistance of counsel raised in his September 12, 2017, petition and later-filed supplement. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate 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, 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). To warrant an evidentiary hearing, petitioner must raise claims supported by specific factual allegations that, if true and not belied by the record, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

19-50112

First, Gayler argued his counsel were ineffective for failing to properly investigate and present to the district court a claim that the statute of limitations barred the prosecution. Gayler contended his counsel failed to properly argue that he did not commit the actions involved in this matter in a secret manner, the victims should have reasonably known of his actions prior to 2009, and, for those reasons, the statute of limitations should have run prior to initiation of the criminal proceedings in 2013.

The record reveals Gayler's initial counsel filed a motion to dismiss the charges based upon the statute of limitations and raised the issues in a manner substantially similar to those raised in Gayler's petition. Gayler's third counsel also filed a supplement to the motion to dismiss. The trial-level court concluded the facts demonstrated Gayler acted in a secret manner, the victims only discovered the nature of his actions in 2009, and for those reasons, the statute of limitations did not bar Gayler's prosecution. *See* NRS 171.085(1); NRS 171.095(1). Following the trial-level court's denial of the motion to dismiss, Gayler's third counsel filed a motion seeking rehearing of the court's decision and again argued the victims should have known of the nature of Gayler's actions prior to 2009. The trial-level court denied the motion for rehearing.

Given the motion to dismiss, the supplement to the motion to dismiss, the motion seeking rehearing of the motion to dismiss, and the circumstances at issue in this matter, Gayler failed to demonstrate his counsel's performances fell below an objectively reasonable standard. Gayler also failed to demonstrate a reasonable probability of a different outcome had counsel raised different arguments concerning the statute of limitations. Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Gayler claimed his counsel were ineffective for failing to file a motion arguing that his actions did not meet the definition of

securities fraud because he did not sell a security. NRS 90.295 includes in its definition of a security “an interest in a limited-liability company.” The State alleged Gayler sold interests in a limited-liability company to the victims and misrepresented the nature of those transactions in an effort to defraud the victims. Based on the nature of the allegations concerning Gayler’s actions and the statutory definition of security, Gayler failed to demonstrate his counsel’s performances fell below an objectively reasonable standard by failing to argue he did not sell a security. Given the record in this matter, Gayler failed to demonstrate a reasonable probability of a different outcome had counsel argued Gayler did not commit securities fraud because he did not sell a security. See NRS 90.295; NRS 90.570 (defining securities fraud). Therefore, the district court did not err by denying this claim without conducting an evidentiary hearing.¹

Third, Gayler argued his third counsel was ineffective for failing to pursue a direct appeal. Gayler contended he asked his counsel to pursue a direct appeal. Gayler supported his claim with an email he contended he sent to counsel shortly after entry of the judgment of conviction in which he requested counsel to pursue a direct appeal and stated he already had a draft of a brief containing arguments he wished to raise on direct appeal. “[C]ounsel has a constitutional duty to file a direct appeal in two circumstances: when requested to do so and when the defendant expresses dissatisfaction with his conviction.” *Toston v. State*, 127 Nev. 971, 978, 267 P.3d 795, 800 (2011). Moreover, “trial counsel has a

¹Gayler also asserts his guilty plea was not knowingly and voluntarily entered because his counsel failed to properly challenge the charges based upon the statute of limitations and the definition of security. As we have concluded Gayler failed to demonstrate his counsel’s performances were not deficient for either claim, Gayler failed to demonstrate withdrawal of his guilty plea was necessary to correct a manifest injustice. See NRS 176.165.

duty to file a direct appeal when the client's desire to challenge the conviction or sentence can be reasonably inferred from the totality of the circumstances." *Id.* at 979, 267 P.3d at 801.

At the hearing concerning Gayler's postconviction petition and in its order denying the petition, the district court focused on whether Gayler could establish prejudice stemming from of his claims of ineffective assistance of counsel. However, when a petitioner claims he was deprived of his right to appeal, counsel's deficiency is presumed to have resulted in prejudice. *Id.* at 976, 267 P.3d at 799. Gayler's allegation that he requested his counsel to pursue a direct appeal and counsel subsequently did not pursue a direct appeal, if true, would entitle Gayler to relief. Therefore, an evidentiary hearing is necessary to ascertain whether Gayler was improperly deprived of a direct appeal. *See Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225. Accordingly, we reverse the district court's denial of this claim and remand for an evidentiary hearing concerning this issue, and we

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. David M. Jones, District Judge
DMSLAW, LLC
Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk