

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAMIEN HALLIBURTON,
Appellant,
vs.
THE STATE OF NEVADA
DEPARTMENT OF CORRECTIONS;
HIGH DESERT STATE PRISON; AND
CALVIN JOHNSON, WARDEN,
Respondents.

No. 83659-COA

FILED

APR 11 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Damien Halliburton appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Halliburton argues the district court erred by denying his March 31, 2021, petition and later-filed supplement without first conducting an evidentiary hearing. Halliburton filed his petition more than one year after entry of the judgment of conviction on January 16, 2020.¹ Thus, Halliburton's petition was untimely filed. *See* NRS 34.726(1). Halliburton's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.*

¹Halliburton's direct appeals were dismissed for lack of jurisdiction because the notices of appeal were untimely filed. *Halliburton v. State*, No. 82291, 2021 WL 237211 (Nev. Jan. 22, 2021) (Order Dismissing Appeal); *Halliburton v. State*, No. 82257, 2021 WL 91089 (Nev. Jan. 7, 2021) (Order Dismissing Appeal). Accordingly, the proper date to measure timeliness is the entry of the judgment of conviction. *See Dickerson v. State*, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

Halliburton claimed he had cause for the delay due to lack of access to the prison law library and because the clerk of the district court did not file his pro se documents. The district court concluded Halliburton demonstrated an impediment to the defense excused his delay, and the State does not challenge this conclusion on appeal. The district court nevertheless denied Halliburton's petition because he could not demonstrate undue prejudice stemming from his underlying claims.

Halliburton's underlying claims involved the ineffective assistance of counsel. To demonstrate ineffective assistance of counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *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*). To demonstrate prejudice regarding the decision to enter a guilty plea, a petitioner must show 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, 988, 923 P.2d 1102, 1107 (1996). Both components of the inquiry—deficiency and prejudice—must be shown. *Strickland*, 466 U.S. at 687. We give deference to the district 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). To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would

entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Halliburton argued his counsel was ineffective for seeking Halliburton's release from custody prior to sentencing. Halliburton asserts that counsel should have known that there was too great a risk that Halliburton would violate the failure-to-appear (FTA) clause contained within the guilty plea agreement and, therefore, counsel should not have sought Halliburton's release from custody. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

Halliburton asserted that counsel should not have requested his release because he was a drug addict at the time, lacked the self-discipline and necessary skills to be released back into the community, and could not appreciate the risk he faced from violating the FTA clause. Halliburton also contended that counsel should have stayed in contact with him or sought counseling for him so that he would not violate the FTA clause.

However, the existence of these factors does not demonstrate that counsel's performance was objectively unreasonable, as there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* Halliburton requested release prior to sentencing so that he could settle his affairs and spend time with his family before going to prison. In addition, Halliburton personally informed the trial-level court during the hearing concerning his request for presentence release that he understood that he would face an adjudication

as a habitual criminal if he violated the FTA clause if the court granted his request for release. In light of the circumstances in this case, Halliburton has not shown that counsel's performance fell below an objective standard of reasonableness by requesting Halliburton's release from custody prior to imposition of sentence. Therefore, we conclude that the district court did not err by denying this claim without conducting an evidentiary hearing.

Second, Halliburton argued his counsel was ineffective for failing to secure a promise that Halliburton would serve the Nevada sentence concurrent with a sentence in a California criminal matter or ensure that Halliburton was sentenced in Nevada in a timely manner. Halliburton contended he was detained in California for an offense committed in that state while he was awaiting sentencing in this matter and he could have served both sentences concurrently if counsel had worked with the State to secure concurrent sentences or requested his return to Nevada for imposition of sentence in this matter.

While Halliburton was awaiting sentencing in this matter, he committed a new offense in California. Halliburton's new offense violated the FTA clause contained within the plea agreement in this matter and the State was thus permitted to seek sentencing pursuant to the habitual criminal enhancement because Halliburton had five prior felony convictions. At the sentencing hearing, the sentencing court found that Halliburton's prior felony convictions were significant, adjudicated him a habitual criminal, and sentenced him to serve a term of 72 to 174 months in prison pursuant to the small habitual criminal enhancement. The sentencing court did not permit Halliburton to credit any time spent in California custody for the offense committed in that state toward his Nevada sentence. In light of the circumstances in this matter, Halliburton

failed to demonstrate a reasonable probability that the sentencing court would have permitted him to serve his Nevada sentence concurrently with his California sentence had counsel undertaken efforts to secure concurrent terms. Halliburton also failed to demonstrate a reasonable probability of a different outcome at the sentencing hearing had counsel sought to have Halliburton sentenced at an earlier date. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Third, Halliburton argued his counsel was ineffective for failing to file a notice of appeal after Halliburton received a lengthy prison sentence. “[T]rial counsel 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). Halliburton did not claim he asked counsel to file an appeal, and he did not allege he expressed the type of dissatisfaction that would have required counsel to file a notice of appeal. *See id.* at 979, 267 P.3d at 801 (noting that the burden is on the defendant to indicate to his attorney that he wishes to pursue a direct appeal). Further, Halliburton specifically waived his right to appeal in his guilty plea agreement. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Fourth, Halliburton argued his counsel was ineffective for improperly inducing him to enter a guilty plea in the California criminal matter without first ensuring that he would serve the sentence in that matter concurrently to the sentence in this case. As stated previously, Halliburton committed a new offense while awaiting sentencing in this matter, he had a lengthy criminal record, and the sentencing court found

his criminal record was significant. In light of the circumstances in this matter, Halliburton failed to demonstrate a reasonable probability that the sentencing court would have permitted him to serve his Nevada sentence concurrently with his California sentence. Therefore, we conclude the district court did not err by denying this claim without conducting an evidentiary hearing.

Halliburton thus failed to demonstrate that his underlying claims had merit. He therefore failed to demonstrate undue prejudice sufficient to overcome the procedural time bar. See NRS 34.726(1)(b). Accordingly, we conclude that the district court did not err by denying the petition, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Ronald J. Israel, District Judge
Steven S. Owens
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk