


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GREGORY GARY GRANT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85459-COA

FILED

OCT 06 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Gregory Gary Grant appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 26, 2018. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

Grant argues the district court erred by denying his petition as procedurally barred. Grant filed his petition more than two years after issuance of the remittitur on direct appeal on August 11, 2015. *See Grant v. State*, No. 63641, 2015 WL 4402494 (Nev. Jul. 17, 2015) (Order of Affirmance). Thus, Grant's petition was untimely filed. *See* NRS 34.726(1). Grant's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.* "Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory." *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). A petitioner has the burden of pleading and proving facts to demonstrate good cause to excuse the delay. *State v. Haberstroh*, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003).

"In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented [them] from

complying with the state procedural default rules.” *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). “An impediment external to the defense may be demonstrated by a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable.” *Id.* (internal punctuation omitted). Prejudice can be shown by demonstrating the errors worked to a petitioner’s actual and substantial disadvantage. *Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993).

Grant argued he had cause for the delay in filing his petition because he encountered official interference. Specifically, on June 7, 2016, Grant filed a motion for the appointment of a guardian ad litem in which he indicated he was incompetent and specified that it was “for purposes of habeas corpus.” The district court granted the motion in 2016 but did not appoint a guardian ad litem. Grant claimed the district court’s actions of granting his motion, not appointing the guardian, and not appointing postconviction counsel to file a petition on his behalf constituted official interference. After Grant filed his petition, the district court found good cause to excuse the procedural bar based on his argument that official interference prevented him from filing a timely petition. We conclude the district court erred as a matter of law.

Grant failed to demonstrate that the district court’s actions in regard to his request for a guardian ad litem constituted good cause. Any error by the district court by granting the motion for guardian ad litem was invited by Grant such that he cannot now complain of it. *See Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (“The doctrine of invited error embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court

or the opposite party to commit.” (quoting 5 Am. Jur. 2d Appeal and Error § 713 (1962)); accord *LaChance v. State*, 130 Nev. 263, 276, 321 P.3d 919, 928 (2014). Therefore, we conclude that the district court’s granting of the motion to appoint a guardian ad litem did not constitute an impediment external to the defense that prevented Grant from filing a timely petition.

As to whether the district court’s failure to appoint a guardian ad litem could constitute good cause, we first note there are no statutory provisions specifically governing the appointment of a guardian ad litem in Nevada criminal law. However, NRS 34.750 provides petitioners with a means of seeking help with postconviction habeas corpus proceedings. By its plain language, NRS 34.750 gives the district court discretion to appoint counsel but only after a petition has been filed. See NRS 34.750(1) (requiring the district court, in deciding whether to appoint postconviction counsel, to consider whether issues presented in the petition are difficult); NRS 34.750(3) (providing that appointed counsel “may file and serve *supplemental* pleadings” (emphasis added)). Here, Grant did not file a petition or otherwise seek the appointment of counsel.

Grant also failed to explain how the appointment of a guardian ad litem would have resulted in a timely petition. A guardian ad litem is not necessarily an attorney, see NRS 159.0455(3), nor is the person appointed allowed to give legal advice to the protected person, NRS 159.0455(4). Rather, the purpose of a guardian ad litem is to advocate for the best interests of the protected person, see NRS 159.0455(4)(a), and Grant had already determined that his best interests included seeking the postconviction relief that is the subject of this appeal. Therefore, we conclude that the district court’s failure to appoint a guardian ad litem did not constitute an impediment external to the defense that prevented Grant

from filing a timely petition. Thus, we further conclude that the district court erred as a matter of law in finding good cause to excuse the procedural default.¹

The district court nevertheless concluded Grant's petition was procedurally barred because he failed to demonstrate prejudice. "A showing of undue prejudice necessarily implicates the merits of the . . . claim." *Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018). Grant argues on appeal that the district court erred by concluding, without first conducting an evidentiary hearing, that Grant failed to demonstrate he was prejudiced such that he could not overcome the procedural time bar. Grant was not entitled to an evidentiary hearing as to prejudice for two reasons: 1) he failed to demonstrate good cause, and 2) he failed to allege specific facts that, if true and not belied by the record, would have demonstrated prejudice such that he could overcome the procedural time bar. See *Hathaway*, 119 Nev. at 255, 71 P.3d at 508 (holding a petitioner is entitled to an evidentiary hearing to determine whether they can overcome procedural bars where their good cause claims are supported by specific factual allegations that, if true and not belied by the record, would demonstrate good cause).

Grant claimed he could demonstrate prejudice to overcome the procedural bar because counsel was ineffective. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance

¹We note Grant's competency or lack thereof would not provide good cause either. See *Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (recognizing that mental disability, illiteracy, and reliance on an inmate law clerk do not constitute good cause to excuse the procedural bars), *superseded by statute on other grounds as stated in Haberstroh*, 119 Nev. at 180-81, 69 P.3d at 681.

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*). Both components of the inquiry 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).

First, Grant claimed counsel was ineffective for conceding his guilt on several of the charges and by presenting a mental health defense against Grant's wishes. Generally, counsel is entrusted with making decisions regarding trial tactics, including what defenses to present. See *Rhyne v. State*, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) ("Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate—and ultimate—responsibility of deciding if and when to object, which witnesses, if any to call, and what defenses to develop." (quoting *Wainwright v. Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring))). However, a defendant personally, and not their counsel, has the authority to pursue a defense of insanity. See *Johnson v. State*, 117 Nev. 153, 163, 17 P.3d 1008, 1015 (2001). Further, "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance." *McCoy v. Louisiana*, 584 U.S. ___, ___, 138 S. Ct. 1500, 1505 (2018). Where a defendant expressly asserts his factual innocence of the crime, counsel cannot override that and admit guilt. *Id.*;

see also *Jones v. State*, 110 Nev. 730, 738-39, 877 P.2d 1052, 1056-57 (1994). However, admitting less than all elements of a charged offense is a strategic decision. *McCoy*, 138 S. Ct. at 1510.

Counsel did not present a trial defense of not guilty by reason of insanity. Instead, counsel argued that Grant's mental health issues prevented him from forming the requisite intent to commit the crimes such that the State failed to prove all of the elements of the crimes beyond a reasonable doubt. Further, this case is distinguishable from *McCoy* and *Jones* because counsel did not admit guilt of the crimes over Grant's express assertion that he was innocent.² Instead, counsel argued that Grant did not have the requisite intent to commit the crimes and, thus, was not guilty. Therefore, counsel's decision to present a defense of lack of intent was a strategic decision within the scope of counsel's duties. And strategic decisions are virtually unchallengeable absent extraordinary circumstances. See *Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004). Further, Grant does not allege what other defenses counsel should have pursued. See, e.g., *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Thus, Grant failed to demonstrate counsel was deficient. And given the overwhelming evidence presented at trial, Grant failed to demonstrate a reasonable probability of a different outcome at trial had counsel not pursued this defense.³ Accordingly, we conclude the district

²In his own trial testimony, Grant admitted to committing the actions that constituted the crimes.

³To the extent Grant suggests he need not demonstrate prejudice because counsel's concession of guilt constituted structural error, we conclude the normal *Strickland* prejudice standard applies because counsel did not concede Grant's guilt.

court did not err by finding, without first conducting an evidentiary hearing, that this claim did not demonstrate prejudice to overcome the procedural time bar.

Second, Grant claimed counsel was ineffective for providing, over his objection, his mental health records to his expert witness and portions of the expert witness report to the jury. Given the overwhelming evidence presented at trial, Grant failed to demonstrate a reasonable probability of a different outcome at trial had counsel not provided the mental health records and report. Therefore, we conclude the district court did not err by finding, without first conducting an evidentiary hearing, that this claim did not demonstrate prejudice to overcome the procedural time bar.


Third, Grant claimed counsel was ineffective for failing to file a motion to withdraw as counsel because the trial court would have given more weight to a motion filed by counsel rather than the motions filed by Grant. Grant argued that he filed several pro se motions to withdraw counsel; the trial court did not give any weight to his motions; and because a previous counsel's motion to withdraw was granted, the trial court would have granted a motion filed by trial counsel.

"The burden to make a proper appellate record rests on appellant," *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980); see also NRAP 30(b)(3), and when an "appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision," *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). Grant failed to provide this court with the transcript regarding his pro se motions to withdraw counsel, and thus, we presume the transcript supports the trial

court's reasoning for denying the motions. Further, Grant failed to demonstrate that had counsel filed a motion, there was a reasonable probability of a different outcome at trial.⁴ Therefore, we conclude the district court did not err by finding, without first conducting an evidentiary hearing, that this claim did not demonstrate prejudice to overcome the procedural time bar.

Having concluded that Grant is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.⁵


_____, C.J.
Gibbons


_____, J.
Bulla

cc: Hon. Jacqueline M. Bluth, District Judge
Gaffney Law
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁴We note that the motion to withdraw filed by previous counsel included an allegation that Grant refused to work with counsel's office because the office had previously requested, and was granted, an order to forcibly medicate Grant. Grant suffered a bad reaction to the medications and nearly died. We further note that Grant did not provide a transcript of the hearing on this previous motion.

⁵The Honorable Deborah L. Westbrook did not participate in the decision in this matter.