


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JESSE ARON ROSS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 89052-COA

FILED

AUG 25 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Jesse Aron Ross appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on September 24, 2015, and supplemental pleadings. Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.

Ross argues the district court erred by determining his petition was procedurally barred because it was untimely filed. Ross filed his petition more than one year after issuance of the remittitur on direct appeal on March 11, 2014. *Ross v. State*, No. 62400, 2014 WL 605496 (Nev. Feb. 13, 2014) (Order of Affirmance). Thus, Ross' petition was untimely filed. *See* NRS 34.726(1). Ross' petition was procedurally barred absent a demonstration of good cause for the delay. *See id.* "To show good cause for [the] delay under NRS 34.726(1), a petitioner must demonstrate two things: that the delay is not the fault of the petitioner and that the petitioner will be unduly prejudiced if the petition is dismissed as untimely." *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 94-95 (2012) (internal quotation marks omitted). A delay is not the petitioner's fault when an impediment external to the defense prevented the petitioner from complying with the procedural default rules. *Id.* at 197, 275 P.3d at 95.

In his petition, Ross argued the delay was not his fault because counsel did not notify him regarding the resolution of his direct appeal. Ross alleged that he believed his direct appeal was still pending and that he did not learn it had been resolved until the supreme court clerk responded to his July 5, 2015, letter inquiring about his case. *See Hathaway v. State*, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003) (noting a petitioner is not likely to pursue postconviction relief while he believes his direct appeal is pending). The district court determined that Ross' claim was belied by the record because the State filed an affidavit from Ross' counsel, in which counsel declared that he informed Ross of the resolution of his direct appeal immediately after counsel learned about it. However, "[a] claim is not 'belied by the record' just because a factual dispute is created by the pleadings or affidavits filed during the post-conviction proceedings" and "it is improper for the district court to resolve a factual dispute created by affidavits without conducting an evidentiary hearing." *Mann v. State*, 118 Nev. 351, 354, 356, 46 P.3d 1228, 1230, 1231 (2002). Thus, we conclude the district court erred by relying on the affidavit to determine Ross had not shown the delay was not his fault.

However, as is discussed above, Ross was also required to demonstrate undue prejudice. "A showing of undue prejudice necessarily implicates the merits of the . . . claim[s]" raised in the petition. *Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018). Here, the district court addressed Ross' claims and concluded they lacked merit. We consider Ross' claims to determine whether he has shown undue prejudice to overcome the procedural bar of NRS 34.726(1).

In his petition, Ross alleged claims of ineffective assistance of trial counsel. To demonstrate ineffective assistance of trial 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*). 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). A petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle the petitioner to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

First, Ross claimed trial counsel was ineffective for failing to conduct an adequate pretrial investigation. Ross alleged counsel should have retained a medical expert to examine Ross to determine whether he was circumcised or should have presented medical records demonstrating Ross was circumcised. Ross alleged the presentation of this evidence would have contradicted the victim's and Detective McGrath's testimony that Ross was not circumcised. A petitioner claiming counsel did not conduct an adequate investigation must demonstrate what the results of a better investigation would have been and how it would have affected the outcome of the proceeding. *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

Although Ross alleged that he was circumcised, he failed to allege when he was circumcised in relation to the timeline of the crimes. Further, the district court found that the jury was shown a photograph

McGrath took subsequent to the crimes depicting Ross' penis and that the photograph showed Ross was circumcised.¹ Ross does not challenge this finding on appeal. Accordingly, Ross failed to demonstrate a reasonable probability of a different outcome at trial had counsel further investigated whether Ross was circumcised. Therefore, we conclude Ross failed to demonstrate undue prejudice to overcome the procedural time bar with respect to this claim.

Second, Ross claimed trial counsel was ineffective for failing to conduct an adequate pretrial investigation by moving, only eight days before trial, for additional funds to continue his investigation. Ross alleged this late motion demonstrated counsel was not prepared for trial. Ross failed to allege specific facts demonstrating what the results of any further investigation would have been or how counsel's failure to move for additional funds earlier impacted the outcome at trial. Accordingly, Ross failed to demonstrate a reasonable probability of a different outcome at trial but for counsel's alleged errors. Therefore, we conclude Ross failed to demonstrate undue prejudice to overcome the procedural time bar with respect to this claim.

Third, Ross claimed trial counsel was ineffective for failing to conduct an adequate pretrial investigation by not independently obtaining documents related to "priors on some of the witnesses and priors on alleged victims of the alleged victim" as opposed to attempting to obtain the documents through a *Brady*² motion filed just before trial. Ross failed to

¹We note that the same district court judge presided over both the trial and postconviction proceedings.

²*Brady v. Maryland*, 373 U.S. 83 (1963).

allege specific facts demonstrating what these documents would have revealed or how they would have impacted the outcome at trial. Accordingly, Ross failed to demonstrate a reasonable probability of a different outcome at trial but for counsel's alleged errors. Therefore, we conclude Ross failed to demonstrate undue prejudice to overcome the procedural time bar with respect to this claim.

Fourth, Ross claimed counsel was ineffective for failing to file a pretrial motion challenging the search warrant for Ross' computers. Ross failed to allege specific facts demonstrating what counsel should have argued or that any such motion would have been successful. Accordingly, Ross failed to demonstrate a reasonable probability of a different outcome at trial but for counsel's inaction. *See Kirksey v. State*, 112 Nev. 980, 990, 923 P.2d 1102, 1109 (1996) (stating an ineffective-assistance-of-counsel claim based on counsel's failure to file a motion to suppress must demonstrate "that the claim was meritorious and that there was a reasonable likelihood that the exclusion of the evidence would have changed the result of a trial"). Therefore, we conclude Ross failed to demonstrate undue prejudice to overcome the procedural time bar with respect to this claim.

Ross also alleged in his petition that appellate counsel was ineffective for failing to consult with him, raise substantive issues on appeal, or notify him that remittitur had issued. To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that the omitted issue would have a reasonable probability of success on appeal. *Id.* at 998, 923 P.2d at 1114. Appellate counsel is not required to raise every non-frivolous issue on

appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). The decision as to what claims to raise on appeal resides within counsel's professional judgment. *Jones*, 463 U.S. at 751-54.

Ross failed to allege specific facts demonstrating: (1) what claims counsel should have raised on appeal, (2) whether the omitted claims would have a reasonable probability of success, or (3) how counsel's failure to communicate with him impacted Ross' ability to prevail on appeal. Accordingly, Ross failed to demonstrate a reasonable probability of a different outcome on appeal but for counsel's alleged errors. Therefore, we conclude Ross failed to demonstrate undue prejudice to overcome the procedural time bar with respect to this claim.

Because Ross failed to demonstrate he would be unduly prejudiced if his petition was dismissed as untimely, we conclude Ross' petition was procedurally barred pursuant to NRS 34.726. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Bulla


_____, J.
Gibbons


_____, J.
Westbrook

cc: Hon. Kimberly A. Wanker, District Judge.
David H. Neely, III
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk