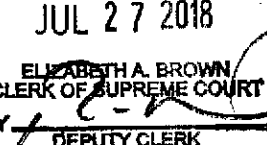


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL JOSEPH GEIGER,
Appellant,
vs.
THE STATE OF NEVADA; AND
TIMOTHY FILSON, WARDEN,
Respondents.

No. 74453

FILED
JUL 27 2018
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY /  /
DEPUTY CLERK

ORDER OF AFFIRMANCE

Michael Joseph Geiger appeals from an order of the district court denying the postconviction petition for a writ of habeas corpus filed on March 29, 2017.¹ Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Geiger claims the district court erred by denying the majority of his petition as procedurally time barred. The district court concluded that Geiger's claims relating to the guilt phase of his case were procedurally time barred because Geiger did not file a petition raising these claims within one year of the issuance of the remittitur from his first appeal.

Geiger filed his petition raising claims challenging the guilt phase of his trial nearly two years after issuance of the remittitur on direct appeal on May 8, 2015. *See Geiger v. State*, Docket No. 66103 (Order Affirming in Part, Reversing in Part and Remanding, March 17, 2015). Thus, Geiger's petition was untimely filed as to those claims. *See* NRS 34.726(1). Geiger's petition was procedurally barred absent a

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

demonstration of good cause—cause for the delay and undue prejudice. *See id.*

Geiger argued his petition was not late because on direct appeal, this court reversed the judgment of conviction. He claimed he is timely from the remittitur issued on appeal from the second corrected judgment of conviction. This claim lacks merit. Geiger's judgment of conviction was reversed because of an error at sentencing regarding how the district court structured the judgment of conviction. Because the majority of Geiger's claims challenged the guilt phase of Geiger's trial, these claims could have been raised before the second corrected judgment of conviction was entered. *See Sullivan v. State*, 120 Nev. 537, 540-41, 96 P.3d 761, 763-64 (2004). Therefore, the district court did not err by denying these claims as procedurally time barred.

Geiger also claims the district court erred by denying his claim that counsel was ineffective at the second sentencing hearing for failing to argue against habitual criminal adjudication. Specifically, he claimed counsel was ineffective for failing to argue his prior convictions were stale, trivial, and nonviolent; the State failed to prove all of the prior convictions contain the information listed in NRS 176.105(1); and each prior conviction had to be proven beyond a reasonable doubt.

To prove ineffective assistance of counsel, a petitioner must demonstrate 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, the outcome of the proceedings would have been different. *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, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). 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).


Geiger failed to demonstrate counsel was deficient or resulting prejudice. While counsel did not make specific argument regarding the stale, trivial, or nonviolent nature of the prior convictions at the second sentencing hearing, counsel referenced and incorporated his argument from the first sentencing hearing. At the first hearing, counsel argued the prior convictions were nonviolent and trivial. The district court stated it had reviewed the transcript of the first sentencing prior to the second sentencing hearing. Geiger himself argued at the second sentencing hearing that the convictions were stale, trivial, and nonviolent. Further, on appeal from the second corrected judgment of conviction, this court rejected an argument that the prior convictions were stale and nonviolent. *Geiger v. State*, Docket No. 68364 (Order of Affirmance, April 20, 2016). Therefore, Geiger failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel provided further argument regarding the nature of the prior convictions.

Finally, the State is not required to prove the prior convictions meet the requirements of NRS 176.105(1) nor is the State required to prove the prior convictions beyond a reasonable doubt. See NRS 207.016(3) ("a defendant may not challenge the validity of a previous conviction"); *Dressler v. State*, 107 Nev. 686, 697-98, 819 P.2d 1288, 1295-96 (1991) (discussing

the burden of proof required to prove a prior conviction). Therefore, any argument by counsel regarding this would have been futile. *See Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). Further, Geiger failed to allege or demonstrate any of his prior convictions were invalid for enhancement purposes. Thus, he failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel challenged his prior convictions. Accordingly, the district court did not err by denying this claim.

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
Michael Joseph Geiger
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk