

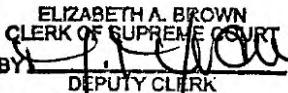
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARIO LUNA, JR., A/K/A MARIO
MACASPAC LUNA, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86380-COA

FILED

APR 10 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Mario Luna, Jr., appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on November 15, 2021, and supplemental pleadings. Eighth Judicial District Court, Clark County; Jennifer L. Schwartz, Judge.

Luna challenges the district court's denial of his claim that counsel was ineffective for failing to file a direct appeal. Luna filed his petition more than one year after entry of the judgment of conviction on November 25, 2019.¹ Thus, Luna's petition was untimely filed. *See* NRS 34.726(1). Luna's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.* The application of procedural bars is mandatory. *See State v. Eighth Jud. Dist. Ct. (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).

Luna first alleged he had good cause because he did not have the necessary paperwork to present a defense. Luna's bare claim did not indicate that the lack of paperwork was due to an impediment external to

¹Luna did not appeal from the judgment of conviction.

the defense, nor did it explain how the lack of paperwork prevented him from filing a timely petition. Therefore, we conclude Luna was not entitled to relief based on this good-cause claim. See *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003); *Hood v. State*, 111 Nev. 335, 338, 890 P.2d 797, 798 (1995).

Luna also alleged he had good cause because he was deprived of his right to a direct appeal due to counsel's deficient performance. The district court concluded that Luna demonstrated good cause as to his appeal deprivation claim because his alleged dissatisfaction with his sentence paired with his "lack of familiarity with the system" meant that counsel should have "at least" engaged in discussions about a direct appeal. The district court then went on to deny relief on the merits of Luna's claim.

The district court did not apply the proper legal standard for determining good cause. "In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." *Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506. An appeal deprivation claim may demonstrate good cause, but only "if the petitioner establishes that the petitioner reasonably believed that counsel had filed an appeal and that the petitioner filed a habeas corpus petition within a reasonable time after learning that a direct appeal had not been filed." *Id.* at 255, 71 P.3d at 508; see also *Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018) (holding a good-cause claim must be raised within one year of its becoming available). Because the district court did not apply the proper legal standard and failed to determine if Luna satisfied the good cause requirements, we conclude the district court erred in determining that Luna's argument demonstrated cause to excuse the delay in raising the

appeal deprivation claim. Nevertheless, for the reasons discussed below, we affirm the district court's denial of the claim. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding a correct result will not be reversed simply because it is based on the wrong reason).

Even had Luna demonstrated cause for the delay, he also had to demonstrate undue prejudice to overcome the procedural time bar. "A showing of undue prejudice necessarily implicates the merits of the . . . claim." *Rippo*, 134 Nev. at 422, 423 P.3d at 1097. 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*). Generally, both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, but in some instances, such as when the petitioner has been deprived of the right to appeal due to counsel's deficient performance, the second component (prejudice) may be presumed, *Lozada v. State*, 110 Nev. 349, 357, 871 P.2d 944, 949 (1994), *abrogated on other grounds by Rippo v. State*, 134 Nev. at 426 n.18, 423 P.3d at 1100 n.18; *see also Garza v. Idaho*, 586 U.S. ___, ___, 39 S. Ct. 738, 749 (2019) (holding "the presumption of prejudice . . . applies regardless of whether the defendant has signed an appeal waiver"). 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).

Luna alleged that counsel had a duty to file a direct appeal because it was apparent Luna was not satisfied with his sentence and conviction, particularly in light of the disparate and inequitable sentences his codefendants received. “[C]ounsel has a constitutional duty to file a direct appeal . . . when the defendant expresses dissatisfaction with his conviction.” *Toston v. State*, 127 Nev. 971, 978, 267 P.3d 795, 800 (2011). A court must consider the totality of the circumstances in determining whether a defendant has expressed dissatisfaction such that counsel could reasonably infer a desire to appeal the conviction or sentence. *Id.* at 979, 267 P.3d at 801. When the defendant has pleaded guilty, relevant circumstances may include whether the defendant (1) indicated a desire to challenge his sentence within the period for filing an appeal; (2) received the sentence he bargained for; (3) reserved certain issues for appeal; and (4) sought relief from the plea before sentencing. *Id.* at 979-80, 267 P.3d at 801.

The district court conducted an evidentiary hearing regarding this claim whereat Luna and counsel testified. The district court found that counsel never received any communication indicating that Luna was dissatisfied with his conviction or sentence. This finding is supported by the record. Luna testified that he left telephone messages with counsel after sentencing but that the messages said nothing about an appeal or being dissatisfied with his conviction or sentence. He also testified that he did not write to counsel. Counsel testified that he received no communications from Luna or Luna's wife asking him to file an appeal or expressing a desire to further litigate the outcome of Luna's case.

The district court also found there was no basis for counsel to reasonably infer that he needed to file an appeal based on the sentence imposed because counsel never promised Luna a particular sentence, Luna never told counsel he expected a particular sentence, and the sentence imposed was not "overly shocking" given Luna's involvement in the offenses and the possible sentence he faced. These findings are supported by the record. In addition, Luna did not reserve any issues for appeal and did not seek relief from his plea before sentencing. After review, we conclude Luna failed to demonstrate that his desire to appeal his sentence could be reasonably inferred from the totality of the circumstances. Therefore, Luna failed to demonstrate that counsel's performance was deficient for failing to file a direct appeal. Accordingly, Luna failed to demonstrate undue prejudice to overcome the procedural time bar to his appeal-deprivation claim, and we conclude the district court erred in concluding he had demonstrated good cause. For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Jennifer L. Schwartz, District Judge
SDS Chartered, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk