

IN THE UTAH COURT OF APPEALS

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Calvin Lee Nixon,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Petitioner and Appellant,	)	
	)	Case No. 20071004-CA
v.	)	
	)	F I L E D
State of Utah,	)	(August 6, 2009)
	)	
Respondent and Appellee.	)	<span style="border: 1px solid black; padding: 2px;">2009 UT App 216</span>

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Second District, Ogden Department, 070903073  
The Honorable Pamela G. Heffernan

Attorneys: Mary C. Corporon and Allison R. Librett, Salt Lake City, for Appellant  
Mark L. Shurtleff and Jeanne B. Inouye, Salt Lake City, for Appellee

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Before Judges Greenwood, Thorne, and Orme.

THORNE, Associate Presiding Judge:

Petitioner Calvin Lee Nixon appeals the district court's dismissal of his petition for post-conviction relief, arguing that the district court erred in finding that his petition is untimely and does not meet the interest of justice exception of the Post-Conviction Remedies Act (PCRA). See Utah Code Ann. § 78-35a-107(1), (3) (Supp. 2007) (current version as amended at Utah Code Ann. § 78B-9-107 (2008)).<sup>1</sup> We review an appeal from an order dismissing a petition for post-conviction relief for correctness, without deference to the lower court's conclusions of law. See Nicholls v. State, 2009 UT 12, ¶ 12, 203 P.3d 976; Adams v. State, 2005 UT 62, ¶ 8, 123 P.3d 400.

Nixon argues that he is entitled to relief under the interest of justice exception because he received ineffective assistance of counsel.

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<sup>1</sup>Utah Code section 78-35a-107 was renumbered and amended. See Utah Code Ann. § 78B-9-107 amend. notes (2008). We cite to the version in effect at the time Nixon filed his petition.

An analysis of what constitutes an exception in the "interest of justice" should involve examination of both the meritoriousness of the petitioner's claim and the reason for an untimely filing. We do not establish as a hard and fast rule that a petitioner must be able to demonstrate both that his claim is meritorious and that he was justified in raising it late; rather, we expect that the district court will give appropriate weight to each of those factors according to the circumstances of a particular case.

Adams, 2005 UT 62, ¶ 16. To demonstrate ineffective assistance of counsel, Nixon must satisfy the two-prong test established in Strickland v. Washington, 466 U.S. 668 (1984), and prove that his counsel (1) rendered deficient performance which fell below an objective standard of reasonable professional judgment and (2) counsel's deficient performance prejudiced him. See id. at 687-92. Nixon raises three arguments that his defense counsel was ineffective. He asserts that his attorney (1) failed to discuss with him the possibility of a self-defense claim, (2) was likely high on drugs at the time of Nixon's plea and sentencing, and (3) did not take Nixon's phone calls and only met with him three times in six months.

We are not persuaded by Nixon's claim that his attorney was ineffective for failing to discuss with him the possibility of a self-defense claim since Nixon provided no factual basis for such a defense. Nixon does not assert that his former wife had been violent toward him before or during the incident which led to his being charged with attempted murder. Instead, Nixon asserts only that he and his wife had a "history of violence." Without some factual basis for a self-defense claim, we cannot conclude that Nixon's counsel was deficient for failing to discuss said defense. Nixon's second claim likewise fails for Nixon's failure to provide some evidence to demonstrate that his trial attorney was on drugs or impaired at the time of his plea or sentencing.<sup>2</sup>

We next consider Nixon's claim that his attorney was ineffective for failing to take Nixon's phone calls and only meeting with him three times in six months. Nixon does not provide any evidence that his counsel was deficient simply as a result of the limited amount of time spent on the case. If the limited time resulted in counsel neglecting an otherwise viable defense or failing to adequately explain the matter to an extent reasonably necessary to permit Nixon to make informed decisions,

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<sup>2</sup>Nixon is represented by new counsel on appeal.

Nixon does not point us to any such claims. Thus, we conclude that Nixon's counsel was not ineffective based solely on the amount of time he spent on the case. See Nicholls, 2009 UT 12, ¶ 38 (noting the supreme court's prior refusal "to hold that counsel is ineffective based on the amount of time counsel spent working on the case or consulting with a client"); Parsons v. Barnes, 871 P.2d 516, 526 (Utah 1994) (declining "to determine what amount of time counsel must spend with a defendant to ensure that the representation does not fall below an objective standard of reasonableness"). Because Nixon has failed to satisfy the first prong of Strickland pertaining to each of his ineffective assistance of counsel claims, we need not reach the second prong. See State v. Diaz, 2002 UT App 288, ¶ 38, 55 P.3d 1131. Based on the above analysis, we conclude that Nixon has failed to demonstrate that his post-conviction ineffective assistance of counsel claims have merit.<sup>3</sup>

Finally, Nixon seeks to excuse his untimely filing by asserting that the district court erred in its determination that he did not take steps to timely file his petition. The district court determined that Nixon provided an inadequate explanation for his delay in filing and explained that

[w]hile the Court accepts that [Nixon's] explanation with regards to the self-defense claim is a plausible reason for delay, it should be noted that [Nixon] raised the very same claims of ineffective assistance of counsel in his Petition for Writ of Coram Nobis filed on May 16, 2006, almost one year prior to his May 11, 2007, petition for post-conviction relief. Additionally, this Court denied the Petition for Writ of Coram Nobis on May 30, 2006, on the grounds that the

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<sup>3</sup>Nixon also asserts that the district court erred by dismissing his petition without granting him a hearing. Although Nixon does mention this issue in his opening brief, he does not attempt to brief it until the reply brief. "[A]n appellant's reply brief 'shall be limited to answering any new matter set forth in the opposing brief.'" Allen v. Friel, 2008 UT 56, ¶ 8, 194 P.3d 903 (quoting Utah R. App. P. 24(c)). It is insufficient to raise issues in a reply brief. See id. ¶ 16. Thus, this argument is not properly preserved. In any event, Nixon's claim is without merit. Rule 65C of the Utah Rules of Civil Procedure provides only that "[t]he petitioner shall be present before the court at hearings on dispositive issues." Utah R. Civ. P. 65C(k). The rule does not, as Nixon contends, require the court to hold a hearing on every dispositive issue.

appropriate procedure for such claims such as [Nixon's] was post-conviction relief; yet [Nixon] does not explain the 11-month delay from the date in filing his petition. Furthermore, [Nixon] provides no explanation as to why he did not previously raise his claims regarding his counsel's alleged drug use and supposed failure to attend to his client.

On appeal, Nixon asserts that his actions prior to filing his post-conviction relief petition--filing a writ of coram nobis, a writ of habeas corpus, and several other petitions--provides clear evidence that Nixon was acting in an expeditious manner. This argument is without merit and does not provide an explanation for the delay. As a result, we agree with the district court that Nixon has not provided an adequate explanation for his delay in filing his petition for post-conviction relief.

In sum, Nixon's claims are without merit and he does not have an acceptable reason for the untimely filing of his petition for post-conviction relief. Therefore, we affirm the district court's dismissal of Nixon's petition.

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William A. Thorne Jr.,  
Associate Presiding Judge

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WE CONCUR:

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Pamela T. Greenwood,  
Presiding Judge

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Gregory K. Orme, Judge