

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID PAUL LEWIS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45004

**FILED**

**OCT 10 2006**

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court denying appellant David Paul Lewis' post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On April 27, 2001, the district court convicted Lewis, pursuant to a plea of nolo contendere, of one count each of second-degree murder, attempted murder and possession of a firearm by an ex-felon. The district court sentenced Lewis to serve a term of life in the Nevada State Prison with the possibility of parole after ten years for second-degree murder, a consecutive term of 24 to 240 months for attempted murder and a concurrent term of 12 to 72 months for possession of a firearm by an ex-felon. This court dismissed Lewis' appeal from his judgment of conviction and sentence for lack of jurisdiction.<sup>1</sup>

On November 7, 2003, Lewis filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

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<sup>1</sup>Lewis v. State, Docket No. 41161 (Order Dismissing Appeal, April 28, 2003).

State moved to dismiss the petition. Lewis opposed the motion to dismiss. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent Lewis. After conducting an evidentiary hearing, the district court denied Lewis' petition. On appeal, this court reversed the order denying the petition and remanded the matter to the district court for an evidentiary hearing to be held with Lewis present.<sup>2</sup>

The district court appointed counsel to represent Lewis at the second evidentiary hearing. On February 25, 2005, the district court held the second evidentiary hearing with both Lewis and appointed counsel present. On March 8, 2005, the district court denied Lewis' petition as untimely. This appeal followed.

Lewis argues that the district court erred in determining that he failed to demonstrate good cause to excuse the untimely filing of the petition. Lewis argues that he demonstrated good cause for the delay in filing his petition under this court's holding in Hathaway v. State,<sup>3</sup> and prejudice was presumed. We disagree.

Lewis filed his petition more than two years after entry of the judgment of conviction. Therefore, the petition was untimely filed.<sup>4</sup> Lewis' petition was procedurally barred absent a demonstration of good cause for the delay and prejudice.<sup>5</sup> In Hathaway, this court held that "a

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<sup>2</sup>Lewis v. State, 42966 (Order of Reversal and Remand, November 4, 2004).

<sup>3</sup>119 Nev. 248, 71 P.3d 503 (2003).

<sup>4</sup>See NRS 34.726(1).

<sup>5</sup>See id.

petitioner can establish good cause for the delay under NRS 34.726(1) 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."<sup>6</sup> This court "will not disturb a trial court's discretion in determining the existence of good cause except for clear cases of abuse."<sup>7</sup>

Both Lewis and his trial counsel, Alzora Jackson-Winder, testified at the evidentiary hearing. Jackson-Winder testified that although the appeals unit of her office did not send Lewis a letter informing him of his right to an appeal, she thoroughly reviewed the guilty plea agreement with Lewis, including the portion that advised him of his limited right to appeal. Jackson-Winder also testified that she discussed appeals with Lewis after he indicated he was having second thoughts about entering the guilty plea, and she informed him that she thought he should go forward with the guilty plea and she would file documents on his behalf in an attempt to obtain relief from the pardon's board. Both Lewis and Jackson-Winder testified that Lewis never asked Jackson-Winder to file an appeal on his behalf. However, Lewis also testified that because Jackson-Winder informed him she would file documents on his behalf he believed she was filing an appeal for him. The testimony also revealed that Lewis waited approximately eleven months after he found out that Jackson-Winder did not file a direct appeal to file his petition. The district court found that Lewis failed to demonstrate that he had a

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<sup>6</sup>Hathaway, 119 Nev. at 255, 71 P.3d at 508.

<sup>7</sup>Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

reasonable belief that Jackson-Winder was pursuing an appeal on his behalf. The district court further found that, even if Lewis reasonably believed Jackson-Winder was pursuing an appeal on his behalf, it was not reasonable for Lewis to wait eleven months before filing his petition. Finally, the district court found that Lewis' IQ of 84 and his fourth to sixth grade education was not good cause to excuse the delay in filing the petition. We conclude that the district court's findings are supported by the evidence and that the district court did not err in determining that Lewis failed to demonstrate good cause to excuse the procedural bar.

Lewis also argues that he should not have been required to show prejudice at the evidentiary hearing. As noted above, to overcome the procedural bar for the filing of an untimely petition, Lewis had to demonstrate good cause for the delay and prejudice.<sup>8</sup> Lewis failed to demonstrate that Jackson-Winder neglected to file an appeal on his behalf after being requested to do so. Accordingly, prejudice was not presumed in this matter.<sup>9</sup> Because prejudice was not presumed, the district court did not err by inquiring into prejudice at the evidentiary hearing.

Finally, Lewis argues that the district court erred and exceeded the scope of the evidentiary hearing by reaching the merits of his claims. Our review of the record on appeal indicates that Lewis' arguments for good cause to excuse the untimely filing of his petition were very similar to and based upon the claims raised in the petition. Because at least a partial resolution of the claims in the petition was necessary in

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<sup>8</sup>See NRS 34.726(1).

<sup>9</sup>See Hathaway, 119 Nev. at 254, 71 P.3d at 507.

order to evaluate Lewis' claims for good cause, we conclude that the district court did not err by addressing these claims on their merits at the evidentiary hearing.

Having considered Lewis' contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.  
Becker

Hardesty, J.  
Hardesty

Parraguirre, J.  
Parraguirre

cc: Hon. Sally L. Loehrer, District Judge  
Robert L. Langford & Associates  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk