

IN THE SUPREME COURT OF THE STATE OF NEVADA

GEORGE WILLIAM GIBBS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45893

FILED

NOV 13 2006

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

ORDER VACATING JUDGMENT AND REMANDING

This is a proper person appeal from an order of the district court denying appellant George Gibbs's post-conviction motion for leave to file a supplemental petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

The district court convicted Gibbs, pursuant to a jury verdict, of one count of manufacturing or compounding a controlled substance, one count of conspiracy to manufacture or compound a controlled substance, one count of trafficking in a controlled substance, four counts of using a minor to produce pornography, eleven counts of lewdness with a child under fourteen years of age, three counts of possession of visual presentation depicting the sexual conduct of a person under sixteen years of age, and nine counts of sexual assault on a minor under fourteen years of age. The district court sentenced Gibbs to various concurrent and consecutive terms of imprisonment, amounting to life with the possibility

of parole. This court affirmed the judgment of conviction.¹ The remittitur issued on July 1, 2003.

On June 17, 2005, Gibbs filed a motion for leave to file "Petitioner's First Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction)." The State opposed the motion, arguing that Gibbs was not entitled to supplement his petition because he did not file one, and that Gibbs's motion must be construed as an original petition and denied as untimely. Gibbs replied that trial and appellate counsel Paul Wommer's refusal to surrender copies of documents pertaining to his case, and his reasonable belief that attorney David Schieck had filed a timely petition constituted good cause to excuse the procedural defect. The State responded and argued that Gibbs's reliance on Hathaway v. State was misplaced.²

On July 18, 2005, the district court denied Gibbs's motion after finding that the proper person post-conviction petition for a writ of habeas corpus apparently prepared in May 2004 was never filed in the district court, it was Gibbs's responsibility to ensure that the petition was filed within one year of the date the remittitur issued, Gibbs's mistaken belief that his petition had been filed is not good cause for the delay, and Gibbs's motion for leave to file a supplemental petition must be denied as untimely pursuant to NRS 34.726(1). This proper person appeal follows.

¹Gibbs v. State, Docket No. 39643 (Order of Affirmance, June 3, 2003).

²119 Nev. 248, 71 P.3d 503 (2003).

Gibbs contends that the district court erred in denying his petition. He claims, among other things, that attorney David Schieck's failure to file his petition constituted good cause to overcome the procedural bar. We agree.

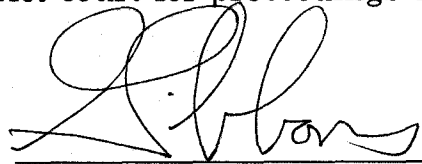
In Hathaway, we stated that "a petitioner's reliance upon his counsel to file a direct appeal is sufficient cause to excuse a procedural default if the petitioner demonstrates: '(1) he actually believed his counsel was pursuing his direct appeal, (2) his belief was objectively reasonable, and (3) he filed his state post-conviction relief petition within a reasonable time after he should have known that his counsel was not pursuing his direct appeal.'"³

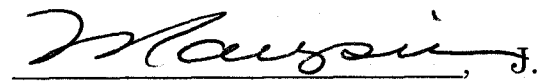
Gibbs's good cause allegation is analogous to Hathaway. Gibbs believed that Schieck was going to file his petition; Schieck informed him in writing that the district court judge had his petition; and Gibbs's supplemental petition was filed within a reasonable time after he learned that his petition may not have been filed. Because Gibbs's allegation, if true, would constitute good cause to overcome the procedural bar, we conclude that the district court erred in denying his petition without first conducting an evidentiary hearing.⁴ Accordingly, we

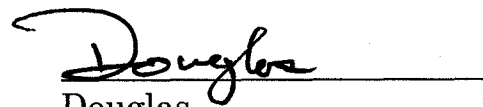
³Id. at 254, 71 P.3d at 507-08 (quoting Loveland v. Hatcher, 231 F.3d 640, 644 (9th Cir. 2000)).

⁴See Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

ORDER the judgment of the district court VACATED AND REMAND this matter to the district court for proceedings consistent with this order.⁵


_____, J.
Gibbons


_____, J.
Maupin


_____, J.
Douglas

cc: Honorable Jackie Glass, District Judge
George William Gibbs Jr.
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁵We have reviewed Gibbs's remaining claims of error and concluded that they are without merit. We have also reviewed all documents that he has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted.