

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL RAY LEWIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50819

FILED

JUL 10 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *h. L. L. L.*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On July 17, 2006, the district court convicted appellant, pursuant to a guilty plea, of one count of conspiracy to commit robbery and one count of robbery with the use of a deadly weapon, victim over the age of 60. The district court sentenced appellant to serve in the Nevada State Prison a term of 12 to 48 months for conspiracy and two consecutive terms of 24 to 84 months for the robbery count, the latter to be served concurrently with the former. No direct appeal was taken.

On July 26, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On that same date, appellant filed a motion for the appointment of counsel. The State filed a motion to dismiss the petition on the ground that the petition was untimely filed. Appellant filed a response. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. On November 29, 2007, after conducting an evidentiary

hearing, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed: (1) his trial counsel was ineffective for failing to inform him that the offense of robbery with the use of a deadly weapon was not probationable; (2) his trial counsel was ineffective for failing to fully explain the deadly weapon enhancement; (3) his trial counsel was ineffective for coercing his guilty plea; (4) his trial counsel was unprepared and failed to adequately investigate; (5) his trial counsel was ineffective for failing to call any family or other available witnesses and failed to present mitigating evidence; (6) his trial counsel was ineffective for failing to adequately communicate; and (7) his trial counsel was ineffective for informing him that he did not have a right to appeal and failing to file an appeal despite his request to do so. Appellant further claimed that the district court erred in accepting the guilty plea.

Having reviewed the record on appeal, we conclude that we cannot affirm the order of the district court denying the petition. The district court denied claims one through six on the merits after hearing testimony on these claims at the evidentiary hearing.¹ However, no testimony was presented regarding the seventh claim—trial counsel was ineffective for informing appellant that he did not have a right to appeal and failing to file an appeal despite his request to do so. Compounding this omission, it appears from the record on appeal that the district court failed to consider the procedural time bar. The petition was filed more

¹Appellant's claim that the district court erred in accepting his guilty plea fell outside the scope of claims permissible. See NRS 34.810(1)(a).

than one year after entry of the judgment of conviction; thus, the petition was untimely filed and procedurally barred absent a demonstration of cause for the delay and undue prejudice.² Although appellant did not set forth a good cause statement on the face of his petition, appellant claimed in his response to the motion to dismiss that his petition was delayed because he believed trial counsel had filed an appeal on his behalf and only learned nine months into his custody that trial counsel had not done so. Appellant claimed that his lack of legal knowledge and access to the prison law library prevented him from raising this claim earlier.

In Harris v. Warden, this court held that “an allegation that trial counsel was ineffective in failing to inform a claimant of the right to appeal from the judgment of conviction, or any other allegation that a claimant was deprived of a direct appeal without his or her consent, does not constitute good cause to excuse the untimely filing of a petition pursuant to NRS 34.726.”³ However, this court clarified its holding in Harris and held that “an appeal deprivation claim is not good cause if that claim was reasonably available to the petitioner during the statutory time period.”⁴ A petitioner may, however, establish good cause for the delay “if the petitioner establishes that the petitioner reasonably believed that counsel had filed an appeal and that the petitioner filed a habeas corpus

²See NRS 34.726(1).

³Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998).

⁴Hathaway v. State, 119 Nev. 248, 253, 71 P.3d 503, 507 (2003).

petition within a reasonable time after learning that a direct appeal had not been filed.”⁵

The record on appeal does not belie appellant’s appeal deprivation claim.⁶ Therefore, we reverse the order of the district court denying the petition and remand this matter for an evidentiary hearing to determine whether there was good cause to excuse the procedural bar. In order to determine whether there was good cause, the district court must conduct an evidentiary hearing on the appeal deprivation claim and apply the factors set forth in Hathaway: (1) whether petitioner actually believed that trial counsel had filed a direct appeal; (2) was the belief objectively reasonable; and (3) did the petitioner file his petition within a reasonable time after he should have known that counsel had not filed the notice of appeal.⁷ The district court may exercise its discretion to appoint post-conviction counsel.⁸

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.⁹ Accordingly, we

⁵Id. at 255, 71 P.3d at 508.

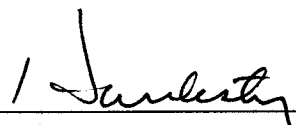
⁶Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

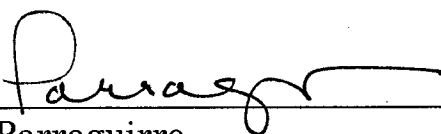
⁷Hathaway, 119 Nev. at 254, 71 P.3d at 507-08

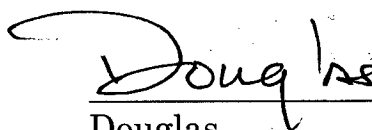
⁸See NRS 34.750(1). We note that appellant filed a motion for the appointment of counsel and the record contains a “certificate of inmate’s institutional account.”

⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

ORDER the judgment of the district court REVERSED AND
REMAND this matter to the district court for proceedings consistent with
this order.¹⁰


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Donald M. Mosley, District Judge
Michael Ray Lewis
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹⁰This order constitutes our final disposition of this appeal. Any
subsequent appeal shall be docketed as a new matter.