

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER KEALA KAULA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51726

FILED

DEC 11 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Fifth Judicial District Court, Nye County; John P. Davis, Judge.

On June 7, 2006, the district court convicted appellant, pursuant to a guilty plea, of lewdness with a child under 14 years of age. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after 10 years. Appellant did not file a direct appeal.

On September 28, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent appellant in post-conviction proceedings, and post-conviction counsel filed a supplement to the petition. The State opposed the petition. Following an evidentiary

hearing, the district court dismissed appellant's petition on April 14, 2008. This appeal follows.

Appellant filed his petition more than 15 months after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.¹ Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.²

In an attempt to demonstrate cause for the delay, appellant argued that he had actually and reasonably believed that his attorney was pursuing an appeal on his behalf. As appellant argued, in Hathaway v. State, this court established that

[A] 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.³

Appellant testified at the evidentiary hearing that he remembered "discussing" the possibility of an appeal with his attorney when he signed

¹See NRS 34.726(1).

²See id.

³Hathaway v. State, 119 Nev. 248, 255, 71 P.3d 503, 508 (2003).

the plea agreement, and that he “assumed” that his attorney had filed an appeal. Each of appellant’s attorneys testified that appellant did not ask them to file an appeal. They also testified that had appellant requested an appeal, they would have complied with the request. Ultimately, the district court concluded that appellant’s testimony was not credible, and that he failed to establish good cause for his delay in filing.

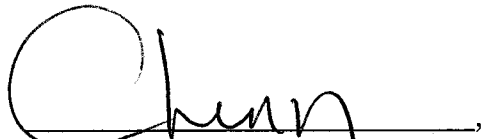
Appellant argues that the district court erred in determining that he had failed to demonstrate good cause. Given the superior position of the district court to evaluate the credibility of witness testimony and evidence, we conclude that the district court did not err in determining that appellant failed to establish good cause.⁴ As indicated in Hathaway, to establish good cause for delay, a petitioner must demonstrate that he both believed that his attorney was filing an appeal, and that his belief was reasonable. While appellant may have believed that his attorney filed an appeal, substantial evidence supports the conclusion that this belief

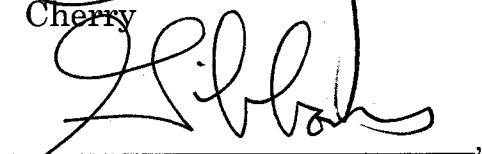
⁴See Rincon v. State, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) (noting that because the district court is in the best position to evaluate the credibility of witness and evidence, a district court’s findings of fact will not be overturned on appeal if they are supported by substantial evidence).


was not reasonable. Therefore, the district court did not err in dismissing appellant's petition.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.⁵ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Saitta

cc: Hon. John P. Davis, District Judge
Gibson & Kuehn
Attorney General Catherine Cortez Masto/Carson City
Nye County District Attorney/Pahrump
Nye County District Attorney/Tonopah
Nye County Clerk

⁵See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).