

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHNATHAN LUCKEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56605

FILED

APR 06 2011

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

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Appellant filed his petition on May 11, 2010, more than one year after entry of the judgment of conviction on May 7, 2009.² Thus, appellant's petition was untimely filed. NRS 34.726(1). Appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice. Id.

Appellant signed and dated the petition on April 22, 2010. Appellant did not answer question number 19, regarding an untimely petition, and did not set forth good cause because it appears that he believed the petition was timely filed. The State filed a motion to dismiss

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²The petition was stamped "received" on May 10, 2010. The receipt and filing dates are both outside the one-year time period.


the petition, arguing that the petition was procedurally time barred and appellant had failed to set forth a good cause statement in his petition. The district court orally denied the petition in court on July 14, 2010. The written order indicates that the district court dismissed the petition as untimely because the prison mailbox rule does not apply to the filing of a post-conviction petition for a writ of habeas corpus and would not provide a different date to measure timeliness. Gonzales v. State, 118 Nev. 590, 594-95, 53 P.3d 901, 903-04 (2002). In dismissing the petition, the district court indicated that the court had no information about when the petition was received and that appellant had mailed the petition two weeks before the deadline. Based upon our review of the record on appeal, we conclude that the district court erred in dismissing the petition without conducting further proceedings.

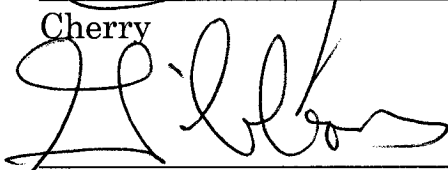
First, we note that the district court's decision on the petition was premature as it was made before the expiration of appellant's time to file a response to the State's motion to dismiss. NRS 34.750(4) (providing that the petitioner shall have 15 days after service of a motion to dismiss to file a response); NRS 178.482 (providing 3 days shall be added to a prescribed time period when an action is required after service of the motion); NRCP 6(e). This premature decision prevented appellant from asserting that the delay in filing the petition was due to official interference, an assertion made by appellant in a statement attached to his notice of appeal.

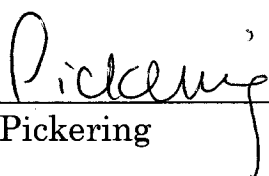
Second, while the district court correctly determined that the prison mailbox rule does not apply to a post-conviction petition for a writ of habeas corpus, the district court erred in failing to conduct an inquiry into whether an impediment external to the defense excused the delay in filing the petition. In Gonzales, this court recognized that a petitioner may be able to demonstrate good cause to excuse an untimely-filed

petition based on official interference. 118 Nev. at 595, 53 P.3d at 904. As acknowledged by the district court in the written order, the record on appeal does not contain any indication when the petition was received by prison officials for mailing. Given the district court's uncertainty about when the petition was received and the disparity between the date the petition was signed by appellant, April 22, 2010, and the date the petition was received in the district court, May 10, 2010, the district court should have conducted an evidentiary hearing to determine if official interference played a role in the delay in filing the petition. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Accordingly, we

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


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Pickering

cc: Hon. Linda Marie Bell, District Judge
Johnathan Luckey
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk