

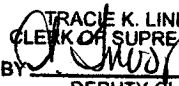
IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM H. PLATT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57092

FILED

MAY 10 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
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. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appellant filed his petition on September 21, 2010, nearly two years after entry of the judgment of conviction on October 20, 2008. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice. See NRS 34.726(1).

In an attempt to demonstrate cause, appellant claimed that he requested his counsel to file an appeal and only learned sometime after August 3, 2010, that an appeal had not been filed.


Based upon the record on appeal, we cannot affirm the district court's order dismissing the petition. No evidentiary hearing was conducted on whether appellant demonstrated good cause to overcome the procedural bar and whether appellant was deprived of a direct appeal

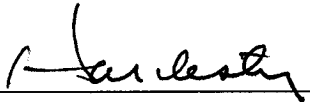
without consent. Because the factual underpinnings of an appeal deprivation claim in general occur outside the record on appeal, an evidentiary hearing is essential for determining whether appellant was deprived of a direct appeal without his consent, Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994); Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003), and whether appellant filed his petition within a reasonable time of learning that no direct appeal had been filed on his behalf. Hathaway, 119 Nev. at 255, 71 P.3d at 508.

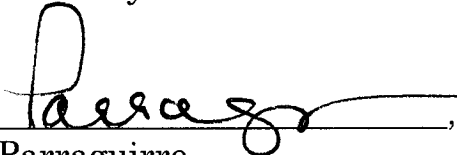
Therefore, we reverse the order of the district court dismissing the petition and remand this matter for an evidentiary hearing to determine whether there was good cause to excuse the procedural bar. In making this determination, the district court should apply the factors set forth in Hathaway: (1) whether petitioner actually believed that trial counsel had filed a direct appeal, (2) was the belief objectively reasonable, and (3) did petitioner file his petition within a reasonable time after he should have known that counsel had not filed the notice of appeal. Hathaway, 119 Nev. at 254, 71 P.3d at 507-08. The district court may exercise its discretion to appoint post-conviction counsel to assist appellant with the evidentiary hearing. NRS 34.750(1). If the district court determines that appellant demonstrated good cause and that appellant was deprived of a direct appeal without his consent, the district court shall follow the procedures outlined in NRAP 4(c). If the district court determines that appellant failed to demonstrate good cause, the

district court shall enter a final written order to that effect. Accordingly,
we

ORDER the judgment of the district court REVERSED AND
REMAND this matter to the district court for proceedings consistent with
this order.¹


_____, J.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Steven P. Elliott, District Judge
William H. Platt
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

¹This order constitutes our final disposition of this appeal. Any
subsequent appeal shall be docketed as a new matter.