

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL A. FRIMMEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58190

FILED

SEP 30 2011

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

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

Appellant filed his petition on December 7, 2010, more than one year after entry of the judgment of conviction on April 16, 2009. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Appellant's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. See id. Good cause must be an impediment external to the defense. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

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).

Appellant first claimed that he had cause for the delay due to his lack of education and legal training and his indisputable mental illness. Appellant failed to demonstrate an impediment external to the defense excused his delay. Id. at 252, 71 P.3d at 506. Appellant failed to demonstrate that his lack of education and any mental issues prevented him from filing a timely petition.² Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988).

Next, appellant claimed that he had cause for the delay because he believed his trial counsel had filed a notice of appeal after being requested to do so and he was not informed otherwise until he wrote to his counsel who represented him at the sentencing hearing.

Based upon our review of the record on appeal, we cannot affirm the decision of the district court to deny this good cause claim without an evidentiary hearing. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that an evidentiary hearing is required where a petitioner sets forth a claim supported by specific factual allegations, not belied by the record on appeal, which if true would entitle the petitioner to relief). A petitioner may establish good cause for the delay in filing a petition "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

²To the extent that appellant appeared to suggest that the time for filing a petition was tolled after he filed a request for the appointment of post-conviction counsel, appellant was mistaken as NRS 34.726(1) does not contain a tolling provision for the request for counsel.


learning that a direct appeal had not been filed.”³ Hathaway, 119 Nev. at 255, 71 P.3d 508. The record does not belie his claim that he believed his counsel had filed an appeal on his behalf. In order to determine whether there was cause for the delay, 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 petitioner file his petition within a reasonable time after he should have known that counsel had not filed the notice of appeal.⁴ If the district court determines that appellant was deprived of a direct appeal without his consent, the district court shall follow the procedures set forth in NRAP 4(c) and resolve any other claims without application of the procedural time bar. If the district court determines that appellant was not deprived of a direct appeal without his consent, and thus, there was no good cause for the late petition, the district court shall enter a final written order to that effect.

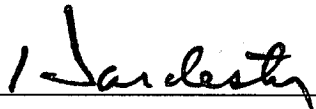
Accordingly, we

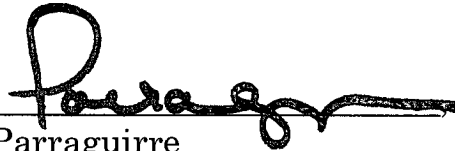
³Id. at 255, 71 P.3d at 508.

⁴We note that during the one-year period for filing a timely petition appellant filed a motion for production of documents based on the alleged discharge of his attorney of record, a motion for withdrawal of counsel, and a motion for the appointment of post-conviction counsel. The filing of these documents may suggest that appellant did not believe he had a direct appeal pending when he filed the documents. However, the district court made no specific finding as to whether the filing of these documents indicated that appellant did not reasonably believe that counsel was pursuing a direct appeal on his behalf.

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.⁵


_____, J.
Douglas


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Jessie Elizabeth Walsh, District Judge
Michael A. Frimmel
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁵We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.