

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCISCO GABRIEL ESCAMILLA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59040

FILED

JAN 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

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; Jerome T. Tao, Judge.

Appellant filed his petition on May 2, 2011, almost two years after issuance of the remittitur on direct appeal on June 9, 2009. Escamilla v. State, Docket No. 51725 (Order of Affirmance, May 12, 2009). 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 id. An ineffective assistance of counsel claim may be good cause only where the right to effective assistance of counsel exists, McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996), and where the claim of ineffective assistance of

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).

counsel is not itself procedurally defaulted. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

Appellant claimed that he had cause for the delay because he was not served with a copy of the dispositional order in the direct appeal contrary to the purported requirements of Lemmond v. State, 114 Nev. 219, 954 P.2d 1179 (1998) (discussing timeliness of appeal from an order denying a habeas corpus petition) and Klein v. Warden, 118 Nev. 305, 43 P.3d 1029 (2002) (discussing timeliness of appeal from an order denying a habeas corpus petition and rejecting civil tolling provisions). We conclude that the district court did not err in rejecting this good cause argument. Appellant failed to provide any facts regarding when he learned that his direct appeal had been resolved, and thus, he failed to demonstrate cause for the entire length of his delay. Further, it appears that appellant was aware of the resolution of his direct appeal within months after the issuance of the remittitur as he filed a motion to terminate his relationship with counsel on September 29, 2009, which was granted on October 13, 2009, and a motion for production of documents and case files, which was granted on December 22, 2009, within the one-year time period for filing a timely post-conviction petition for a writ of habeas corpus. The holdings in Lemmond and Klein have no applicability in the instant situation, and thus, failed to provide good cause for the delay.

To the extent that appellant asserted that he had good cause because appellate counsel failed to inform him of the denial of his appeal, even assuming that counsel had a constitutional duty to inform appellant of the resolution of the direct appeal, appellant failed to demonstrate that

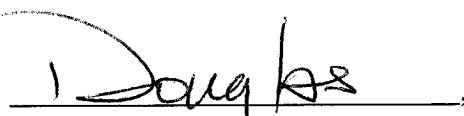
he was prejudiced by counsel's performance as documents in the record indicate that appellant learned of the resolution of the direct appeal within the one-year period as discussed above.² Strickland v. Washington, 466 U.S. 668, 687-88, 697 (1984) (providing a two-prong test for evaluating ineffective assistance of counsel: deficiency and prejudice, and that both prongs must be proven); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in Strickland). Thus, this claim would not provide good cause in the instant case because the ineffective assistance of counsel claim would not explain the entire length of the delay. See Hathaway, 119 Nev. at 252, 71 P.3d at 506.


To the extent that appellant asserted that appellate counsel's failure to inform him about the availability of post-conviction remedies and the procedures for such remedies constituted good cause, appellant failed to demonstrate good cause as appellate counsel did not have a constitutional duty to inform appellant about the availability of or procedures for post-conviction remedies. See McKague, 112 Nev. at 164, 912 P.2d at 258; see also Pena v. U.S., 534 F.3d 92, 95-96 (2d Cir. 2008) (holding that the right to the effective assistance of counsel in a first-tier appeal does not encompass a requirement that an attorney inform his client of the possibility of certiorari review or that the attorney assist the client in preparing such a petition); Moore v. Cockrell, 313 F.3d 880, 882

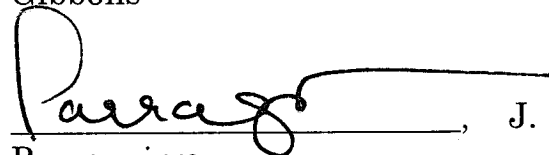
²Further, as discussed earlier, appellant provided no specific facts as to when he learned about the resolution of his direct appeal, leading to a failure to provide good cause for the entire length of his delay.

(5th Cir. 2002) (holding that the right to counsel ends when the decision by the appellate court is entered). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. Jerome T. Tao, District Judge
Francisco Gabriel Escamilla
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk