

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIO J. ANTONACCIO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59302

FILED

MAR 30 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *Angela*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

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; Joseph T. Bonaventure, Senior Judge.

Appellant filed his petition on July 13, 2011, more than five years after entry of the judgment of conviction on October 25, 2005. 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).

To excuse his procedural defects, appellant claimed that he had cause for the delay because he believed his trial counsel had filed a

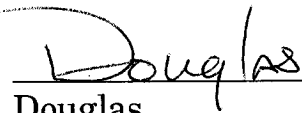
¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).


notice of appeal after being requested to do so and he was never informed otherwise. Appellant also included affidavits from several members of his family stating that counsel had told them that he would appeal. 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, 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 learning that a direct appeal had not been filed." Hathaway, 119 Nev. at 255, 71 P.3d at 508.

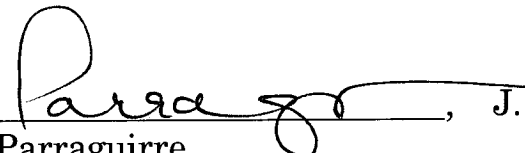
The record does not belie appellant's claim that he believed his counsel had filed an appeal on his behalf. In order to determine whether there was cause for the delay, the district court must conduct an evidentiary hearing on the appeal deprivation claim and apply the factors set forth in Hathaway: (1) whether petitioner actually believed that trial counsel had filed a direct appeal; (2) whether the belief was objectively reasonable; and (3) whether petitioner filed his petition within a reasonable time after he should have known that counsel had not filed the notice of appeal. 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

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.²


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Chief Judge, The Eighth Judicial District Court
Hon. Joseph T. Bonaventure, Senior Judge
Mario J. Antonaccio
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein.