

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID L. GRAY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 60362

**FILED**

**DEC 12 2012**

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order denying a post-conviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Appellant filed his petition on November 4, 2011, more than two years after entry of the judgment of conviction on September 1, 2009. Thus, appellant's petition was untimely filed.<sup>2</sup> 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 and must afford a legal excuse. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

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<sup>1</sup>This 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).

<sup>2</sup>Because appellant did not challenge the revocation of probation, the January 20, 2011, order revoking probation and amending the judgment of conviction would not provide good cause in the instant case. See Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).

Appellant claimed that he had cause to excuse his delay because he requested that his trial counsel file an appeal, he was misled into believing an appeal had been filed, and he only learned that no appeal had been filed in August 2011 when he received his case files from counsel. Appellant also alleged that he was without adequate access to a law library because he was incarcerated in various jail facilities during the one-year period.

The district court conducted an evidentiary hearing. Trial counsel testified that appellant never asked for an appeal. At the conclusion of the hearing, the district court stated that it felt that appellant's "moving through the system" explained his delay and stated that the court preferred deciding a case on the merits rather than the procedural bar. The district court then denied relief. The written order, prepared by the State, appears to deny the petition both on the merits of the claims raised and the procedural bar.

Based upon our review of the record on appeal, we conclude that the petition was procedurally time barred and without good cause, and we affirm the order denying the petition on this basis. Application of the procedural bars is mandatory, State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005); thus, a preference to decide a case on the merits is not a legal excuse to a procedural bar. Further, the record does not support the district court's finding of cause for the delay in the instant case. Even assuming, without deciding, that the facilities that appellant was incarcerated in during the one-year period did not have adequate law

library access,<sup>3</sup> appellant failed to explain the entirety of his delay when it appears from his recitation of facts that he was not incarcerated for at least a portion of the time before his probation was revoked.<sup>4</sup> Finally, the appeal-deprivation claim did not provide cause for the delay because appellant failed to demonstrate that he asked for an appeal, that he reasonably believed an appeal was pending, and that he filed his petition within a reasonable time of learning no appeal had been taken. Hathaway, 119 Nev. at 255, 71 P.3d at 508.

Moreover, appellant failed to demonstrate that he was unduly prejudiced by the denial of his petition as procedurally barred because his claims for relief lacked merit. Appellant failed to demonstrate that his trial counsel was ineffective for failing to file an appeal. See Toston v. State, 127 Nev. \_\_\_, \_\_\_, 267 P.3d 795, 799 (2011). Trial counsel testified that she was never asked to file an appeal, and in rejecting this claim, the district court found appellant's trial counsel's testimony to be more credible. Appellant further failed to demonstrate that his counsel's


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<sup>3</sup>We note that this assertion was not supported by any proof from appellant.

<sup>4</sup>Appellant likewise did not explain why his access to a law library was inadequate after his probation was revoked and he was sent to prison. Although the district court orally noted that appellant may not have had adequate access as he was moving through the system, this does not account for those periods when he was not incarcerated, the period when he was incarcerated in prison, the fact that appellant's incarceration was a result of his conduct on probation, and the fact that appellant had an attorney helping him in proceedings that followed entry of the judgment of conviction. It does not appear from the record that appellant expressed any interest in challenging the validity of his judgment of conviction until after his probation was revoked and he was sent to prison—after the one-year period for filing a timely petition.

performance was deficient or that he was prejudiced when counsel advised him to enter a guilty plea and in clarifying the factual basis for the plea during the plea canvass. See Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996). Therefore, we conclude that the petition was procedurally barred and without good cause. Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>5</sup>

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Hardesty

cc: Hon. David B. Barker, District Judge  
David L. Gray  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>5</sup>We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.