

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAY ANTONIO AZCARATE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60872

FILED

DEC 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY Tracie K. Lindeman
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from an order denying a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.

Appellant filed his petition on September 8, 2011, more than two years after issuance of the remittitur on direct appeal on June 2, 2009. Azcarate v. State, Docket No. 50616 (Order of Affirmance, May 5, 2009). Thus, appellant's petition was untimely filed and procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. See NRS 34.726(1). 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). An evidentiary hearing is warranted on an allegation of cause if the allegation is supported by specific facts, not belied by the record, that if true would provide cause for the delay in filing

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).

the petition. See generally Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).


Appellant claimed that he had cause to excuse his delay because he was not informed by his appellate counsel, Mr. David Amesbury, of the resolution of his direct appeal. Appellant claimed that he only learned in May 2011 that his appeal had been resolved. No evidentiary hearing was conducted on this allegation of cause for the delay.

Based upon our review of the record on appeal, we cannot affirm the decision of the district court to deny appellant's petition without conducting an evidentiary on appellant's cause argument. The record is silent as to whether appellate counsel informed his client of the resolution of the direct appeal and this information is critical to the proper person litigant to meet the stringent deadline imposed by NRS 34.726. Naturally and reasonably, a client is not likely to pursue post-conviction relief while he believes his direct appeal is pending. See Hathaway, 119 Nev. at 254, 71 P.3d at 507. Nothing in the record indicates when appellant learned or should have learned of the resolution of his direct appeal.² An evidentiary hearing is necessary to determine whether appellant actually believed his direct appeal was still pending, whether that belief was objectively reasonable, and whether he filed his petition within a reasonable time after he should have known that his appeal had been resolved. See id. at

²While appellant submitted post-marked envelopes of correspondence with the clerk of the district court and the clerk of this court, those envelopes do not indicate the contents of the correspondence and do not by themselves establish when appellant learned or should have learned of the resolution of his direct appeal.

254-55, 71 P.3d at 507-08. While this matter is complicated by the passing of appellant's counsel Mr. Amesbury, this complication does not eliminate the necessity of an evidentiary hearing in the instant case. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.³


_____, J.
Saitta


_____, J.
Pickering


_____, J.
Hardesty

cc: Hon. Valorie J. Vega, District Judge
Ray Antonio Azcarate
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³The district court may exercise its discretion in determining whether to appoint counsel to assist appellant in his litigation of this issue in the district court. See NRS 34.750(1).