

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RENE ROSALES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 66369

**FILED**

APR 15 2015

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

*ORDER OF AFFIRMANCE*

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Senior Judge.

Appellant Rene Rosales filed his petition on October 22, 2014, more than one year after entry of the judgment of conviction on October 12, 2012. Thus, Rosales' 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).

Rosales first claimed that his counsel's failure to file a direct appeal constituted good cause. The Nevada Supreme Court has held that an appeal-deprivation claim may in certain circumstances provide good cause to excuse the filing of an untimely petition. See *Hathaway v. State*, 119 Nev. 248, 253-54, 71 P.3d 503, 507 (2003). "[T]rial counsel has a duty to file a direct appeal when the client's desire to challenge the conviction

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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).

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or sentence can be reasonably inferred from the totality of the circumstances.” *Toston v. State*, 127 Nev. \_\_\_, \_\_\_, 267 P.3d 795, 801 (2011). We review a district court’s good cause determination de novo, giving deference to the court’s factual findings if they are supported by substantial evidence and not clearly wrong. *See State v. Huebler*, 128 Nev. \_\_\_, \_\_\_, 275 P.3d 91, 95 (2012).

Here, counsel testified at the evidentiary hearing that Rosales had only hired him to file a motion to withdraw guilty plea and that he did not remember Rosales asking him to file a direct appeal. Counsel also testified that he had explained to Rosales that Rosales had 30 days to file a notice of appeal after entry of the judgment of conviction and that he should contact a different attorney if he wanted to file a direct appeal. Rosales testified that he asked counsel to file a direct appeal, but the district court found that Rosales’ testimony was not credible. The district court concluded that Rosales did not ask counsel to file a notice of appeal. Our review of the record reveals that the district court’s factual findings are supported by substantial evidence. *See Toston*, 128 Nev. at \_\_\_, 267 P.3d at 801 (explaining that the defendant has the burden to inform counsel that he wishes to pursue a direct appeal). Therefore, the district court did not err in denying this good cause claim.


Second, Rosales claimed that federal equitable tolling standards should excuse the procedural bar. The Nevada Supreme Court has expressly rejected federal tolling standards, *see Brown v. McDaniel*, 130 Nev. \_\_\_, \_\_\_, 331 P.3d 867, 874 (2014), and accordingly, Rosales failed to demonstrate that this claim provided good cause. Therefore, the district court did not err in denying this good cause claim.

Third, Rosales claimed that the procedural bar should not apply because he would suffer from a fundamental miscarriage of justice.

In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Calderon v. Thompson*, 523 U.S. 538, 559 (1998); *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Rosales did not attempt to demonstrate his factual innocence. Therefore, Rosales failed to show that “it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.” *Calderon*, 523 U.S. at 559 (quoting *Schlup v. Delo*, 513 U.S. 298, 327, (1995)); see also *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537; *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). We conclude that the district court did not err in denying the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Chief Judge, Eighth Judicial District Court  
Hon. Joseph T. Bonaventure, Senior Judge  
Rene Rosales  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk