

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEREK LOWELL KIRK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68452

FILED

DEC 18 2015

TAMIE K. LINDEMAN
CLERK OF APPELLATE COURT
BY: *[Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Lidia Stiglich, Judge.

Appellant Derek Lowell Kirk filed his petition on May 13, 2014, more than one year after entry of the judgment of conviction on March 15, 2013.¹ Thus, Kirk'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). To warrant an evidentiary hearing, a petitioner must raise claims that are supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

¹Kirk's direct appeal was dismissed for lack of jurisdiction because the notice of appeal was untimely filed. *Kirk v. State*, Docket No. 64485 (Order Dismissing Appeal, March 13, 2014). Accordingly, the proper date to measure timeliness is the entry of the judgment of conviction. See *Dickerson v. State*, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

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First, Kirk argues he has good cause because he did not have access to a phone or postage while incarcerated in the county jail and he was therefore unable to contact his attorney during that time. This does not constitute good cause because Kirk fails to demonstrate these issues prevented him from filing a petition over the entire length of his delay. *See Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Moreover, Kirk's claims challenging the validity of his judgment of conviction were reasonably available to be raised in a timely petition, and Kirk does not explain why he could not file a petition after his transfer to state prison. *See id.* Therefore, the district court did not err in denying this good cause claim without conducting an evidentiary hearing.


Second, Kirk appears to argue his counsel's failure to properly pursue a direct appeal provided good cause. The Nevada Supreme Court has held an appeal-deprivation claim may in certain circumstances provide good cause to excuse the filing of an untimely petition. *Id.* at 254-55, 71 P.3d at 507-08. In order to demonstrate cause for the delay, a petitioner must demonstrate he actually believed trial counsel had filed an appeal, the belief was objectively reasonable, and he had filed a post-conviction petition within a reasonable time after learning that no direct appeal had been filed. *Id.* Here, Kirk acknowledged he knew his direct appeal was not timely filed, yet he chose to wait until the Nevada Supreme Court disposed of his untimely direct appeal before he pursued habeas relief. Under these circumstances, Kirk fails to demonstrate cause to excuse his delay. Therefore, the district court did not err in denying this good cause claim without conducting an evidentiary hearing.


Third, Kirk argues the procedural time 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). Kirk did not attempt to demonstrate his factual innocence. Therefore, Kirk fails to show “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 without conducting an evidentiary hearing, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Lidia Stiglich, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk