

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BILLY CEPERO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67950

FILED

NOV 19 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellant Billy Cepero filed his petition on June 24, 2014, more than three years after issuance of the remittitur on direct appeal on January 5, 2011. *Cepero v. State*, Docket No. 55993 (Order of Affirmance, December, 10, 2010). Thus, Cepero'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). 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).

First, Cepero argues he had good cause due to ineffective assistance of appellate and previous postconviction counsel. Cepero fails to demonstrate good cause. A procedurally barred claim of ineffective


assistance of appellate counsel cannot constitute cause for additional claims of ineffective assistance of counsel. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). After conducting an evidentiary hearing, the district court concluded Cepero's claim of ineffective assistance of appellate counsel was procedurally barred because it was reasonably available to be raised at an earlier time, yet Cepero chose to pursue legal remedies for his other criminal cases due to Cepero's belief he had a greater likelihood of success with those matters. Therefore, Cepero's claims of ineffective assistance of appellate counsel did not constitute cause for this untimely petition. Our review of the record reveals the district court's decision is supported by substantial evidence and not clearly wrong.

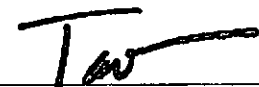
In addition, Cepero was not entitled to the effective assistance of postconviction counsel, *see McKague v. Warden*, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996), and therefore, his claim of ineffective assistance of postconviction counsel did not demonstrate good cause. *See Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 871-72 (2014) (explaining postconviction counsel's performance does not constitute good cause to excuse the procedural bars unless the appointment of postconviction counsel was mandated by statute). Therefore, Cepero fails to demonstrate these claims constituted good cause.


Second, Cepero argues federal equitable tolling standards should excuse the procedural bars and invites us to adopt those standards. However, the Nevada Supreme Court has rejected federal equitable tolling because the plain language of NRS 34.726 "requires a petitioner to demonstrate a legal excuse for any delay in filing a petition." *See id.* at

___, 331 P.3d at 874. Therefore, Cepero did not demonstrate this claim constituted good cause. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Douglas W. Herndon, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk