

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KWAUYSHAUN WILLIAMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69299

FILED

FEB 23 2017

ELIZABETH BROWN
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Kwauyshaun Williams appeals from an order of the district court denying his postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Williams argues the district court erred in denying his petition as procedurally barred. Williams filed his petition on April 24, 2014, almost three years after entry of the judgment of conviction on May 26, 2011.¹ Thus, Williams' petition was untimely filed. *See* NRS 34.726(1). Williams' petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.*

¹Williams appealed from an order denying a motion for credit for time served and argued that the Nevada Supreme Court should treat that appeal as the functional equivalent of a direct appeal. The Nevada Supreme Court concluded that even if it were to construe the motion as a notice of appeal, it was not timely filed and dismissed the appeal for lack of jurisdiction. *Williams v. State*, Docket No. 58796 (Order Dismissing Appeal, November 13, 2011). Accordingly, the proper date to measure timeliness for filing of Williams' postconviction petition 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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Williams first claimed he had cause to excuse his delay because counsel did not file a proper direct appeal or communicate with him following his conviction. Williams asserted he filed his petition within a reasonable time of learning his counsel failed to properly pursue a direct appeal, particularly in light of his youth and low intelligence.

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. *Hathaway v. State*, 119 Nev. 248, 253-54, 71 P.3d 503, 507 (2003). 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 postconviction petition within a reasonable time after learning that no direct appeal had been filed. *Id.* at 255, 71 P.3d at 508.

Here, Williams failed to demonstrate he filed his petition within a reasonable time after learning a direct appeal was not pending. On February 19, 2013, Williams filed a "motion to dismiss counsel and transfer of records," in which he requested to proceed in pro se so that he could file a postconviction petition for a writ of habeas corpus. In that motion, Williams alleged he needed to proceed without counsel in part because his counsel had refused to accept Williams' phone calls when counsel knew Williams wished to pursue a direct appeal. Even assuming Williams filed this motion immediately after learning counsel had failed to properly pursue a direct appeal, he waited more than a year after filing that motion to seek postconviction relief. Such a delay was not reasonable. In addition, Williams' youth and low intelligence do not demonstrate cause to excuse his delay. *See Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656,

660, 764 P.2d 1303, 1306 (1988). Therefore, we conclude the district court properly found Williams did not demonstrate cause for the delay.

Second, Williams claimed he has cause for his delay because his counsel acted in a reckless manner by failing to properly pursue a direct appeal and then abandoned his young, mentally deficient client. However, these claims of ineffective assistance of counsel are procedurally barred because they were reasonably available to be raised at an earlier time, and therefore, cannot constitute good cause for additional procedurally barred claims. See *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (“[I]n order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally barred.”).


Third, Williams claimed that Nevada should adopt federal equitable tolling standards and asserts the facts of this case would qualify for federal equitable tolling. 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.” *Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 874 (2014).²

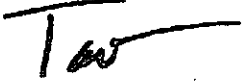
Fourth, Williams argues the district court erred by failing to consider whether Williams demonstrated undue prejudice sufficient to overcome the procedural bars. As previously stated, to demonstrate good

²In his reply brief, Williams asserts the State has confessed error by failing to adequately respond to his good-cause claims in its answering brief. We conclude this assertion lacks merit as the State responded to Williams’ claims with sufficient detail to permit this court to appropriately review those claims.

cause under NRS 34.726(1), a petitioner must demonstrate both cause for the delay and undue prejudice. *See State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 94-95 (2012). Because Williams did not demonstrate cause to excuse his delay, he cannot overcome the procedural time bar. Because he cannot overcome the procedural time bar, the district court did not err in declining to consider whether Williams could demonstrate undue prejudice. *See Rubio v. State*, 124 Nev. 1032, 1046 & n.53, 194 P.3d 1224, 1233-34 & n.53 (2008) (“The court may also reject a substantive post-conviction claim without an evidentiary hearing when the claim is procedurally barred and the defendant cannot overcome the procedural bar.”).

Having concluded Williams is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Susan Johnson, District Judge
Karen A. Connolly, Ltd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk