

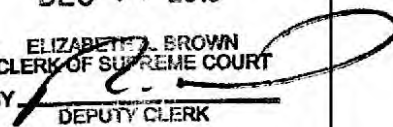
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PAULETTE W. PERRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 77822-COA

FILED

DEC 11 2019

ELIZABETH L. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Paulette W. Perry appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on August 8, 2018. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Perry's petition was untimely because it was filed more than thirteen years after the remittitur on direct appeal was issued on December 28, 2004,¹ *see* NRS 34.726(1), and it was successive because she had previously filed a postconviction petition for a writ of habeas corpus that was decided on the merits,² *see* NRS 34.810(2). Consequently, her petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(3).

Perry claimed she had good cause because the district court did not appoint counsel to assist her during the pendency of her first

¹*See Perry v. State*, Docket No. 41256 (Order of Affirmance, December 1, 2004).

²*See Perry v. State*, Docket No. 49768 (Order Dismissing Appeal, July 17, 2008).

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postconviction petition for a writ of habeas corpus. However, she did not have a constitutional or statutory right to postconviction counsel and therefore the district court's rejection of her request for counsel did not provide good cause. *See Brown v. McDaniel*, 130 Nev. 565, 571, 331 P.3d 867, 871-72 (2014). Moreover, even if a district court's decision to reject such a request could give rise to good cause, she has known for more than twelve years that her request was rejected and has failed to demonstrate good cause for the entire length of this delay. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

Perry also claimed she had good cause because she has new factual evidence that was not reasonably available to her until postconviction counsel was retained and a proper investigation was done. She argued this new evidence showed that trial counsel failed to inform her of an offer the State extended to resolve her case. She asserted that she would have accepted the offer if it had been presented to her. And she attached two sworn declarations to her petition to show the evidence of the State's plea offer was newly discovered evidence.

The district court found that Perry's evidence was not newly discovered evidence and Perry did not demonstrate good cause for the following reasons: (1) she conceded that she had learned about the plea offer in 2017 and yet waited eight months before raising her claim; (2) her codefendant raised a substantially similar claim in his 2014 postconviction habeas petition, and therefore, her claim had been available for several years; and (3) she cited to court minutes where her codefendant's counsel advised the court in 2001 that the parties were "looking for solutions," and

therefore, her claim could have been raised in her first postconviction habeas petition.

We conclude the district court's good cause findings do not invalidate Perry's good cause claim. In particular, we note the record indicates Perry filed her petition within a reasonable time after the basis for her claim became available. *See generally Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018) (observing that one year provides a reasonable time in which to file a petition after the basis for a postconviction claim becomes available). The fact Perry's codefendant raised a *similar* claim in his 2014 postconviction petition does not demonstrate the basis for Perry's claim had been available to her for several years, especially where the record does not indicate whether Perry had knowledge of her codefendant's 2014 petition. And the mere fact that codefendant's counsel informed the district court that the parties were "looking for solutions" does not mean she knew that a formal plea offer had been extended.

The district court also found that Perry failed to demonstrate actual prejudice "because all of her claims are meritless." We conclude the district court failed to properly evaluate actual prejudice. "Actual prejudice requires a showing not merely that the errors complained of created a possibility of prejudice, but that they worked to the petitioner's actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions." *State v. Williams*, 120 Nev. 473, 477, 93 P.3d 1258, 1260-61 (2004) (brackets omitted).

Perry claimed but for trial counsel's failure to communicate the State's formal plea offer to her, she would have accepted the offer, pleaded guilty to second-degree murder with the use of a deadly weapon, and

received a more favorable prison sentence. These claims, if true, demonstrate she was deprived of her constitutional right to effective assistance of counsel and actual prejudice ensued.³ See *Lafler v. Cooper*, 566 U.S. 156, 162 (2012) (a defendant has a right to effective assistance of counsel during plea negotiations); *Missouri v. Frye*, 566 U.S. 134, 147, 148 (2012) (defense counsel's failure to communicate formal plea offers to the defendant is deficient performance and prejudice is established by showing "a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time").

We conclude Perry's good cause claim is supported by specific facts not belied by the record, which if true, would entitle her to relief. See *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984); see also *Hathaway*, 119 Nev. at 252, 71 P.3d at 506 (good cause may be demonstrated by showing that a factual or legal basis for a claim was not reasonably available during the statutory period for filing the petition). Because the district court did not conduct an evidentiary hearing regarding Perry's claim, we cannot determine whether the State extended a formal plea offer, whether trial counsel conveyed the plea offer to Perry, whether Perry would have accepted the plea offer, and when Perry first learned of

³Perry was convicted of first-degree murder with the use of a deadly weapon and sentenced to two consecutive prison terms of life without the possibility of parole. If she had been convicted of second-degree murder with the use of a deadly weapon, she would have been eligible for parole after serving a minimum of 20 years in prison. See NRS 193.165(1) (1995); NRS 200.030(5).

the plea offer. Therefore, we conclude the district court must conduct an evidentiary hearing to determine whether Perry has demonstrated good cause to overcome the procedural defects to her petition, and we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.⁴


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Tierra Danielle Jones, District Judge
Resch Law, PLLC d/b/a Conviction Solutions
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁴In light of our decision, we decline to address Perry's claim that her constitutional and statutory rights were violated by the State's failure to provide discovery and the district court's refusal to order discovery.