

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY LAMAR BAGLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40524

FILED

NOV 05 2003

ORDER OF REVERSAL AND REMAND

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Ribick*
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On October 5, 1999, the district court convicted appellant, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole. This court affirmed appellant's conviction on direct appeal.¹ The remittitur issued on July 10, 2001.

On July 11, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, arguing that the petition was untimely filed because it was one day late. The State further argued that several of appellant's claims were waived because appellant had failed to raise them on direct appeal and that appellant failed to demonstrate that his attorney at trial and on appeal was ineffective. Appellant filed a reply.² Pursuant

¹Bagley v. State, Docket No. 35100 (Order of Affirmance, June 12, 2001).

²In his reply, appellant provided a good cause statement and responded to the State's arguments relating to the merits of his claims. The district court's written order included a statement that the district

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to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On December 6, 2002, the district court denied appellant's petition. This appeal followed.

NRS 34.726(1) requires a habeas corpus petition to be filed within one year after entry of the judgment of conviction if no direct appeal was taken, or within one year after this court issues its remittitur if a direct appeal was taken. Appellant's petition was filed one day beyond the one-year statutory period. Thus, appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice.³

The district court concluded that appellant had not attempted to demonstrate good cause. The district court determined that the petition was procedurally barred. However, the district court's conclusion and determination may have been in error.

In his reply, appellant argued that he had good cause to excuse the one day delay in filing his habeas corpus petition because the photocopier in the Ely Prison Library was inoperable from late May through July 15, 2002.⁴ Appellant also claimed that the prison had a policy limiting the amount of carbon paper that an individual could buy at

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court had "considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein" Appellant's reply was filed approximately one week prior to the district court's oral decision on the petition. Therefore, we conclude that the district court implicitly gave permission for appellant to file a reply and that appellant's reply was properly before the district court. See NRS 34.750(5).

³See NRS 34.726(1).

⁴Appellant provided the names of two individuals who could verify that the photocopier was broken, but he did not provide an affidavit from these individuals.

any one time. Appellant argued the broken photocopier interfered with his ability to file a timely petition because appellant was required to provide a copy of the petition when filing it in the district court and because appellant was required to serve the respondent, the attorney general and the district attorney, with copies of the petition.⁵ Appellant alleged that he mailed the original copy of the petition to his sister on July 5, 2002, that she received the petition on July 10, 2002, and that she copied the petition and took it to the court to be filed on July 11, 2002.⁶

In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him from complying with the state procedural default rules.⁷ An impediment external to the defense may be demonstrated by a showing “that the factual or legal basis for a claim was not reasonably available to counsel, or that ‘some interference by officials,’ made compliance impracticable.”⁸ A broken photocopier or a policy limiting the amount of carbon paper would

⁵See NRS 34.730; NRS 34.735.

⁶Appellant also argued that his petition should have been treated as if it was filed on June 11, 2002, because a received date stamped on the petition indicated that the petition was received in the district court on June 11, 2002. This argument is repelled by the record. Specifically, appellant signed his petition on July 5, 2002, thus negating any inference that the petition was received in the district court on June 11, 2002. Further, appellant's recitation of facts indicates that he did not send the petition to his sister until July 2002. It appears that the June 11, 2002, stamp is an error made by the clerk's office. The file stamp date accurately reflects the date that the petition was presented to the district court for filing—July 11, 2002.

⁷Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Director, Dep't Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989).

⁸Murray v. Carrier, 477 U.S. 478, 488 (1986) (citations omitted).

constitute an impediment external to the defense because the situation prevented appellant from making the copies of his petition required by statute. A prisoner must, in large part, rely upon the prison to provide access to tools used to facilitate access to the courts.

It appears that the district court did not consider appellant's good cause argument. Appellant's good cause argument is factually specific and is not belied by the record on appeal. Appellant's good cause argument if true would entitle him to have his petition decided on the merits. It is impossible to evaluate from the record before this court whether appellant actually demonstrated good cause to excuse his one-day delay. Therefore, we reverse the order of the district court and remand the matter to the district court for a hearing to consider whether appellant had demonstrated good cause to excuse his one-day delay. If the district court determines that appellant demonstrated good cause for the delay, the district court shall review the merits of all of the claims raised in appellant's habeas corpus petition.⁹ If the district court determines that appellant failed to demonstrate good cause for the delay, the district court shall enter a written order containing specific findings of fact and conclusions of law relating to appellant's good cause argument.

⁹Although the district court's order addressed the merits of appellant's claims, the district court's order incorrectly concluded that four of appellant's claims (claims 2-5) were waived because he had not raised the claims on direct appeal and had not demonstrated good cause for his failure to do so. Appellant, in his petition, argued that he did not raise these claims on direct appeal because his appellate counsel had failed to do so. Appellant argued in ground 1 of his petition that his appellate counsel was ineffective for failing to raise these claims on direct appeal. Thus, the district court order should have analyzed these claims as claims of ineffective assistance of appellate counsel.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.¹⁰ Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.¹¹

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. Joseph T. Bonaventure, District Judge
Anthony Lamar Bagley
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹¹We have considered all proper person documents filed or received in this matter. We conclude that appellant is entitled only to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.