

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN LEE ALLEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40897

FILED

OCT 07 2003

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order granting the State's motion to dismiss appellant Brian Allen's untimely post-conviction petition for a writ of habeas corpus.

Appellant, along with Robert Servin and Pedro Rodriguez, was charged with the murder and robbery of Kimberly Fondy.¹ Appellant pled guilty to first-degree murder and robbery, both with the use of a deadly weapon, and a three-judge panel sentenced him to serve two consecutive terms of life in prison without the possibility of parole for the murder. The district court entered the judgment of conviction on November 8, 1999. Appellant did not appeal from his conviction or sentence.

On March 4, 2002, appellant filed a post-conviction petition for a writ of habeas corpus. Counsel was appointed and filed a supplement. Appellant conceded that the petition was untimely pursuant to NRS 34.726(1) but argued that good cause excused his delay.² The State filed a

¹See Rodriguez v. State, 117 Nev. 800, 32 P.3d 773 (2001); Servin v. State, 117 Nev. 775, 32 P.3d 1277 (2001).

²See NRS 34.726(1) (providing that a post-conviction petition for a writ of habeas corpus which challenges the validity of a judgment of conviction must be filed within one year from the judgment of conviction, *continued on next page . . .*)

motion to dismiss, and appellant filed an opposition. The district court granted the State's motion, relying in part on Harris v. Warden.³ This appeal followed.

While acknowledging that his original petition is untimely, appellant argues that his delay should be excused because the following grounds establish good cause to excuse his delay: (1) he requested that trial counsel file a direct appeal, and they failed to do so; (2) trial counsel failed to provide him with his files; and (3) he suffers from mental retardation and mental illness, including drug-induced psychosis. Appellant provides the following facts with respect to his appeal deprivation claim: he requested an appeal after being sentenced; he was assured that an appeal would follow but that "[n]othing of the sort occurred"; "[u]pon smelling the coffee, (that an appeal was not going to be filed by trial counsel)," appellant requested his transcripts so that he could "file one"; trial counsel did not comply until the district court filed an order demanding the transcripts be sent, but by then, "it was too late." Appellant also claims that his mental infirmities contributed to his delay in filing his petition. He also appears to assert that he will suffer prejudice if his petition is procedurally barred because he has numerous meritorious grounds for reversing his conviction and vacating his

... continued

or if an appeal has been taken, within one year after this court issues its remittitur, unless the petitioner demonstrates good cause for the untimely filing and prejudice).

³114 Nev. 956, 959, 964 P.2d 785, 787 (1998) (stating that an allegation that a petitioner was deprived of a direct appeal without his or her consent does not constitute good cause to excuse the untimely filing of a habeas corpus petition).

sentence. He alleges that he was incompetent to enter a plea, he was insane at the time of the crimes, and his sentence is excessive.

This court recently clarified its holding in Harris. In Hathaway v. State,⁴ this court explained that

Harris does not preclude a finding of good cause in every case in which the good cause allegation is based upon an appeal deprivation claim. Rather, Harris stands for the proposition that an appeal deprivation claim is not good cause if that claim was reasonably available to the petitioner within the one-year statutory period for filing a post-conviction habeas petition. A petitioner's mistaken but reasonable belief that his or her attorney was pursuing a direct appeal is good cause if the petitioner raises the claim within a reasonable time after learning that his or her attorney was not in fact pursuing a direct appeal on the petitioner's behalf.⁵

The court then adopted the following three-part test from Loveland v. Hatcher⁶ to determine whether an appeal deprivation claim excuses procedural default:

The court in Loveland held that a petitioner's reliance upon his counsel to file a direct appeal is sufficient cause to excuse a procedural default if the petitioner demonstrates: "(1) he actually believed his counsel was pursuing his direct appeal, (2) his belief was objectively reasonable, and (3) he filed his state post-conviction relief petition within a reasonable time after he should

⁴119 Nev. 30, 71 P.3d 503 (2003).

⁵Id. at ___, 71 P.3d at 505.

⁶231 F.3d 640 (9th Cir. 2000).

have known that his counsel was not pursuing his direct appeal."⁷

Under Hathaway, appellant has not articulated specific factual allegations that, if true, establish good cause to excuse the statutory procedural bar.⁸ First, appellant has failed to specify when he realized a direct appeal was not forthcoming. He therefore has not articulated a claim that he actually and reasonably continued to believe that his counsel were pursuing his direct appeal even after the period for filing a timely petition had expired.⁹ Further, neither appellant's alleged mental retardation/mental illness nor his failure to receive his files excuses the untimely filing of his petition.¹⁰ Moreover, appellant concedes that after his transfer to Ely State Prison, he realized that a habeas petition had to be filed within one year of the judgment of conviction. Finally, we conclude that the record repels appellant's contentions that he was incompetent at the time of his guilty plea, insane at the time of the crimes, or that his sentence is excessive. Thus, the district court did not

⁷Hathaway, 119 Nev. at ___, 71 P.3d at 507-08 (quoting Loveland, 231 F.3d at 644).

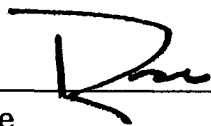
⁸Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).


⁹See NRAP 30(b)(3) (providing that it is appellant's responsibility to provide this court with "the record essential to determination of issues raised in appellant's appeal").


¹⁰See Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988) (holding that a petitioner's limited intelligence or poor assistance in framing issues will not overcome procedural bar); see also Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995) (holding that trial counsel's failure to send a petitioner his files did not prevent the petitioner from filing a timely habeas corpus petition).

err in granting the State's motion to dismiss appellant's untimely habeas petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹¹


_____, J.
Rose


_____, J.
Leavitt


_____, J.
Maupin

cc: Hon. Brent T. Adams, District Judge
Mary Lou Wilson
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹¹In resolving this appeal, we have only considered the documents properly before this court. Accordingly, we deny the State's motion to strike portions of the appendix. We remind appellant that the appendix shall only include documents that are properly in the appellate court record. See NRAP 30(b).