

IN THE SUPREME COURT OF THE STATE OF NEVADA

WALTER TRIPP A/K/A ROBERT G.  
BONE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 41193

FILED

FEB 25 2004

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

ORDER OF AFFIRMANCE

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

Tripp was originally charged with 4 counts of sexual assault on a minor under 14 years old and 19 counts of lewdness with a minor under 14 years old for performing numerous sexual acts on 7 different male victims ranging in age from 7 to 11 years old. On March 5, 1992, after a thorough plea canvass, Tripp pleaded guilty to three counts of sexual assault.<sup>1</sup> The district court sentenced Tripp to serve two concurrent life prison terms with parole eligibility in 5 years and one consecutive life prison term with parole eligibility in 5 years. On May 8, 1992, the district court entered an amended judgment of conviction imposing \$2,852.50 in restitution. Tripp did not appeal from either the original or the amended judgment of conviction.

On June 10, 2002, Tripp filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition, and

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<sup>1</sup>Although Tripp alleges that he pleaded guilty based on his trial counsel's promise that he would serve only five years, at the plea canvass, the district court advised Tripp that it could potentially sentence him to consecutive life prison terms and, if it did so, Tripp would not be eligible for parole for fifteen years.

Tripp filed a proper person reply to the State's opposition. The district court conducted an evidentiary hearing, and on December 6, 2002, dismissed Tripp's petition, finding that it was untimely and procedurally barred.<sup>2</sup> On January 6, 2003, Tripp, with the assistance of counsel, filed a motion seeking: (1) to "clarify post-order or set post-order filing time frames"; (2) to alter or amend the district court's findings; and (3) a new trial. On April 2, 2003, the district court entered an amended order dismissing Tripp's post-conviction habeas petition and a separate order denying Tripp's motion to clarify.<sup>3</sup> Tripp, with the assistance of counsel, filed the instant appeal.

Tripp's post-conviction habeas petition is untimely and procedurally barred absent a showing of good cause and prejudice because it was filed more than eleven years after the entry of the judgment of conviction.<sup>4</sup> Moreover, because over eleven years have passed since the entry of the judgment of conviction and the State specifically pleaded laches, Tripp must rebut the presumption of prejudice to the State.<sup>5</sup>

Tripp contends that the district court erred in dismissing his petition because he showed good cause and prejudice to overcome the

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<sup>2</sup>At the post-conviction hearing, Tripp was represented by retained counsel, Alan R. Johns.

<sup>3</sup>To the extent that Tripp appeals from the district court order denying his motion to clarify, we conclude that Tripp has failed to show that the district court erred in denying the motion.

<sup>4</sup>See NRS 34.726(1); NRS 34.810(3).

<sup>5</sup>See NRS 34.800(2).

procedural default.<sup>6</sup> In particular, to excuse the untimely filing of his petition, Tripp contends that his retained trial and post-conviction counsel were "grossly negligent" in failing to pursue post-conviction remedies on Tripp's behalf because: (1) trial counsel failed to inform him of his right to appeal; and (2) both trial and post-conviction counsel promised to file a post-conviction habeas petition on Tripp's behalf and then failed to do so. Relying on Ford v. Hubbard,<sup>7</sup> Tripp argues that his trial and post-conviction attorneys' representation was so deficient and egregious that it was an exceptional circumstance warranting "equitable tolling" of the post-conviction procedural bars. In a related argument, Tripp contends that he had good cause to excuse the procedural default because, like in Hathaway v. State,<sup>8</sup> he reasonably relied on his attorneys' advice by believing that they were actively pursuing post-conviction remedies on his behalf. Finally, Tripp argues that a substantial miscarriage of justice will occur if this court does not remand his case for consideration of Tripp's claims on the merits because Tripp may encounter the same procedural

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<sup>6</sup>Alternatively, Tripp argues that his petition was timely because neither he nor his trial counsel were present at a hearing conducted in April 1992 where the district court amended the judgment of conviction imposing restitution. We reject Tripp's arguments and conclude that Tripp's petition was untimely.

<sup>7</sup>305 F.3d 875 (9th Cir. 2002) (remanding for an evidentiary hearing on whether attorney's refusal to provide petitioner with portions of his file equitably tolled the time period in which to file a federal post-conviction habeas petition), opinion superseded on denial of rehearing, 330 F.3d 1086 (9th Cir. 2003), cert. granted, Pliler v. Ford, 124 S. Ct. 981 (2004); but see Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995) (rejecting the argument that an attorney's failure to turn over post-conviction petitioner's case files constituted good cause to overcome the procedural bar).

<sup>8</sup>119 Nev. \_\_\_, 71 P.3d 503 (2003).

bars in federal court and, therefore, Tripp's claims will never be considered on the merits. We conclude that Tripp's arguments lack merit.

In this case, the district court did not err in dismissing Tripp's petition because he failed to demonstrate good cause to overcome the procedural default. Likewise, the district court did not err in ruling that Tripp failed to overcome the rebuttable presumption of prejudice to the State. None of the reasons provided by Tripp are sufficient to show an impediment external to the defense.<sup>9</sup> Moreover, Hathaway is inapposite because that case concerns an appeal deprivation claim. Nonetheless, even assuming Hathaway is applicable here because Tripp was deprived of his right to a direct appeal<sup>10</sup> and reasonably believed that his post-conviction counsel had filed a habeas petition, Tripp has failed to show that he filed his petition within a reasonable time of learning that his counsel had not done so. Tripp filed his post-conviction habeas petition approximately eleven years after the entry of the judgment of conviction and three years after he terminated his relationship with his post-conviction counsel.<sup>11</sup> Accordingly, the district court did not err in ruling that Tripp's petition was procedurally barred.

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<sup>9</sup>See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994); see also Hathaway, 119 Nev. at \_\_\_, 71 P.3d at 506 ("in order [for a claim of ineffective assistance of counsel] to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted").

<sup>10</sup>Tripp alleges that he was deprived of his right to a direct appeal because his trial counsel informed him that, in pleading guilty, Tripp had waived his right to a direct appeal.

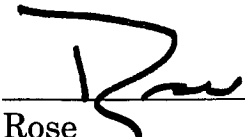
<sup>11</sup>See Hathaway, 119 Nev. at \_\_\_, 71 P.3d at 5007-08 (recognizing that a petitioner's reliance on counsel's advice may be good cause where: (1) he actually believed his counsel was pursuing his direct appeal, (2) his

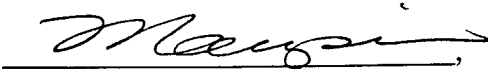
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Having considered Tripp's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.<sup>12</sup>

  
Shearing, C.J.

  
Rose, J.

  
Maupin, J.

cc: Hon. Michael L. Douglas, District Judge  
Alan R. Johns  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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belief was objectively reasonable, and (3) he filed his state post-conviction relief petition within a reasonable time after he should have known that his counsel was not pursuing his direct appeal.") (quoting Loveland v. Hatcher, 231 F.3d 640, 644 (9th Cir. 2000)).

<sup>12</sup>For the first time in the reply brief, Tripp asks this court to remand this case to correct a clerical error in the judgment of conviction; namely, Tripp notes that the date of the sentencing hearing set forth in the text of the judgment is inaccurate. We conclude that Tripp should seek correction of the judgment of conviction in the district court in the first instance.