

IN THE SUPREME COURT OF THE STATE OF NEVADA

WALTER THOMAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42870

FILED

SEP 07 2004

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 dismissing appellant Walter Thomas's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

On December 9, 1997, Thomas was convicted, pursuant to a guilty plea, of two counts of burglary and four counts of robbery with the use of a deadly weapon. The district court sentenced Thomas to serve two concurrent prison terms of 24 to 72 months for the burglary counts and four consecutive prison terms of 30 to 120 months for the robbery counts, with four equal and consecutive terms for the deadly weapon sentencing enhancements. Thomas did not file a direct appeal.

On December 4, 2002, Thomas, with the assistance of counsel, filed a post-conviction petition for a writ of habeas corpus. On January 30, 2002, the State filed a motion to dismiss the petition, arguing that it was untimely and procedurally barred. Counsel for Thomas filed an opposition to the State's motion, arguing that Thomas had good cause to overcome the procedural default. After conducting an evidentiary hearing, the district court dismissed the petition, finding that it was procedurally

barred because Thomas failed to demonstrate good cause.¹ Thomas filed this timely appeal.

Citing to Hathaway v. State,² Thomas argues that the district court erred in dismissing his petition because he had good cause to overcome the procedural default. In particular, Thomas argues that initially he had an objectively reasonable belief that his trial counsel was pursuing an appeal, and that after he learned that an appeal had not been filed, the subsequent three-year delay in filing his petition was reasonable given that he was unrepresented by counsel and did not know that post-conviction remedies existed. Thomas contends that, in considering whether a delay in filing a petition was reasonable under the test set forth in Hathaway, this court should consider only the period of time in which a petitioner becomes aware of the right to file a post-conviction petition for a writ of habeas corpus. We conclude that Thomas's contention lacks merit.

A petitioner can establish good cause, pursuant to NRS 34.726(1), if the petitioner: (1) reasonably believed that counsel had filed an appeal; and (2) filed a habeas corpus petition within a reasonable time after learning that a direct appeal had not been filed.³ Generally, this court will not disturb a district court's finding regarding good cause "except for clear cases of abuse."⁴

¹See NRS 34.726(1).

²119 Nev. 248, 71 P.3d 503 (2003).


³Id. at 255, 71 P.3d at 508.

⁴Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

In the instant case, Thomas concedes that he learned that his trial counsel was not pursuing a direct appeal in 1999. Thomas, however, did not file a post-conviction petition for another three years. The district court found that Thomas did not file his petition within a reasonable time after learning that trial counsel was not pursuing a direct appeal. Although Thomas alleges that he did not know about the post-conviction remedies during the three-year period, Thomas has not demonstrated that the district court clearly abused its discretion in finding that the three-year delay was unreasonable.⁵ Accordingly, we conclude that the district court did not err dismissing the petition as procedurally barred.

Having considered Thomas's contention and concluded that it lacks merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

⁵See generally Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988) (limited intelligence and reliance on inmate law clerks who are untrained in the law does not constitute good cause for delay in filing petition).

cc: Hon. Michael A. Cherry, District Judge
Law Office of Bruce K. Snyder
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk