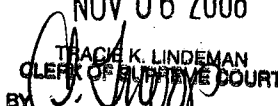


IN THE SUPREME COURT OF THE STATE OF NEVADA

RUFINO PATACASIL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51444

FILED

NOV 06 2008
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Sixth Judicial District Court, Pershing County; John M. Iroz, Judge.

On November 14, 2005, the district court convicted appellant, pursuant to a guilty plea, of one count of sexual assault. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole. No direct appeal was taken.

On July 31, 2007, a document submitted by appellant labeled "motion for leave to file petition for writ of habeas corpus" was filed in the district court. The July 31, 2007 file-stamped date was interlineated with a handwritten notation "filed in error." In the July 31, 2007 motion, appellant sought permission to file a late post-conviction petition for a writ of habeas corpus on the ground that appellant had asked for an appeal, but that his trial counsel had failed to file an appeal on his behalf. On October 9, 2007, the motion was re-filed in the district court and the district court granted the motion on that date. The district court specifically found that trial counsel's failure to file an appeal was good cause to file a post-conviction petition for a writ of habeas corpus.

On October 25, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On April 1, 2008, the district court denied appellant's petition. This appeal followed.¹

In his petition, appellant claimed: (1) the information was insufficient to support a charge of sexual assault; (2) appellant should only have been convicted of the lowest-degree of the offense to which he had confessed; and (3) his trial counsel was ineffective for coercing his guilty plea and misinforming him that he could receive probation.

Appellant filed his petition almost two years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.² Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.³

The district court determined that appellant had good cause to file his petition because trial counsel had allegedly failed to file an appeal after being requested to do so. The district court's remedy was to allow appellant to file a late, proper person post-conviction petition for a writ of habeas corpus without any apparent limitation on the scope of the claims.

¹Appellant filed a response to the State's opposition, but the district court rejected consideration of that response as no permission had been granted. We conclude that the district court did not abuse its discretion in declining appellant permission to file the response. NRS 34.750(5).

²NRS 34.726(1). Appellant's motion to file a late post-conviction petition for a writ of habeas corpus was filed 20 months after entry of the judgment of conviction, and thus, the motion was likewise untimely filed.

³Id.

In Harris v. Warden, this court held that “an allegation that trial counsel was ineffective in failing to inform a claimant of the right to appeal from the judgment of conviction, or any other allegation that a claimant was deprived of a direct appeal without his or her consent, does not constitute good cause to excuse the untimely filing of a petition pursuant to NRS 34.726.”⁴ In Hathaway v. State, this court later clarified its holding in Harris and held that “an appeal deprivation claim is not good cause if that claim was reasonably available to the petitioner during the statutory time period.”⁵ A petitioner may, however, establish good cause for the delay “if the petitioner establishes that the petitioner reasonably believed that counsel had filed an appeal and that the petitioner filed a habeas corpus petition within a reasonable time after learning that a direct appeal had not been filed.”⁶

Based upon the record on appeal before this court, we cannot affirm the district court’s finding of good cause for the late filing of a petition in this case. It appears from the record on appeal that no evidentiary hearing was conducted on the appeal deprivation claim. Because the factual underpinnings of an appeal deprivation claim in general, and in this case in particular, occur outside the record on appeal, an evidentiary hearing is essential for determining whether appellant was deprived of a direct appeal without his consent and whether appellant filed his petition within a reasonable time of learning that no direct appeal

⁴Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998).

⁵Hathaway v. State, 119 Nev. 248, 253, 71 P.3d 503, 507 (2003).

⁶Id. at 255, 71 P.3d at 508.

had been filed on his behalf.⁷ Further, the remedy fashioned by the district court for the alleged appeal deprivation is not the appropriate remedy. If the district court finds that a petitioner has been deprived of a direct appeal without his consent, the district court must appoint counsel to assist the petitioner in filing a post-conviction petition for a writ of habeas corpus, in which the petitioner would have an opportunity to litigate direct appeal claims.⁸

Therefore, we reverse the order of the district court denying the petition and remand this matter for an evidentiary hearing to determine whether there was good cause to excuse the procedural bar. In order to determine whether there was good cause, the district court must conduct an evidentiary hearing on the appeal deprivation claim and apply the factors set forth in Hathaway: (1) whether petitioner actually believed that trial counsel had filed a direct appeal; (2) was the belief objectively reasonable; and (3) did petitioner file his petition within a reasonable time after he should have known that counsel had not filed the notice of appeal.⁹ The district court may exercise its discretion to appoint post-conviction counsel to assist appellant with the evidentiary hearing.¹⁰ If

⁷We note that there was no authentication of the “letter” appellant purportedly sent to his trial counsel regarding his direct appeal. There is nothing in the record regarding when this “letter” was purportedly sent and whether trial counsel received the “letter.” Further, the “letter” appears to be a follow-up on a request for an appeal and there is no transcript of an evidentiary hearing establishing that appellant had asked trial counsel for an appeal.

⁸Lozada v. State, 110 Nev. 349, 359, 871 P.2d 944, 950 (1994).

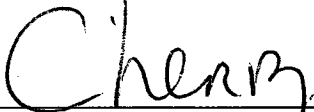
⁹Hathaway, 119 Nev. at 254, 71 P.3d at 507-08.


¹⁰NRS 34.750(1).


the district court determines that appellant was deprived of a direct appeal without his consent, the district court shall appoint counsel to pursue the remedy set forth in Lozada v. State.¹¹ If the district court determines that appellant was not deprived of a direct appeal without his consent, and thus, there was no good cause for the late petition, the district court shall enter a final written order to that effect.

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.¹² Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.¹³


_____, J.
Cherry


_____, J.
Maupin


_____, J.
Saitta

¹¹Lozada, 110 Nev. at 359, 871 P.2d at 950.

¹²See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹³This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter. We deny appellant's request for counsel in this appeal.

cc: Hon. John M. Iroz, District Judge
Rufino Patacsil
Attorney General Catherine Cortez Masto/Carson City
Pershing County District Attorney
Pershing County Clerk