

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,  
Appellant,  
vs.  
MARGARET RUDIN,  
Respondent.

No. 53143

FILED

MAY 10 2010

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY A. Ingeon  
DEPUTY CLERK

ORDER OF REVERSAL

This is an appeal from an order of the district court granting a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Respondent Margaret Rudin, with the aid of counsel, filed a post-conviction petition for a writ of habeas corpus in the district court on August 21, 2007, more than three years after the remittitur from her direct appeal was issued on April 27, 2004.<sup>1</sup> Thus, Rudin's petition was untimely filed.<sup>2</sup> See NRS 34.726(1). Rudin's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice.

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<sup>1</sup>Rudin v. State, 120 Nev. 121, 86 P.3d 572 (2004).

<sup>2</sup>Rudin also filed a proper person document entitled "motion for substitution of court appointed attorney Dayvid Figler and opening brief supplement" on April 5, 2006. This motion raised some claims which challenged the judgment of conviction. Even assuming that this motion could be construed as Rudin's first petition for a writ of habeas corpus, this document was filed almost two years after the remittitur from her direct appeal was issued, and therefore was also untimely filed. See NRS 34.726(1).

Id. “Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory.” State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). A petitioner has the burden of pleading and proving facts to demonstrate good cause to excuse the delay. State v. Haberstroh, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003).

“In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules.” Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994)). “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.’” Id. (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986) (citations and internal quotations omitted)). Prejudice can be shown by demonstrating that the errors worked to a petitioner’s actual and substantial disadvantage. Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 716 (1993). “Appellate courts will not disturb a trial court’s discretion in determining the existence of good cause except for clear cases of abuse.” Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989) (citing State v. Estencion, 625 P.2d 1040, 1042 (Haw. 1981)).

Rudin did not attempt to provide good cause for the delay in her pleadings before the district court.<sup>3</sup> However, this issue was discussed

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<sup>3</sup>Notably, Rudin acknowledged in an errata to the petition, filed on August 22, 2007, that the petition was untimely, but did not include any arguments of good cause to excuse the delay.

briefly at a status hearing during the post-conviction proceedings. At the hearing, post-conviction counsel acknowledged that the petition was untimely filed and the State briefly argued that the district court should not find good cause to excuse the delay. The district court then stated that it was “going to find that there were extraordinary circumstances which would allow the court to extend the one-year deadline,” based on Rudin’s lengthy trial and her first post-conviction counsel’s failure to file a timely petition. At the status hearing the district court withheld making a final ruling on the procedural bar, but the district court’s final order granting the petition did not address the issue of good cause to excuse the delay in filing the petition. The district court’s final order discussed Rudin’s claims on the merits and determined that her trial counsel was ineffective for failing to properly investigate and interview witnesses, and was therefore not prepared for trial.

The State argues on appeal that the district court erred in granting the petition because it was procedurally barred and without good cause for the delay.

While the district court did not discuss the procedural bar in its order granting the petition, it appears from the record that the district court concluded that Rudin had demonstrated cause for the delay because her trial was lengthy, her case file was large and her first post-conviction counsel had failed to file a timely petition.<sup>4</sup>

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<sup>4</sup>If the district court did not conclude that Rudin had demonstrated good cause for the delay, then the district court erred in considering the merits of claims raised in an untimely post-conviction petition for a writ of habeas corpus. NRS 34.726(1); Riker, 121 Nev. at 231, 112 P.3d at 1074.

Assuming the district court determined that Rudin had demonstrated cause to excuse the delay, we conclude that the district court erred as a matter of law. See id. A lengthy trial and a large case file are not impediments external to the defense which demonstrate cause to excuse the delay because neither affords a factual or legal basis to find that Rudin's claims were not reasonably available to be raised in a timely manner. See Hathaway, 119 Nev. at 252, 71 P.3d at 506.

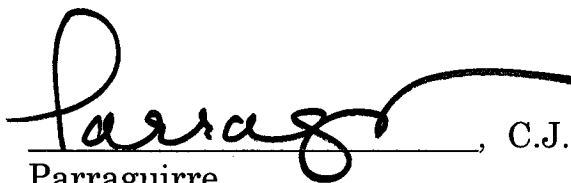
In addition, Rudin was not entitled to post-conviction counsel and therefore, she was not entitled to the effective assistance of post-conviction counsel. NRS 34.750; McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996). As Rudin was not entitled to the effective assistance of post-conviction counsel, she cannot demonstrate cause for the delay based on the failure of her first post-conviction counsel to file a timely petition because that also does not provide a legal or factual excuse to find that Rudin's claims were not reasonably available to be raised in a timely manner. McKague, 112 Nev. at 164-65, 912 P.2d at 258; Hathaway, 119 Nev. at 252, 71 P.3d at 506.

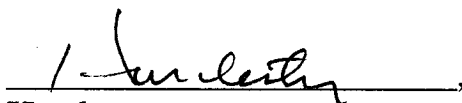
Rudin argues that the petition should be considered timely filed because her post-conviction counsel complied with the district court's schedule and because the State did not file a motion to dismiss the petition due to the procedural time bar. The district court cannot extend the time for filing a post-conviction petition for a writ of habeas corpus without good cause, regardless of whether the State filed a motion to dismiss. Riker, 121 Nev. at 231, 112 P.3d at 1074; Haberstroh, 119 Nev. at 181, 69 P.3d at 681. Even assuming the district court's schedule could provide good cause, Rudin did not comply with the schedule because she did not file a petition by the July 6, 2005, deadline set by the district court

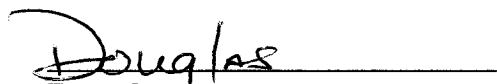
and sought numerous continuances after the deadline had passed. To the extent Rudin argues it would be a fundamental miscarriage of justice to enforce the procedural time bar because the State did not file a motion to dismiss, this claim is patently without merit. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Schlup v. Delo, 513 U.S. 298, 327 (1995).

Based on all of the documents before this court, we conclude that the district court erred as a matter of law in considering Rudin's petition on the merits and erred as a matter of law in granting the petition because the petition was procedurally barred and without good cause to excuse the delay.<sup>5</sup> Accordingly, we

ORDER the judgment of the district court REVERSED.<sup>6</sup>

  
\_\_\_\_\_, C.J.  
Parraguirre

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Douglas

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<sup>5</sup>As the district court did not consider any other good cause claims beyond the legally insufficient claims discussed above and Rudin acknowledged before the district court the petition was untimely filed and did not raise any claims of good cause, further proceedings before the district court are not necessary.

<sup>6</sup>The State also argues that the district court erred in granting Rudin's claim that her trial counsel was ineffective for failing to be prepared for trial because Rudin did not demonstrate that she was prejudiced. As we conclude that the district court erred in considering Rudin's claims on the merits because her petition was procedurally barred, we need not consider this claim.

cc: Eighth Judicial District Court Dept. 15, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Christopher R. Oram  
Eighth District Court Clerk