

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANDRE DOW,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70410-COA

FILED

JUN 11 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

Andre Dow appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Dow filed his petition on April 20, 2015, almost five years after issuance of the remittitur on direct appeal on June 21, 2010. *Dow v. State*, Docket No. 52583 (Order of Affirmance, May 26, 2010). Thus, Dow's petition was untimely filed. *See* NRS 34.726(1). Dow's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.*

First, Dow claimed he had cause for the delay because he retained an attorney to file a postconviction petition and that attorney did not do so. Dow further claimed his retained attorney also informed him that a second attorney would be helping with the postconviction proceedings, but that person was not actually an attorney and also did not file a postconviction petition. In addition, Dow asserted he relied upon advice

from those persons when they asserted the deadline for filing a postconviction could be extended by investigation into his case.

While claims of ineffective assistance of postconviction counsel generally do not constitute cause for a petitioner's delay, *see Brown v. McDaniel*, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014), a claim that an attorney "essentially abandoned his client" and did so without notice may constitute cause for the delay in some circumstances, *see Maples v. Thomas*, 565 U.S. 266, 282-83 (2012). If a petitioner demonstrates that he believed counsel filed a timely petition on his behalf, shows his belief was objectively reasonable, counsel then abandoned him without notice and failed to file a timely petition, and the petitioner filed his petition within a reasonable time after he should have known counsel did not file a timely petition, a petitioner may demonstrate cause for his delay under NRS 34.726(1). *See id.* at 283 (explaining that abandonment by an attorney of record would supply "extraordinary circumstances beyond [the petitioner's] control" to overcome a state procedural bar); *see also Hathaway v. State*, 119 Nev. 248, 254-55, 71 P.3d 503, 507-08 (2003) (setting forth a "test for evaluating an allegation of good cause based upon a petitioner's mistaken belief that counsel had filed a direct appeal").

In his petition, Dow contended he retained an attorney to file a postconviction petition in 2010, the attorney and his associate communicated with him concerning the potential petition and assured him a petition would be filed and it would overcome any procedural bar concerns, and the attorney and his associate subsequently ceased communicating with him. Dow further alleged he learned in November of 2014 that the

attorney had not filed a petition and he filed the instant petition in 2015. Dow also provided correspondence, text messages, and an affidavit in support of his good-cause claim. Dow provided specific allegations that were not belied by the record and, if true, would warrant relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, we conclude the district court erred by denying this good-cause claim without conducting an evidentiary hearing. Accordingly, the district court should conduct an evidentiary hearing to assess Dow's claim of attorney abandonment and whether he can demonstrate cause to excuse the delay.

Second, Dow urged Nevada to adopt federal equitable tolling standards and asserted the facts of this case would qualify for federal equitable tolling. However, the Nevada Supreme Court has rejected federal equitable tolling because the plain language of NRS 34.726 "requires a petitioner to demonstrate a legal excuse for any delay in filing a petition." *Brown*, 130 Nev. at 576, 331 P.3d at 874. Therefore, the district court did not err by denying relief for this claim without considering it at an evidentiary hearing.¹

¹In his reply brief, Dow asserts the procedural time bar at NRS 34.726(1) violates separation of powers principles because it limits the court's inherent equitable powers. However, Dow did not raise this issue in his opening brief, and we need not consider it because reply briefs are limited to answering new matters set forth in the answering brief. *See* NRAP 28(c); *Bongioli v. Sullivan*, 122 Nev. 556, 569 n.5, 138 P.3d 433, 443 n.5 (2006). Nevertheless, no relief is warranted because the Nevada Supreme Court has already concluded the procedural time bar at NRS 34.726(1) "is a reasonable regulation of the right to pursue habeas relief"

Third Dow claimed he would suffer a fundamental miscarriage of justice if his claims were not considered on their merits because he is actually innocent. Dow asserted he was innocent because witnesses and evidence showed he was not present when the victims were killed and there were others who wished to harm the victims. Dow acknowledged the majority of this information was presented to the jury during trial and the defense was aware of all of this information at the time of his trial.


In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. *Calderon v. Thompson*, 523 U.S. 538, 559 (1998); *Pellegrini v. State*, 117 Nev. 860, 887; 34 P.3d 519, 537 (2001). A petitioner is entitled to an evidentiary hearing regarding a gateway claim of actual innocence if he raises specific factual allegations which would “show that it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.” *Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015). Dow’s claim failed to meet that standard because it was not based upon new evidence. Therefore, the district court did not err by denying Dow’s actual-innocence claim without considering it at an evidentiary hearing.² Accordingly, we

and “the Legislature had the power to enact the statute, and we find no constitutional infirmity in it.” *Pellegrini v. State*, 117 Nev. 860, 878, 34 P.3d 519, 531 (2001).

²Because we reverse the district court’s decision to deny the petition and remand for an evidentiary hearing, we need not address the remaining

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


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Eric Johnson, District Judge
Chesnoff & Schonfeld
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

claims raised on appeal. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

We deny Dow's May 22, 2019, motion requesting oral argument.