


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANDRE LAMONT ASBURY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86621-COA

FILED

NOV 13 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

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

Andre Lamont Asbury appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on March 21, 2023. Eighth Judicial District Court, Clark County; Crystal Eller, Judge.

Asbury filed his petition more than one year after issuance of the remittitur on direct appeal on September 7, 2021. *See Asbury v. State*, No. 81733-COA, 2021 WL 3578347 (Nev. Ct. App. Aug. 12, 2021) (Order of Affirmance). Thus, Asbury's petition was untimely filed. *See* NRS 34.726(1). Asbury's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.* "In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented [them] from complying with the state procedural default rules." *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). "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.* (internal quotation marks and

punctuation omitted). To warrant an evidentiary hearing, a petitioner's good-cause claims must be supported by specific factual allegations that are not belied by the record and, if true, would entitle the petitioner to relief. *See Berry v. State*, 131 Nev. 957, 967, 363 P.3d 1148, 1154-55 (2015).

First, Asbury claimed he had good cause for the delay because he lacked an education, he did not have any knowledge of the law, and he was unable to locate inmate assistance to help him prepare his petition. Asbury's lack of legal knowledge and inability to secure inmate assistance would not constitute good cause because they were not impediments external to the defense. *See Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding a petitioner's claim of organic brain damage, borderline mental disability, and reliance on assistance of inmate law clerk unschooled in the law did not constitute good cause for the filing of a procedurally barred postconviction petition), *superseded by statute on other grounds as stated in State v. Haberstroh*, 119 Nev. 173, 180-81, 69 P.3d 676, 681 (2003). Therefore, we conclude the district court did not err by denying this good-cause claim without conducting an evidentiary hearing.

Second, Asbury claimed he had good cause for the delay because COVID-19 lockdowns and other factors prevented him from accessing the prison law library, which contained the form needed to file his petition. In particular, Asbury claimed (1) the prison law library was closed from the issuance of the remittitur until May 22, 2022; (2) the prison law library was closed in June 2022; (3) he was denied access to the prison law library from July 2022 to December 9, 2023, due to staff shortages and equipment failures; and (4) his unit's access to the prison law library was intermittently suspended thereafter.

As alleged, for reasons external to the defense, Asbury had only one week prior to the statutory deadline to obtain the form needed to file his petition. Thus, Asbury raised specific factual allegations that, if true, would demonstrate official interference made compliance with the statutory deadline impracticable.¹ However, Asbury also had to allege facts indicating prejudice would result if his claims were not heard on the merits. “A showing of undue prejudice necessarily implicates the merits of the” claims raised. *Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018).

In his petition, Asbury claimed he was entitled to additional presentence credit. This claim neither challenged the validity of Asbury’s plea nor alleged that Asbury received ineffective assistance of counsel. Accordingly, this claim was outside the scope of claims permissible in a postconviction petition for a writ of habeas corpus challenging a judgment of conviction based on a guilty plea.² See NRS 34.810(1)(a); see also

¹To the extent the district court held that lack of access to a law library cannot constitute good cause pursuant to *Lewis v. Casey*, 518 U.S. 343 (1996), the district court erred. *Lewis* did not address whether lack of access to a law library may constitute good cause to overcome the procedural bars to the filing of a postconviction habeas petition. Moreover, although a petitioner does not have “an abstract, freestanding right to a law library or legal assistance,” they may “demonstrate that the alleged shortcomings in the library or legal assistance program hindered [their] efforts to pursue a legal claim.” *Lewis*, 518 U.S. at 351. Here, Asbury alleged that his lack of access to the prison law library prevented him from obtaining the form needed to file his petition. Therefore, *Lewis* did not bar Asbury’s good-cause claim. See NRS 34.735 (setting forth a form that must be substantially followed in filing a postconviction habeas petition).

²Asbury pleaded guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). An *Alford* plea is equivalent to a guilty plea insofar as how the court treats a defendant. *State v. Lewis*, 124 Nev. 132, 133 n.1, 178 P.3d

Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (“[C]laims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings.”), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 150, 979 P.2d 222, 223-24 (1999). Therefore, we conclude the district court did not err by denying this claim as procedurally barred.

Asbury also claimed that he did not understand the terms of his plea agreement because he believed the term “concurrent” meant he would receive credit for time served that would run along with his sentence in district court case no. C-18-330562-1 and that counsel failed to explain to him that he would not receive presentence credit. “A guilty plea entered on advice of counsel may be rendered invalid by showing a manifest injustice through ineffective assistance of counsel. Manifest injustice may also be demonstrated by a failure to adequately inform a defendant of the consequences of his plea.” *Rubio v. State*, 124 Nev. 1032, 1039, 194 P.3d 1224, 1228-29 (2008) (footnote and internal quotation marks omitted).

The district court held that Asbury’s claims were barred by the doctrines of res judicata and law of the case because he previously raised them in a “motion for amended judgment of conviction to include time served credits” filed on March 8, 2022. The district court also held Asbury’s claims were belied by the record. The district court’s findings are not supported by the record.

Asbury did not challenge the validity of his plea or raise an ineffective assistance of counsel claim in his March 8, 2022, motion, and this court did not address the merits of any such claims on appeal. *See Asbury*

146, 147 n.1 (2008), *overruled on other grounds by State v. Harris*, 131 Nev. 551, 556, 355 P.3d 791, 793-94 (2015).

v. State, No. 84900-COA, 2022 WL 17072209 (Nev. Ct. App. Nov. 17, 2022) (Order Dismissing Appeal). Therefore, the doctrines of res judicata and law of the case do not bar Asbury's claims. See *Hsu v. Cty. of Clark*, 123 Nev. 625, 629-30, 173 P.3d 724, 728-29 (2007) (discussing the law of the case doctrine); see also *Weddell v. Sharp*, 131 Nev. 233, 241, 350 P.3d 80, 85 (2015) (discussing the doctrine of res judicata).

Moreover, Asbury's claims are not belied by the record. "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." *Berry*, 131 Nev. at 969, 363 P.3d at 1156 (quotation marks omitted). At the sentencing hearing, Asbury asked the district court as to "when I'm going to be able to get my days credit for, you know, the time I been fighting this case?" Contrary to the district court's finding, this question does not prove Asbury's claims to be false; rather, it indicates Asbury did not understand that he would not receive additional presentence credit.

Asbury alleged facts indicating he did not understand he would not receive additional presentence credit and that counsel failed to explain to him the consequences of his plea. As such, Asbury alleged specific facts that are not belied by the record and, if true, would demonstrate good cause to excuse the procedural time-bar. Accordingly, we conclude the district court erred by denying Asbury's good-cause claim without first conducting an evidentiary hearing, and we remand this matter to the district court for an evidentiary hearing to determine whether Asbury can demonstrate good cause to excuse the delay in filing his petition.

On appeal, Asbury argues the district court committed several errors regarding his "motion for application of A.B. 271 to minimum sentence" filed on May 10, 2023. Asbury has previously appealed from the

district court's order denying his May 10, 2023, motion. *See Asbury v. State*, No. 86716, 2023 WL 4442993 (Nev. July 10, 2023) (Order Dismissing Appeal). A second, duplicate appeal may not be pursued. Therefore, we do not consider these claims.

For the foregoing reasons, we

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.³


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Crystal Eller, District Judge
Andre Lamont Asbury
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³Having considered Asbury's pro se brief, we conclude that a response is not necessary. *See* NRAP 46A(c). This appeal therefore has been submitted for decision based on the pro se brief and the record. *See* NRAP 34(f)(3).

On remand, the district court may reconsider its decision on whether to appoint counsel to represent Asbury in these proceedings. *See* NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760, 760-61 (2017).