

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEANGELO R. CARROLL,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

No. 63115

Electronically Filed
Jun 05 2013 04:07 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

OPPOSITION TO MOTION TO DISMISS APPEAL

Appellant, DeAngelo R. Carroll, was tried for and convicted of first degree murder and conspiracy to commit murder. There is no dispute that Carroll wanted his conviction appealed, and that his court-appointed trial attorneys failed to file a notice of appeal. RA 72-90. A few months after the judgment of conviction was entered — it was entered on September 8, 2010 — the trial attorneys withdrew as counsel for Carroll. The district court then appointed Patrick E. McDonald, Esq., on December 17, 2010, to represent Carroll in post-conviction proceedings.

A little over one year later, on December 29, 2011, Mr. McDonald filed a petition for a writ of habeas corpus (post-conviction), raising, among other claims for relief, an appeal-deprivation claim. *See* RA 25-26. The State moved to dismiss Carroll's petition. RA 48-54. The State's only argument was that Carroll's petition was time barred pursuant to NRS 34.726 because it was filed more than 1 year after entry of the judgment of conviction, and Carroll had failed to show good cause to overcome the procedural bar. *Id.*

The district court then held an evidentiary hearing on Carroll's appeal-deprivation claim. RA 72-90. After hearing the evidence and considering the briefing of both parties, the district court found Carroll was denied his appeal rights, granted Carroll's post-conviction petition as to the appeal-deprivation claim, and ordered that he be allowed to proceed with his direct appeal. RA 85-87. When the ruling was announced, the State did not object that the district court had failed to find good cause or state so on the record, despite being given an opportunity to do so. *See e.g.*, RA 85:22-23. Likewise, the State did not raise these points when the district court entered its written findings of fact, conclusions of law and order, again despite being given the opportunity to review the written order before it was submitted to the district court for signature. RA 88:23 – 89:17.

For the following reasons, the State's motion to dismiss Carroll's direct appeal should be denied.

Points and Authorities

I. The State waived its procedural bar arguments

The State, now challenging the district court's decision under NRAP 4(c)(3), has waived its objection that Carroll's petition was time-barred and the district court did not expressly find "good cause" to excuse the delay. The State filed a motion to dismiss Carroll's post-conviction petition in the district court, arguing that it was procedurally barred under NRS 34.726. RA 48-54. However, the State

did not think much of its claims. After the district court announced its decision, and again after the court's written findings and conclusions were entered, the State did not press its objection nor did it complain that the district court failed to expressly address whether Carroll had shown good cause.

By failing to bring these issues to the district court's attention when they arose, the State waived the error, if error it was. "[A] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Schuck v. Signature Flight Support*, 126 Nev. ___, ___, 245 P.3d 542, 545 (2010); *see also In re Care & Treatment of Hay*, 953 P.2d 666, 677 (Kan. 1998) ("[I]n the absence of an objection at the trial court level to the failure to make findings, the trial judge is presumed to have made necessary findings, and this precludes appellate review of this issue."). The State cannot take advantage of an "error" it helped create in order to deny Carroll his right to appeal. *See Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) ("The doctrine of 'invited error' embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit.").

To the extent these arguments are not waived, the State's motion should nevertheless be denied.

II. If there is any irregularity with the district court's ruling, that defect is harmless

Pursuant to NRCP 61 — the “harmless error” rule — “no error or defect in any ruling or order or in anything done or omitted by the court . . . is ground . . . for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice.” Under that rule, the State’s motion must fail because the defect it complains of is harmless. First, the district court’s written order substantially complies with the requirements of the Rules of Appellate Procedure. Second, even without an explicit finding by the district court, there is sufficient evidence in the record to find good cause for Carroll’s delay. And in either event, denying Carroll the opportunity to appeal his conviction is severely prejudicial.

A. *The district court’s order complies with NRAP 4(c)(1)(B)*

NRAP 4(c)(1)(B) lays out the order a district court must make when it grants a petition with an appeal-deprivation claim. The rule states, in relevant part, that the district court must enter “a written order containing . . . specific findings of fact and conclusions of law finding that the petitioner has established a valid appeal-deprivation claim and is entitled to a direct appeal with the assistance of appointed or retained appellate counsel.” NRAP 4(c)(1)(B). Noticeably absent is any requirement that the district court address any procedural bars.

The district court’s order complies with the rule. Indeed, there is no dispute

that Carroll was unlawfully deprived of the right to a timely direct appeal from his judgment of conviction and sentence. The State's complaint is only that the order does not say that there was good cause for the late filing. Inasmuch as that is not required by NRAP 4(c)(1)(B), that omission is harmless error.

However, even if such a statement were required by NRAP 4(c)(1)(B), the omission is still harmless. Underlying the State's motion is the assumption that if the district court failed to say there was good cause then the district court did not actually look for and find it. In reality, the presumption should be the opposite. "Trial judges are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002); *accord United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008); *cf. Leonard v. State*, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) ("A jury is presumed to follow its instructions."). Furthermore, the district court "is presumed to have done its duty," *State v. Proell*, 726 N.W.2d 591, 595 (N.D. 2007), and absent an objection, "omissions in findings will not be considered on appeal, and the district court is presumed to have found all facts necessary to support its judgment." *Gray v. Manhattan Med. Center*, 18 P.3d 291, 299 (Kan. App. 2001); *accord In re Care & Treatment of Hay*, 953 P.2d at 677.

In sum, absent some evidence otherwise, a district court should be presumed to have done its job correctly. But the only way the defect here is not harmless

error is if the opposite is presumed — that the district court ignored the procedural hurdle, even though the State had raised it previously. There is just no reason to presume that. Consequently, the State’s motion must be denied as harmless error.

B. *Good cause exists for the delay*

Because the State failed to press the time-bar issue at the evidentiary hearing — in fact, the State did not even mention it — there is very little detail on the point in the available record. Nevertheless, there are at least two bases for good cause in the record we do have.

First, it appears that the factual or legal basis for Carroll’s claims were not reasonably available until near or after the deadline for a timely petition. *See Pellegrini v. State*, 117 Nev. 860, 886–87, 34 P.3d 519, 537 (2001). From the time he was appointed, the record shows that Carroll’s post-conviction counsel had an extremely difficult time getting the full file from trial counsel. Indeed, such were his troubles that the district court granted several extensions for submitting the petition. And even on September 13, 2011, more than a year after entry of judgment, the district court’s journal entry indicates that Carroll’s post-conviction counsel had yet to receive the entire record. RA 100.

The available record does not show exactly when McDonald discovered no notice of appeal had been filed. Moreover, that fact alone does not establish a viable appeal-deprivation claim. To determine whether Carroll could establish a

factually and legally valid appeal-deprivation claim, McDonald, at the very least, would need a copy of prior counsel's file, time to review the file, he would need to discuss the issue with Carroll, and question trial counsel about the matter to find out if Carroll wanted to pursue an appeal, what (if anything) trial counsel informed Carroll about an appeal, and why counsel did not file a notice of appeal.

In *Hathaway v. State*, this Court stated that a petitioner has good cause under NRS 34.726(1) if “(1) he actually believed his counsel was pursuing his direct appeal, (2) his belief was objectively reasonable, and (3) he filed his state post-conviction relief petition within a reasonable time after he should have known that his counsel was not pursuing his direct appeal.” 119 Nev. 248, 248, 71 P.3d 503, 507–08 (2003). There is no question that Carroll had an objectively reasonable belief that his trial counsel were pursuing his direct appeal. But once McDonald had the necessary records in hand, he filed Carroll's petition within a reasonable time: after receiving the records on September 13, 2011, more than a year after entry of the judgment, McDonald filed the petition on December 29, 2011. RA 11.

Moreover, assuming the district court abided by the law, which we must, two conclusions follow. First, in light of the many extensions the district court afforded McDonald to obtain prior counsels' files, the court must have found as a factual matter that those files were necessary to Carroll's petition. Second, because the district court approved Carroll's petition, the court must also have

found as a factual matter that Carroll's petition was filed within a reasonable time. *See e.g., State v. Huebler*, 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012) (district court's factual determinations regarding good cause given deference). Thus, Carroll had good cause for his delay.

The decision in *Hood v. State* does not alter that conclusion. In *Hood*, a *per curiam* decision, this Court stated simply that a petitioner did not have good cause for procedural default though his attorney failed to send him his file because that “did not prevent appellant from filing a timely petition.” 111 Nev. 335, 338, 890 P.2d 797, 798 (1995). But, understandably in a *per curiam* decision, this Court did not explain *why* it did not prevent him from filing his petition. Without a *why*, *Hood* simply is not the categorical rule that the State suggests — “difficulty in obtaining [the] file from prior counsel . . . is not good cause as a matter of law.” *See State's Motion to Dismiss* at 6. Indeed, if the factual or legal basis for a claim is found in prior counsel's file, then by definition, a cause external to the defense has caused the delay.

Alternatively, if post-conviction counsel had to file a petition within 1 year, *no matter what*, then his failure to do so rendered him ineffective. Although the United States Supreme Court has not yet ruled that a petitioner has a constitutional right to effective assistance of post-conviction counsel, equity demands that a petitioner be allowed to present his substantial claims when the reason he failed to

present them before was because of post-conviction counsel's ineffectiveness. *See, Martinez v. Ryan*, 566 U.S. ___, 132 S.Ct. 1309, 1318 (2012). When such is the case, according to the United State Supreme Court, post-conviction counsel's ineffectiveness may provide the "good cause" necessary to overcome a procedural default rule or a procedural bar in habeas proceedings. *Id.* at 1315-19 (2012).

This Court should adopt the United States Supreme Court's reasoning and apply it to this matter. There is no dispute that Carroll's appeal-deprivation claim is substantial and valid. The only problem here is that Carroll's post-conviction counsel presented the claim more than one year after entry of the judgment. This Court should hold that counsel's ineffectiveness was good cause for the delay.

C. *Dismissing Carroll's appeal will cause him undue prejudice*

"[T]he denial of the right to appeal deprives a person of a basic right that presumably prejudices the person." *Lozada v. State*, 110 Nev. 349, 358, 871 P.3d 944, 949 (1994) (citing *Fawaz v. State*, 105 Nev. 682, 783 P.2d 425 (1989)). Indeed, when a defendant requests an appeal, but his attorney fails to heed the request, the defendant has suffered a "complete denial of counsel." *Id.* And obviously, without an appeal, Carroll will never be able to test the constitutional firmity of his conviction and sentence. Indeed, he will have lost the ability to vindicate his rights and correct any errors that occurred during his trial. Thus, besides good cause, Carroll can show he will be unduly prejudiced if his right to

appeal is taken away.

III. If the Court is inclined to grant the State's motion, the proper remedy is remand

Finally, if this Court determines that the district court's omission requires some remedy, the proper resolution is to remand the case to the district court, not dismiss the petition outright. *See Nika v. State*, 120 Nev. 600, 605, 97 P.3d 1140, 1144 (2004). At that point, the district court can amend its order to address the State's procedural objections, and Carroll's appeal can proceed.

Conclusion

The State's motion to dismiss Carroll's appeal should be denied.

DATED: June 5, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on June 5, 2013. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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/s/ Mario D. Valencia
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