

Electronically Filed
Jun 10 2013 04:48 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

) Case No. 63115

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The instant appeal arises from the granting of an appeal deprivation claim below which entitled Carroll to an untimely appeal from judgment of conviction. The State now challenges that decision and moves to dismiss this appeal pursuant to NRAP 4(c)(3).

Dated this 10th day of June, 2013.

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MEMORANDUM

Carroll first argues that the State has “waived” its argument that the petition was time-barred and “invited” the error by not “pressing” the issue below and by not reminding the district court judge of the omission in its findings. It is difficult to understand what more the State could have done. In good faith and as a professional courtesy, the State stipulated to continuances up until the defense asked for an extension that would have bypassed the one-year time bar. At this point, the State spoke up, objected to the continuance, and warned the defense and the district court of its intent to raise delay. When the petition was finally filed, the State moved to dismiss specifically on grounds of the one-year time bar.

Application of the one-year time bar is mandatory and cannot be waived, stipulated, or ignored. State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003). The one-year time bar is not an affirmative defense that the State must raise to preserve for appellate review. Id. To the contrary, it is Carroll who bears the burden: “To raise a claim in an untimely and/or successive post-conviction habeas petition, *the petitioner has the burden* of pleading and proving specific facts that demonstrate good cause and prejudice to overcome the procedural bars. State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1 (2003) (emphasis added); see also Ford v. Warden, 111 Nev. 872, 979-80, 901 P.2d 123, 127 (1995). Also, the district court has a duty imposed by law to consider in the first instance whether procedural default rules apply before granting an evidentiary hearing or ruling on the merits. State v. Dist. Ct. (Riker), 121 Nev. 225, 112 P.3d 1070 (2005). A party bears no burden to object to proposed findings and conclusions or to seek to modify them after the order has been filed. Byford v. State, 123 Nev. ___, 156 P.3d 691, 692-93 (2007). In short, the State did raise the one-year time bar below, even though it had no duty to do so, but Carroll and the district court ignored the law.

1 Citing to NRCPP 61, Carroll next argues that any error in failing to address
2 good cause and prejudice for violating the one-year time bar was “harmless.”
3 However, harmlessness as applied against the State in a criminal proceeding is a
4 novel application of the rule without precedent in the law. More importantly, the
5 Nevada Rules of Civil Procedure apply only to the extent they are not inconsistent
6 with NRS Chapter 34. See NRS 34.780; Beets v. State, 110 Nev. 339, 871 P.2d
7 357 (1994) (civil remedy of summary judgment is not applicable in post-conviction
8 habeas proceedings). Because NRS Chapter 34 addresses the applicable standards
9 for showing good cause and prejudice, the rules of civil procedure do not apply.
10 This Court gives deference to the district court’s factual findings regarding good
11 cause to overcome post-conviction procedural bars, but will review the court’s
12 application of the law to those facts de novo. State v. Huebler, 128 Nev. ___, 275
13 P.3d 91, 95 (2012).

14 The State generally agrees that good cause may exist where the factual or
15 legal basis for a claim is not reasonably available. However, Carroll has failed to
16 show how the appeal deprivation claim in this case was not previously available
17 until the entire file was received from prior counsel. Although Carroll disagrees
18 that Hood v. State created a categorical rule, he fails to identify anything in trial
19 counsel’s file that was necessary before he could raise his appeal deprivation
20 claim. Discovery is generally available after a petition is filed, not before, and the
21 petition can be supplemented as new facts are developed. NRS 34.750; 34.790. At
22 no time did Carroll ever allege below (or indeed even now on appeal) how or when
23 he first learned that his trial counsel had failed to file a direct appeal. Without this
24 factual allegation in the record, Carroll can not show that he filed his claim within
25 a reasonable time after it became available to him.

26 Inasmuch as Carroll asserts ineffective assistance of post-conviction counsel
27 as good cause, this is a new claim raised for the first time on appeal. Generally this
28 Court will not entertain claims of ineffective assistance of counsel in the first

1 instance because they are fact-based claims that require development of the record
2 below. Besides, Martinez v. Ryan has no application outside of federal court and
3 did nothing to change state law that ineffectiveness of post-conviction counsel will
4 not serve as an excuse for procedural default. McKague v. Warden, 112 Nev. 159,
5 912 P.2d 255 (1996). Carroll has failed to demonstrate the applicability of such
6 federal authority to state law questions of good cause and prejudice. See e.g., Gore
7 v. State, ___ So.3d ___, 2012 WL 1149320 (Fla. 2012) (“It appears that Martinez
8 is directed toward federal habeas proceedings and is designed and intended to
9 address issues that arise in that context.”), cert. denied, 132 S. Ct. 1904 (2012);
10 Sherman v. Baker, 2012 WL 993419 at 11 (D. Nev. 2012).

11 Because the district court did not consider any claims of good cause and the
12 only claims advanced by Carroll are legally insufficient, further proceedings before
13 the district court are not necessary. Although remand was appropriate in Nika due
14 to deficient findings, that was where the district court’s decision, “if properly
15 explained, could be upheld.” Nika v. State, 120 Nev. 600, 605, 97 P.3d 1140, 1144
16 (2004). Such is not the case here. Carroll’s explanations of good cause are
17 inadequate as a matter of law. Under these circumstances, he should not be
18 favored with a remand so as to make new factual allegations and correct
19 deficiencies in his petition. Any additional arguments of good cause must be
20 raised in a new petition where Carroll can attempt to meet his burden of proof.

21 WHEREFORE, the State requests the instant appeal be dismissed.

22 Dated this 10th day of June, 2013.

23 Respectfully submitted,

24 STEVEN B. WOLFSON
25 Clark County District Attorney
Nevada Bar # 001565

26 BY /s/ Steven S. Owens

27 STEVEN S. OWENS
28 Chief Deputy District Attorney
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify and affirm that this document was filed electronically with
3 the Nevada Supreme Court on 10th day of June, 2013. Electronic Service of the
4 foregoing document shall be made in accordance with the Master Service List as
5 follows:

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