

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Jan 06 2016 08:46 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

CASE NO: 69036

FAST TRACK RESPONSE

Routing Statement: This appeal is not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(1) because it is a post-conviction appeal in a case involving a conviction for a Category A felony offense.

1. **Name of party filing this fast track response:** The State of Nevada
2. **Name, law firm, address, and telephone number of attorney submitting this fast track response:**
Ryan J. MacDonald
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3. **Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:**
Same as (2) above.
4. **Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal:** None.
5. **Procedural history.**

Appellant Brian Kerry O'Keefe was charged by way of Information on December 19, 2008 with one count of Murder with Use of a Deadly Weapon (Open

Murder) (Felony – NRS 200.010, 200.030, 193.165).¹ Appellant’s Appendix (hereinafter “AA”) 1-3.

O’Keefe proceeded to trial on March 16, 2009. IV AA 724. On March 20, 2009, the jury returned a verdict of guilty on the charge of Second Degree Murder with Use of a Deadly Weapon. II AA 327-328. A Judgment of Conviction was filed on May 8, 2009. II AA 327-328. O’Keefe appealed to the Nevada Supreme Court and on April 7, 2010, this Court reversed and remanded his case for a new trial due to a jury instruction issue; Remittitur issued May 3, 2010. VI AA 1023.

O’Keefe proceeded to trial for a second time on August 23, 2010. XXVIII AA 5528. On September 2, 2010, the district court declared a mistrial on account of a hopelessly deadlocked jury at a 10 to 2 vote. II AA 327-328.

On October 3, 2011, O’Keefe filed a Motion to Dismiss Appointed Counsel and for a Faretta Hearing. XVI AA 3165-3166. The district court conducted a Faretta Canvass on December 16, 2011, and dismissed O’Keefe’s counsel, thus allowing O’Keefe to represent himself. II AA 327-328.

On May 9, 2012, a federal court denied O’Keefe’s Motion to Stay the State Court Proceedings. II AA 327-328. The federal court denied O’Keefe’s renewed Motion on June 5, 2012. II AA 327-328. O’Keefe proceeded to trial for a third time

¹ An Amended Information was also filed February 10, 2009, containing the same charge.

on June 11, 2012. XXII AA4278. On June 15, 2012, the jury returned a guilty verdict to Second Degree Murder With Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165). XVIII AA 3592-3593.

On August 28, 2012, the district court sentenced O’Keefe as follows: a minimum of one hundred twenty to a maximum of three hundred months, plus a consecutive term of 8 to 20 years for use of a deadly weapon, with 1,394 days credit for time served. II AA 327-328; XXIV AA 4623-4624. A Judgment of Conviction was filed on September 5, 2012. XXIV AA 4623-4624.

A Notice of Appeal was filed on September 13, 2012. II AA 327-328. The Supreme Court affirmed on April 10, 2013. XXIV AA 4653. Remittitur issued July 23, 2013. XXIV AA 4653.

On December 6, 2013, O’Keefe filed a Petition for Writ of Mandamus or, in the Alternative, Writ of Coram Nobis and a Motion to Appoint Counsel. XXIV AA 4663-4694. The State filed its Response on December 31, 2013. XXIV AA 4708-4713. The district court denied the Petition and Motion without prejudice as the allegations therein related to another of O’Keefe’s cases, Case Number 04C202793. XXIV AA 4761. The written Order was filed on January 28, 2014. XXIV AA 4761.

On January 27, 2014, O’Keefe filed a Motion to Modify and/or Correct Illegal Sentence. XXIV AA 4760. The State filed the Opposition on February 24, 2014. XXV AA 4811-4817. The district court denied O’Keefe’s Motion to Modify and/or

Correct Illegal Sentence on February 27, 2014. II AA 327-328. On March 4, 2014, O’Keefe filed an untimely Reply. XXV AA 4821-4832.

On July 23, 2014, O’Keefe filed a “Motion for Relief from Judgment Based on Lack of Jurisdiction for U.S. Court of Appeals has Not Issued any Remand, Mandate or Remittitur.” XXV AA 4871-4889. The State filed a Response on August 7, 2014. XXV AA 4891-4902. The Motion was denied on August 14, 2014. II AA 327-328.

O’Keefe filed a Notice of Appeal on the denial of his “Motion for Relief from Judgment Based on Lack of Jurisdiction for U.S. Court of Appeals has Not Issued any Remand, Mandate or Remittitur” on August 29, 2014. XXV AA 4923. O’Keefe’s appeal was dismissed on September 24, 2014, pursuant to an Order from the Nevada Supreme Court. XXVI AA 5062.

On August 28, 2014, O’Keefe filed a Pro Per Motion to “Chief Judge to Reassign Case to Jurist of Reason Based on Pending Suit Against Judge Michael Villani for Proceeding in Clear ‘Want of Jurisdiction’ Thereby Losing Immunity, Absolutely!” XXV AA 4903-4912. On August 29, 2014, O’Keefe filed a Notice of Motion and “Motion for Leave of Court to File Motion for Rehearing – Pursuant to EDCR, Rule 2.24.” II AA 327-328. The State filed Oppositions to both motions on September 12, 2014. XXV AA 4930-4939. O’Keefe’s Pro Per Motion to “Chief Judge to Reassign Case to Jurist of Reason Based on Pending Suit Against Judge

Michael Villani for Proceeding in Clear ‘Want of Jurisdiction’ Thereby Losing Immunity, Absolutely!” was referred to Judge Jennifer Togliatti and denied by Order on October 6, 2014. II AA 327-328.

O’Keefe filed a Post-Conviction Petition for Writ of Habeas Corpus on September 15, 2014, as well as Motion to Appoint Counsel. II AA 327-328. On October 3, 2014, O’Keefe filed an Amended Petition and Accompanying Exhibits. XXV AA4995-5007. The State’s Response and Motion to Dismiss to the Post-Conviction Petition for Writ of Habeas Corpus, Amended Petition and Accompanying Exhibits, the State’s Opposition to Request for Evidentiary Hearing, and the State’s Opposition to O’Keefe’s Motion to Appoint Counsel was filed on October 10, 2014. II AA 327-328. On October 27, 2014, O’Keefe filed a Reply. II AA 327-328. On November 6, 2014, the district court appointed counsel and set a supplemental briefing schedule. II AA 327-328. Oddly, O’Keefe filed a notice of appeal from the denial of his Petition on November 21, 2014. XXVI AA 5067. As the Petition was not denied, the Nevada Supreme Court dismissed O’Keefe’s appeal on February 11, 2015.

On April 8, 2015, O’Keefe filed a Supplemental Post-Conviction Petition for Writ of Habeas Corpus. XXVI AA 5094-5144. The State filed its Response on June 2, 2015. XXVI AA 5145-5146.

On June 8, 2015, O’Keefe filed a pro per Motion to Withdraw Counsel. XXVI AA 5148-5153. The State filed its Opposition on June 25, 2015. II AA 327-328. On June 30, 2015, the district court denied O’Keefe’s Motion. II AA 327-328.

On June 15, 2015, O’Keefe filed a pro per Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) and Evidentiary Hearing Request and “Motion to Leave to File Supplemental Petition Addressing All Claims in the First Instance Required by Statute for Juridical Economy with Affidavit.” XXVII AA 5364-5419. On June 16, 2015, he filed a pro per “Reply to States’ Response to O’Keefe’s Pro Per Post Conviction Petition for Habeas Corpus,” and on June 17, 2015, filed a pro per “Supplement with Notice Pursuant NRS 47.150(2); NRS 47.140(1), That the United States Supreme Court has Docketed (#14-10093) the Pretrial Habeas Corpus Matter Pursuant.” II AA 327-328. The State’s response was filed on July 9, 2015. XXVIII AA 5455-5458. O’Keefe’s Petition was denied on September 4, 2015. XXVIII AA 5528-5536. A Findings of Fact, Conclusions of Law and Order was filed on October 2, 2015. II AA 327-328.

O’Keefe filed a Notice of Appeal on October 21, 2015. XXVII AA 5552. On December 9, 2015, O’Keefe filed the instant Fast Track Statement (hereinafter “FTS”). The State responds as follows.

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6. Statement of Facts.

As discussed above, O’Keefe filed multiple petitions and supplemental petitions. On September 4, 2015, the district court orally denied O’Keefe’s Post-Conviction Petition for Writ of Habeas Corpus:

And I do find the notice of remittitur like I said was July 2013. And the petition was filed September 24, 2014. And I think, Mr. Carling, I think the problem here was he filed so many motions, gave him different names, if I recall, you know, regurgitated some of the same motions and he appealed every single denial. And we probably have three or four remittiturs from the Supreme Court on this particular case. But I do find that he is time barred under 34.726. Good cause is not shown. And so – and also I’m going to deny the request for evidentiary hearing on this matter because like I said it’s a jurisdictional bar on this particular matter.”

XXVIII AA 5562-5563. A Findings of Fact, Conclusions of Law and Order was filed on October 2, 2015. II AA 327-328. O’Keefe filed a Notice of Appeal on October 21, 2015. XXVII AA 5552. On December 9, 2015, O’Keefe filed the instant Fast Track Statement

7. Issue on appeal.

- I. WHETHER THE DISTRICT COURT PROPERLY DENIED O’KEEFE’S PETITION.

8. Legal Argument, including authorities:

- I. THE DISTRICT COURT PROPERLY DENIED O’KEEFE’S PETITION

a. O’Keefe’s Petition is Time Barred

O’Keefe’s Petition for Writ of Habeas Corpus is time barred pursuant to NRS

34.726(1):

Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:

(a) That the delay is not the fault of the petitioner; and

(b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The Supreme Court of Nevada has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar prescribed by NRS 34.726 begins to run from the date the Judgment of Conviction is filed or a Remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the Notice within the one-year time limit.

Remittitur was issued from O’Keefe’s timely direct appeal on July 23, 2013. Thus, the one-year time bar began to run from that date. O’Keefe’s Post-Conviction Writ of Habeas Corpus was filed on September 15, 2014, over one year after the date of Remittitur and in excess of the one-year time frame. Thus, O’Keefe’s claim is untimely in violation of NRS 34.762(1). Accordingly, the district court properly denied O’Keefe’s Petition on that basis.

b. O’Keefe Has Not Shown Good Cause to Overcome the Procedural Bars

O’Keefe’s Reply in Support of the Supplemental Petition includes the appropriate provision under NRS 34.726 for “good cause,” and O’Keefe here re-states his claims that consideration of his Pro Per Motion for Stay of the Remittitur would have made his Petition timely.

NRS 34.726(1) provides:

Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, **if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur.** For the purposes of this subsection, **good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:**

- (a) That the delay is not the fault of the petitioner; and**
- (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.**

(emphasis added).

To avoid procedural default under NRS 34.726, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or comply with the statutory requirements.

See Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988).

“To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003); see Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Such an external impediment could be “that the factual or legal basis for a claim was not reasonably available to counsel, or that ‘some interference by officials’ made compliance impracticable.” Hathaway, 74 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (*citing* Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

The Nevada Supreme Court has clarified that, “appellants cannot attempt to manufacture good cause[.]” Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a “substantial reason; one that affords a legal excuse.” Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Excuses such as the lack of assistance of counsel when preparing a petition, as well as the failure of trial counsel to forward a copy of the file to a petitioner have been found not to constitute good cause. See Phelps, 104

Nev. at 660, 764 P.2d at 1306, superseded by statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

Additionally, in order to demonstrate prejudice to overcome the procedural bars, a defendant must show “not merely that the errors of [the proceeding] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.” Hogan v Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (internal quotation omitted); Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545.

O’Keefe has not demonstrated good cause for failing to file his Petition in a timely manner. O’Keefe’s only attempt to show good cause is his contention that that ineffective assistance of appellate counsel amounts to good cause to overcome the defaulted nature of the instant petition. FTS 24. Specifically, O’Keefe contends that if appellate counsel had filed a stay of the Remittitur on direct appeal during the pendency of his attempt to pursue a Certiorari Petition in the United States Supreme Court, this would have changed the Remittitur date and transformed his untimely petition into a timely one.² This assertion fails for a few reasons. First, ineffective assistance of counsel cannot excuse the failure to comply with the procedural rules

²O’Keefe’s petition in the United States Supreme Court was denied on October 15, 2013.

of NRS Chapter 34 and thus does not constitute good cause. Brown v. McDaniel, 130 Nev. ___, ___, 331 P.3d 867,869 (2014). Second, good cause must explain *the period of delay*. This assertion of good cause does not explain the failure to file a timely petition at any time after October 15, 2013. For example, if an impediment external to the defense continually operated to deprive O’Keefe of the ability to file a petition from July 23, 2013 to September 15, 2014, good cause would be established. The claim here does no such thing, thus his good cause argument fails and the district court did not err in so concluding.

O’Keefe makes no other attempt to establish good cause, but claims that under Mitchell v. State, 122 Nev. at 1274, 149 P.3d at 33, O’Keefe does not need to show good cause to overcome the time bar if a showing of constitutional violation which resulted in the conviction of one who is actually innocent is made. FTS 21. O’Keefe offers a statement that malice is an essential element of “murder,” and that every element of an offense charged must be in the jury instructions, yet no reference to the record, nor further argument is made in support of the claim. FTS 28. Thus, O’Keefe has failed to overcome the procedural bars applicable to his untimely Petition through this insufficiently pleaded actual-innocence claim. Accordingly, O’Keefe’s Petition is time barred, pursuant to NRS 34.726(1), and good cause has not been shown. As such, the district court properly denied O’Keefe’s Petition.

c. O’Keefe was Not Entitled to an Evidentiary Hearing

O’Keefe was not entitled to an evidentiary hearing in this matter. NRS 34.770

determines when a defendant is entitled to an evidentiary hearing. It reads:

1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.
2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an Evidentiary Hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; See also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (1984) (holding that “[a] defendant seeking post-conviction relief is not entitled to an Evidentiary Hearing on factual allegations belied or repelled 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.” Mann, 118 Nev. at 354, 46 P.3d

at 1230 (2002). O’Keefe met none of these requirements, therefore his request for an Evidentiary Hearing was properly denied.

9. Preservation of the Issue.

These issues were properly preserved.

VERIFICATION

1. I hereby certify that this Fast Track Response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Fast Track Response has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point and Times New Roman style.
2. I further certify that this Fast Track Response complies with the type-volume limitations of NRAP 32(a)(8)(B) because it is proportionately spaced, has a typeface of 14 points and contains 3,059 words.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 6th day of January, 2016.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Ryan J. MacDonald*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 6, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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