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Summary of Hathaway v. State

Melanie Koep
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Koep, Melanie, "Summary of Hathaway v. State" (2003). *Nevada Supreme Court Summaries*. 731.
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***Hathaway v. State*, 71 P.3d 503 (Nev. 2003)¹**

Criminal Law – Habeas Corpus

Summary

Proper person appeal from an order of the Eighth Judicial District Court, Honorable John S. McGroarty, denying appellant's post-conviction petition for writ of habeas corpus.

Disposition/Outcome

Reversed and remanded for evidentiary hearing on the issue of good cause to excuse procedural time-bar.

Factual and Procedural History

Petitioner Hathaway was convicted of one count of first-degree murder, one count of sexual assault, and one count of attempted sexual assault, pursuant to a guilty plea, on December 11, 1998. He was sentenced to two concurrent terms of life with possibility of parole and a third concurrent term of 20 years with possibility of parole after 8 years. No direct appeal was filed.

On November 6, 2001, Petitioner filed his proper person post-conviction petition for writ of habeas corpus in the district court. He alleged: (1) he had been deprived of a direct appeal without his consent; (2) there was cause to excuse his delay in filing the petition because he filed within a reasonable time after he learned no appeal was filed; (3) immediately after sentencing, he told his attorney that he wanted to appeal and his attorney indicated he would take care of it; and (4) after the sentencing, his attorney failed to respond to any further communication, and only after inquiry to the Nevada Supreme Court did he learn the appeal was not filed.

The State objected to the petition, arguing it was procedurally barred because it was untimely and Hathaway failed to demonstrate adequate cause for the delay. The district court declined to appoint post-conviction counsel or allow an evidentiary hearing under Nevada Revised Statute 34.750 and 34.770, and denied the petition as untimely. Petitioner appealed.

The Nevada Supreme Court, Justices Robert Rose, William Maupin and Mark Gibbons, *per curiam*, held the Court's previous holding in *Harris v. Warden*² did not preclude a finding of good cause. The court found: (1) an appeal deprivation claim is not good cause where it was reasonably available to the petitioner within the one-year statutory period for filing a post-conviction petition for writ of habeas corpus; and (2) good cause existed where Petitioner believed his counsel was filing a direct appeal and raised his claim within a reasonable time period after learning the direct appeal had not been filed.

¹ By Melanie Koep.

² 114 Nev. 956, 964 P.2d 785 (1998).

Discussion

Under Nevada Revised Statute 34.726(1), a post-conviction petition for writ of habeas corpus must be filed within one year after entry of the judgment of conviction, if no direct appeal is filed, unless good cause is shown for the delay. “Generally, ‘good cause’ means a ‘substantial reason; one that affords a legal excuse.’”³ Good cause to excuse procedural default may be demonstrated: (1) by showing that “an impediment external to the defense” prevented the petitioner from filing in a timely manner;⁴ or (2) by a (timely) claim of ineffective assistance of counsel if counsel was so ineffective as to violate the Sixth Amendment.⁵ An adequate allegation of good cause would sufficiently explain why an otherwise untimely petition was filed outside the statutory time frame. However, a claim which was reasonably available to the petitioner during the statutory time period would not constitute good cause.

The Nevada Supreme Court’s previous ruling in *Harris* provided that an allegation of ineffective assistance of counsel for failing to inform a claimant of the right to appeal, or any other allegation of deprivation of direct appeal without consent, does not constitute good cause for failing to timely file a petition under Nevada Revised Statute 34.726.⁶ Conversely, in *Loveland v. Hatcher*,⁷ the Ninth Circuit noted that if a petitioner believes his attorney is pursuing a direct appeal, he will not file his own post-conviction petition. Accordingly, it held a petitioner’s reliance upon his counsel to file a direct appeal sufficiently excuses procedural default where petitioner demonstrates he actually believed his counsel was filing an appeal, the belief was objectively reasonable, and his post-conviction relief petition was filed within a reasonable time after he should have known his counsel was not undertaking a direct appeal.

Petitioner Hathaway filed his petition for post-conviction relief approximately three years after sentencing. Accordingly, without a showing of good cause, his petition should be barred as untimely. Hathaway claimed he had good cause to excuse the delay because of the ineffective assistance of his counsel. He alleged that he asked his attorney to file an appeal, he believed his attorney was pursuing the appeal, and he filed his petition for relief within a reasonable time after learning his counsel had not made a direct appeal. While the Court generally will not disturb a district court’s finding of good cause, the district court, in this case, misplaced its reliance on *Harris*. A deprivation claim is not good cause if it was available to the petitioner within the statutory time period; however, the ruling in *Harris* should not be read to preclude all consideration of good cause simply because a case involves an appeal deprivation claim.

Hathaway raised claims which, if true, would entitle him to relief. However, those facts were not a part of the record because the district court failed to conduct an evidentiary hearing regarding the allegations. The Court could not determine whether Hathaway was entitled to relief, without knowing whether Hathaway believed his counsel filed an appeal, whether that belief was objectively reasonable, and whether Hathaway filed his petition for writ of habeas corpus within a reasonable time frame. Accordingly, the case was remanded for an evidentiary hearing to determine if Hathaway can show good cause under the *Loveland* test. If good cause is

³ Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), quoting State v. Estencion, 625 P.2d 1040, 1042 (Haw. 1981).

⁴ Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); Passanisi v. Dir., Dep’t Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989).

⁵ Edwards v. Carpenter, 529 U.S. 446, 451 (2000), citing, Murray v. Carrier, 477 U.S. 478, 488-89 (1986); see also Crump v. Warden, 113 Nev. 293, 304, 934 P.2d 247, 253 (1997).

⁶ *Harris*, 114 Nev. at 959, 964 P.2d at 787.

⁷ 231 F.3d 640, 644 (9th Cir. 2000).

established under Hathaway's claim for ineffective assistance of counsel, Hathaway will have established undue prejudice necessary to excuse the one-year time limitation.

Conclusion

The Nevada Supreme Court's previous ruling in *Harris* should not be construed so broadly. The District Court must consider the issue of good cause to excuse the delay for filing a post-conviction petition for relief and must not deny relief or an evidentiary hearing simply because the claim is one which is characterized as an appeal deprivation claim. The district court's order was reversed in its entirety and remanded for an evidentiary hearing to determine whether Petitioner Hathaway can demonstrate good cause to excuse the delay in filing his petition.