

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH HURTADO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43127

FILED

SEP 01 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant Kenneth Hurtado's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On April 23, 1999, the district court convicted Hurtado, pursuant to a guilty plea, of one count of attempted sexual assault. The district court sentenced Hurtado to serve a term of 48 to 120 months in the Nevada State Prison. The district court also imposed a special sentence of lifetime supervision to commence after any term of imprisonment or release on parole. Hurtado did not file a direct appeal.

On January 6, 2004, Hurtado filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Hurtado or to conduct an evidentiary hearing. On March 8, 2004, the district court denied Hurtado's petition. This appeal followed.

Hurtado filed his petition almost five years after entry of his judgment of conviction. Thus, Hurtado's petition was untimely filed.¹

¹See NRS 34.726(1).

Hurtado's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.²

In an attempt to demonstrate cause for the delay, Hurtado argued that his trial counsel never advised him of his right to a direct appeal, or that he only had one year in which to file a petition for a writ of habeas corpus. The district court did not err in rejecting this attempt to excuse his untimely petition. "[T]here is no constitutional requirement that counsel must always inform a defendant who pleads guilty of the right to pursue a direct appeal" unless the defendant inquires about a direct appeal or there exists a direct appeal claim that has a reasonable likelihood of success.³ Here, Hurtado did not demonstrate the existence of either of the above exceptions; he further failed to establish that he could not have raised this claim in a timely petition.⁴ Further, trial counsel was not required to inform Hurtado of post-conviction remedies.⁵ Consequently, Hurtado failed to demonstrate that his trial counsel's actions excused his untimely petition.

Hurtado next contended that his untimely petition should be excused because one of the claims he raised in the petition was not reasonably available during the statutory time period for filing his post-conviction habeas petition. Specifically, Hurtado argued that his guilty plea was not knowingly or voluntarily entered because he was not advised of the special sentence of lifetime supervision. Hurtado claimed that this

²See id.

³Thomas v. State, 115 Nev 148, 150, 979 P.2d 222, 223 (1999).


⁴See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003).


⁵See generally Thomas, 115 Nev. 148, 979 P.2d 222.

court's 2002 decision in Palmer v. State,⁶ in which the court held that a defendant must be aware of lifetime supervision prior to the entry of a guilty plea, provided the requisite good cause. Even assuming, without deciding, that Palmer retroactively applies to Hurtado's case, we note that Hurtado failed to adequately explain the entirety of his delay in filing the instant petition; this court issued the Palmer decision in December 2002, and Hurtado did not file his petition until January 2004. Because Hurtado failed to excuse his subsequent delay in filing the instant petition, the district court did not err in concluding that his petition was procedurally barred.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Hurtado is not entitled to relief and that briefing and oral argument are unwarranted.⁷ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

⁶118 Nev. 823, 59 P.3d 1192 (2002).

⁷See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Steven P. Elliott, District Judge
Kenneth Hurtado
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk