

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES LEE FAIRBANKS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43447

FILED

OCT 07 2004

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order dismissing appellant James Lee Fairbanks' post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On May 31, 2000, Fairbanks was convicted, pursuant to a guilty plea, of one count of attempted lewdness with a minor under the age of 14 years. The district court sentenced Fairbanks to serve a prison term of 60 to 240 months, ordered him to submit to DNA testing, and imposed a special sentence of lifetime supervision. Fairbanks did not file a direct appeal.

On October 6, 2003, Fairbanks filed a proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel to represent Fairbanks, and counsel supplemented the petition. The State moved to dismiss the petition, and counsel for Fairbanks filed an opposition to the motion to dismiss. The State filed a reply to the opposition to the motion to dismiss. Without conducting an evidentiary hearing, the district court dismissed the petition, ruling that Fairbanks failed to show good cause to overcome the untimely filing of the petition. Fairbanks filed this timely appeal.

Fairbanks filed his petition more than three years after the entry of his judgment of conviction. Thus, the petition was untimely filed.<sup>1</sup> Fairbanks petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>2</sup> Fairbanks argues that the district court erred in dismissing his petition because he demonstrated good cause to overcome the procedural bar. Specifically, Fairbanks alleges that: "[a] good portion of the delay in filing was caused by counsel's inability to note critical constitutional issues, protect those issues and advise the client to appeal."<sup>3</sup> We conclude that the district court did not err in dismissing the 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.<sup>4</sup> Here, Fairbanks did not demonstrate the existence of either of the above exceptions; he further failed to establish that the claims in the instant

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<sup>1</sup>See NRS 34.726(1).

<sup>2</sup>See id.

<sup>3</sup>According to Fairbanks, trial counsel should have raised the following constitutional challenges on direct appeal: (1) the collection of his DNA pursuant to NRS 176.0913 constitutes an illegal search and seizure; (2) the lifetime supervision sentence imposed is overbroad, violates Fairbanks' right to travel and right to due process of law; and (3) the imposition of NRS 213.1245 violates Fairbanks' right to free speech.

<sup>4</sup>Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999).

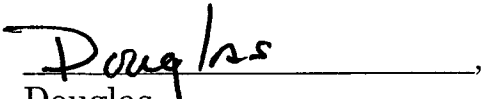
petition could not have been raised earlier.<sup>5</sup> Because Fairbanks failed to demonstrate that his trial counsel's actions excused his untimely petition, the district court did not err in concluding that Fairbanks' petition was procedurally barred.

Having considered Fairbanks' contention and concluded that it lacks merit, we

ORDER the judgment of the district court AFFIRMED.

  
Rose, J.

  
Maupin, J.

  
Douglas, J.

cc: Hon. Connie J. Steinheimer, District Judge  
Karla K. Butko  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>5</sup>See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003) (requiring a petitioner to raise an appeal deprivation claim within a reasonable time of learning that the petitioner had been deprived of a direct appeal); see also Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994) (good cause is an impedimental external to the defense).