

IN THE SUPREME COURT OF THE STATE OF NEVADA

TOBY BISHOP,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43458

FILED

JUL 01 2005

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court denying appellant Toby Bishop's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

On May 7, 2001, Bishop was convicted, pursuant to a guilty plea, of one count of solicitation to commit murder. The district court sentenced Bishop to serve a prison term of 48-120 months to run consecutively to the sentence imposed in district court case no. C166909. Bishop did not pursue a direct appeal from the judgment of conviction and sentence.

On May 8, 2002, Bishop filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Along with the petition, Bishop filed a "Notice to Court" stating that "petitioner will submit an Amended Petition to supercede [sic] this instant petition within 30 days with his supporting facts." On January 14, 2004, Bishop, with the assistance of counsel, filed a "Brief in Support of Petition for Writ of

Habeas Corpus” in the district court. The State opposed the petition. On August 23, 2004, the district court entered an order denying Bishop’s petition on the merits. This timely appeal followed.

Bishop contends that he received ineffective assistance of counsel prior to the entry of his guilty plea. More specifically, Bishop argues that counsel failed to advise him that he could receive a sentence consecutive to the sentence already imposed in district court case no. C166909. In fact, Bishop claims that “[n]o mention is made in the [plea] agreement regarding concurrent versus consecutive time to the companion case.” As a result, Bishop contends that he did not enter his guilty plea knowingly and intelligently.¹

Bishop filed his habeas petition more than one year after the entry of his judgment of conviction. Thus, Bishop’s petition was untimely filed and procedurally barred absent a demonstration of good cause for the delay and prejudice.² Good cause is established by showing that an impediment external to the defense prevented a petitioner from filing a

¹Bishop also raises arguments pertaining to district court case no. C166909 which are not cognizable in this appeal.

²See NRS 34.726(1); NRS 34.810(3); see also Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998) (holding that the one-year period for filing a post-conviction habeas corpus petition begins to run from the entry of the judgment of conviction if no direct appeal was taken).

timely petition.³ Without good cause for the delay and prejudice, this court will excuse the procedural bar only if the petitioner can demonstrate that a failure to consider his claims would result in a fundamental miscarriage of justice.⁴ Application of the procedural default rules to post-conviction petitions for writs of habeas corpus is mandatory.⁵

On May 17, 2005, this court filed an order directing counsel for Bishop to show cause why the district court should not be affirmed based on the procedural bar. On June 6, 2005, counsel for Bishop filed a response. There is no indication in either the documents provided by counsel in the response or in the record on appeal that Bishop filed a timely petition, and at no point in the proceedings below did Bishop allege that any good cause and prejudice existed to overcome the procedural bar. Therefore, we conclude that Bishop's petition should not have survived the procedural bar, and that the district court should have denied Bishop's petition on that basis alone.⁶ Further, Bishop has not demonstrated that a

³See Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998), clarified by Hathaway v. State 119 Nev. 248, 71 P.3d 503 (2003); see also Murray v. Carrier, 477 U.S. 478, 488 (1986).

⁴See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); cf. NRS 34.800(1).


⁵State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003).


⁶See generally Kraemer v. Kraemer, 79 Nev. 287, 291, 382 P.2d 394, 396 (1963) (holding that a correct result will not be reversed simply because it is based on the wrong reason).

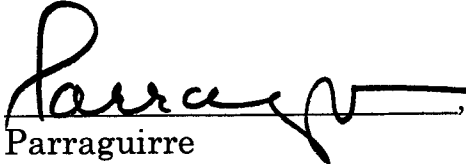
failure to consider his claims would result in a fundamental miscarriage of justice.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Hon. Nancy M. Saitta, District Judge
Michael P. Villani & Associates
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk