

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN DION SIMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43620

FILED

NOV 24 2004

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court dismissing appellant Brian Sims' post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On September 18, 2000, the district court convicted Sims, pursuant to an Alford plea,¹ of second-degree murder. The district court sentenced Sims to serve a term of ten to twenty-five years in the Nevada State Prison. Sims did not file a direct appeal.

On March 22, 2004, Sims filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss Sims' untimely petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Sims or to conduct an evidentiary hearing. On June 17, 2004, the district court dismissed Sims' petition. This appeal followed.

¹See North Carolina v. Alford, 400 U.S. 25 (1970).

Sims filed his petition more than three years after entry of his judgment of conviction. Thus, Sims' petition was untimely filed.² His petition was procedurally barred absent a demonstration of good cause for the delay and prejudice.³

In an attempt to demonstrate good cause for the delay, Sims argued this his petition was not timely filed because he was dependent on his attorney. Sims also claimed that he received new evidence in the form of an affidavit from one of the witnesses to the murder. We conclude that the district court did not err in dismissing Sims' petition. Sims did not establish that an impediment external to the defense prevented him from filing a timely petition.⁴ Further, the affidavit which Sims argued contained "new evidence" was dated well before the expiration of the statutory time period for filing a post-conviction habeas petition; Sims failed to explain why he was unable to raise claims relating to the affidavit in a timely petition.⁵ Consequently, Sims did not establish good cause to overcome his procedural defect.

²See NRS 34.726(1).

³See id.


⁴See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994); Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988).


⁵See Hathaway v. State, 119 Nev. 248, 253, 71 P.3d 503, 506 (2003) (providing that "a claim or allegation that was reasonably available to the petitioner during the statutory time period would not constitute good cause to excuse the delay").

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Sims is not entitled to relief and that briefing and oral argument are unwarranted.⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁷


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Joseph T. Bonaventure, District Judge
Brian Dion Sims
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁷We have reviewed all documents that Sims has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted.