

IN THE SUPREME COURT OF THE STATE OF NEVADA

RYAN OSHUN MOORE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44211

FILED

MAY 04 2005

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying a proper person post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; James W. Hardesty, Judge.

On September 24, 1999, the district court convicted appellant Ryan Moore, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon, robbery with the use of a firearm, and conspiracy to commit robbery with the use of a firearm. The district court sentenced Moore to serve various concurrent terms of imprisonment for the underlying offenses and consecutive terms as enhancements for using a deadly weapon.

On direct appeal, this court partially vacated Moore's conspiracy conviction, holding that a deadly weapon enhancement may not be used to enhance a conspiracy conviction.¹ Moore's direct appeal was remanded in part to the district court with instructions to correct his sentence on this basis. This court issued the remittitur on August 21, 2001, and the district court entered an amended judgment of conviction in accordance with this court's instructions on September 20, 2001.

¹Moore v. State, 117 Nev. 659, 663, 27 P.3d 447, 450 (2001).

On September 5, 2002, Moore filed a post-conviction petition for a writ of habeas corpus in proper person. Without conducting an evidentiary hearing, the district court entered an order on October 15, 2004, dismissing Moore's petition as untimely pursuant to NRS 34.726. Moore was thereafter appointed counsel. This appeal followed, raising several challenges to the dismissal of his petition.

NRS 34.726(1) provides in part that a post-conviction petition for a writ of habeas corpus challenging the validity of a judgment of conviction or sentence must be filed within one year from the date this court issues its remittitur from a direct appeal.² The application of this one-year limitation may be overcome if a petitioner can show good cause to excuse his failure to file a timely petition. To show good cause, a petitioner must demonstrate that any delay in the filing of his petition was not his fault and that its dismissal will result in undue prejudice.³ Absent such a showing, this court will only consider the merits of a petition if a petitioner demonstrates that the dismissal of his petition will result in a fundamental miscarriage of justice.⁴

Initially we must determine the date of the remittitur for purposes of calculating the one-year period pursuant to NRS 34.726(1). Moore and the State both assert in their briefs on appeal that this date is August 29, 2001. However, both parties are incorrect.

²See Pellegrini v. State, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001).

³See NRS 34.726(1).

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

Our review of the record reveals that August 29, 2001, is the date on which the district court filed the receipt of the remittitur from this court, and this is not the proper date from which the one-year period pursuant to NRS 34.726 begins to run. This court held in Gonzalez v. State that "the one-year period for filing a post-conviction habeas petition commences to run from the date that this court issues its remittitur . . . [and] not the date on which the district court subsequently acknowledges receipt of the remittitur."⁵ The remittitur was issued by this court on August 21, 2001. To be timely, Moore's petition therefore had to be filed by August 21, 2002—one year from the date this court issued the remittitur from his direct appeal—and not August 29, 2002.

Moore nonetheless maintains on appeal that the one-year period pursuant to NRS 34.726 should run not from the date of the remittitur but from the date the amended judgment of conviction was issued by the district court in his case. Under this reasoning, he maintains that his petition would be timely filed within one year because the amended judgment of conviction was issued on September 20, 2001, and his petition was filed on September 5, 2002.

This court, however, recently held in Sullivan v. State that the plain language and spirit of NRS 34.726 demand that the one-year period for filing a timely petition begins to run from the date this court issues the remittitur from the direct appeal, and not the date a subsequently amended judgment of conviction is issued.⁶

⁵118 Nev. 590, 593, 53 P.3d 901, 902 (2002) (emphasis added).

⁶See 120 Nev. ___, ___, 96 P.3d 761, 764 (2004).

Moore asserts in his opening brief that the district court erred in applying the holding of Sullivan to the facts of his case. Yet he later concedes in his brief that Sullivan is "squarely on point" and, if applied, does render his petition untimely. We agree and conclude that Sullivan is applicable to Moore's petition. This court issued the remittitur from Moore's direct appeal on August 21, 2001, and he filed his petition over one year later on September 5, 2002. Pursuant to Sullivan, we conclude that the district court properly dismissed his petition as untimely pursuant to NRS 34.726.

Even if the petition is untimely, Moore argues that good cause exists to excuse his delay. He specifically contends that he signed his petition on August 23, 2002, and gave it to prison officials for mailing on that date. Because his petition was not filed until September 5, 2002, thirteen days later, Moore maintains that negligence on the part of prison officials establishes good cause to excuse his delay. He further maintains that an evidentiary hearing should have been held on this matter.


Negligence on the part of prison officials may establish good cause to excuse an untimely petition under some circumstances.⁷ Yet such is not the case here. In making his good cause argument, Moore incorrectly assumes that his petition was due on August 29, 2002. Rather, as discussed above, the actual date his petition was due was August 21, 2002. Even if Moore did sign his petition and give it to prison officials on August 23, 2002, and those officials were negligent, his petition was already untimely by his own admission by at least two days. Therefore,


⁷See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (recognizing that good cause to excuse an untimely petition may be shown where interference by officials made filing a timely petition impracticable).

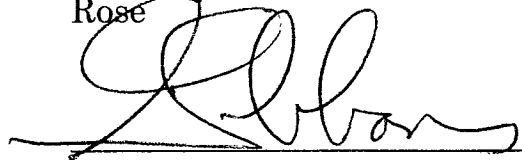
Moore's allegations, even if true, would not entitle him to any relief. He was not entitled to an evidentiary hearing.⁸

Moore does not contend that the dismissal of his petition by the district court pursuant to NRS 34.726 would result in a fundamental miscarriage of justice, and our review of his petition does not reveal that any such injustice would occur. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Becker


_____, J.
Rose


_____, J.
Gibbons

cc: Second Judicial District Court Dept. 9, District Judge
Mary Lou Wilson
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁸See Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001) (providing that a petitioner is only entitled to an evidentiary hearing if he raises claims that are not belied or repelled by the record and, if true, would entitle him to relief).