

IN THE SUPREME COURT OF THE STATE OF NEVADA

JENNIFER IRENE MCELROY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44614

FILED

AUG 24 2005

ORDER OF AFFIRMANCE

CLERK OF THE SUPREME COURT
J. Richards
CLERK

This is an appeal from an order of the district court denying appellant Jennifer Irene McElroy's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; James W. Hardesty, Judge.

On December 21, 2001, McElroy entered a guilty plea to one count of robbery. Prior to sentencing, McElroy filed a motion to withdraw the guilty plea in the district court arguing that her plea was not entered knowingly, intelligently, and voluntarily. More specifically, McElroy contended that the coercive nature of the "package deal" plea, made in conjunction with her fiancé/codefendant, rendered the plea invalid. Additionally, McElroy contended that there was insufficient evidence against her because there was no corroborating evidence of her alleged admission to an accomplice. The State opposed the motion, and the district court appointed new counsel to represent McElroy. After hearing arguments from counsel, the district court denied McElroy's motion to withdraw the guilty plea. Thereafter, on August 23, 2002, the district court sentenced McElroy to serve a prison term of 24 to 60 months.

McElroy filed a proper person direct appeal. This court dismissed the appeal as untimely filed.¹

On December 17, 2003, McElroy filed a proper person post-conviction petition for a writ of habeas corpus in the district court. In her petition, McElroy alleged that she was deprived of her right to a direct appeal, she received ineffective assistance of counsel, and her guilty plea was invalid. The district court appointed counsel to represent McElroy, and counsel supplemented the petition. The State opposed the petition. After conducting an evidentiary hearing, the district court denied the petition. This timely appeal followed.

As a preliminary matter, we note that McElroy's petition was untimely because it was not filed within one year of the entry of the judgment of conviction.² Although McElroy filed a direct appeal, the notice of appeal was untimely and, consequently, the one-year time period set forth in NRS 34.726(1) began from the entry of the judgment of conviction as if no appeal had been taken.³ Because McElroy failed to allege good cause for the untimely petition,⁴ it is procedurally barred, and

¹McElroy v. State, Docket No. 40352 (Order Dismissing Appeal, January 13, 2003).

²See NRS 34.726(1).

³See Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998) ("In the case of an untimely appeal, no 'appeal has been taken from the judgment' within the meaning of NRS 34.726(1).").

⁴Although McElroy raised an appeal deprivation claim in her petition, she failed to allege, much less show, that she could not raise that claim during the one-year statutory period. See Lozada v. State, 110 Nev.

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we explicitly conclude that the petition should have been denied on that basis.⁵

We note, however, that the district court correctly determined that McElroy's petition lacked merit. The district court found that defense counsel was not ineffective under the standard set forth in Strickland v. Washington,⁶ and that McElroy's guilty plea was knowing, voluntary and intelligent. The district court's factual findings regarding the validity of a guilty plea and claims of ineffective assistance of counsel are entitled to deference when reviewed on appeal.⁷ McElroy has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong. Moreover, McElroy has not demonstrated that the district court erred as a matter of law. Accordingly, we affirm the district court's ruling on that separate, independent ground.⁸

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349, 871 P.2d 944 (1994); see also Hathaway v. State, 119 Nev. 248, 253, 71 P.3d 503, 507 (2003) ("an appeal deprivation claim is not good cause if that claim was reasonably available to the petitioner during the statutory time period").

⁵See generally Harris v. Reed, 489 U.S. 255, 263 (1989) (holding that procedural default does not bar federal review of claim on the merits unless state court rendering judgment relied "clearly and expressly" on procedural bar) (citation omitted).

⁶466 U.S. 668 (1984).

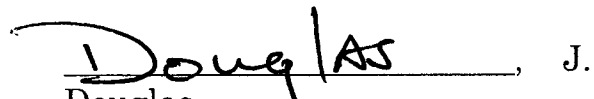
⁷See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

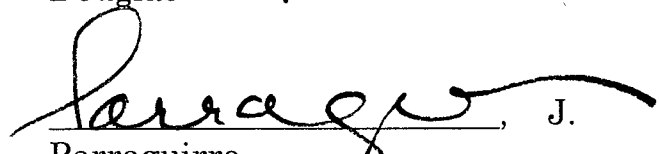
⁸See Harris, 489 U.S. at 264 n.10 (holding that as long as the state court explicitly invokes a state procedural bar, "a state court need not fear reaching the merits of a federal claim in an alternative holding").

Having considered McElroy's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.


Maupin


Douglas


Parraguirre

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