

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAVIER PIZARRO LUNA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44899

FILED

JUL 17 2006

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court dismissing appellant Javier Luna's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

On March 14, 2003, the district court convicted Luna, pursuant to a guilty plea, of one count each of sexual assault of a child and lewdness with a child under the age of fourteen years. The district court sentenced Luna to serve a term of life in the Nevada State Prison with the possibility of parole after twenty years for the sexual assault conviction, and a concurrent term of life with the possibility of parole after ten years for the lewdness conviction. Luna did not file a direct appeal.

On March 16, 2004, Luna filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Pursuant to NRS 34.750, the district court appointed counsel to represent Luna, and counsel filed a supplemental petition. The State moved to dismiss the petition as untimely. The district court ordered Luna to show cause why the petition should not be dismissed as untimely. Luna filed a response to the order to show cause and two notices of follow up investigation. On February 28,

2005, the district court granted the State's motion and dismissed Luna's petition. This appeal followed.

Luna argues that the district court erred in dismissing his petition without conducting an evidentiary hearing on the issue of timeliness. Luna concedes that the petition was not timely filed, but argues that because he signed, verified and dated a certificate of service by mail on March 10, 2004, an evidentiary hearing was warranted to determine whether the delay in the filing was Luna's fault. We disagree.

A petitioner is entitled to an evidentiary hearing if he alleges specific factual allegations, which if true, would entitle him to relief.¹ A petitioner "is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record."²

The record reveals that Luna's petition was not filed until March 16, 2004, one day beyond the one-year time limit for filing a post-conviction petition for a writ of habeas corpus.³ Therefore, Luna's petition was procedurally barred absent a demonstration of good cause for the delay and prejudice.⁴ "[A] petitioner may be able to demonstrate good cause to excuse the untimely filing of a post-conviction petition based on official interference with the timely filing of a petition."⁵

¹Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

²Id. at 503, 686 P.2d at 225.

³Because March 14, 2004, fell on a Sunday, Luna had until Monday March 15, 2004, to file his petition. See NRS 178.472.

⁴See NRS 34.726(1)

⁵Gonzales v. State, 118 Nev. 590, 595, 53 P.3d 901, 904 (2002).

In the supplemental petition and the response to the order to show cause, Luna argued that although the petition was not filed until March 16, 2004, it was still timely because the petition was dated March 10, 2004, and presumably placed in the hands of prison officials on that date. However, the prison mailbox rule does not apply to the filing of post-conviction habeas corpus petitions filed under NRS chapter 34.⁶ Even assuming that Luna placed the petition in the hands of prison officials on March 10, 2004, because the petition was not filed until March 16, 2004, Luna failed to demonstrate that he would be entitled to relief and therefore was not entitled to an evidentiary hearing on this basis.

In an unverified and non-notarized letter attached to the February notice of follow up investigation, Luna asserted that he mailed the petition "on like a Wednesday" and found it "suspicious" that it took five or six days for the petition to get from Lovelock to Reno. Luna surmised that the petition was received in the district court on March 15, 2004, but not filed until March 16, 2004. Luna's claim that the district court received his petition on March 15, 2004, was not supported by the record, and Luna did not provide any documentation in support of this claim. Absent a specific allegation of official interference with the filing of the petition, Luna's mere conjecture regarding the date the district court received his petition was insufficient to entitle him to an evidentiary hearing.

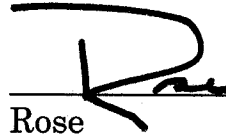
Luna failed to demonstrate that he was entitled to an evidentiary hearing regarding the timeliness of his petition. Accordingly,

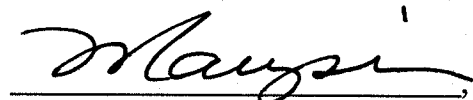
⁶Id. at 595, 53 P.3d at 903-04.

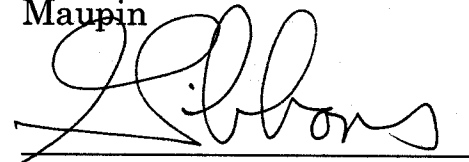
we conclude the district court did not err in dismissing Luna's petition without conducting an evidentiary hearing.

Having considered Luna's contention and concluded that it is without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

cc: Hon. Robert H. Perry, District Judge
Mary Lou Wilson
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk