

IN THE SUPREME COURT OF THE STATE OF NEVADA

HAROLD KEVIN DESPAIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47631

FILED

DEC 05 2006

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

On December 18, 2002, the district court convicted appellant, pursuant to an Alford plea,¹ of one count of lewdness with a child under the age of fourteen years. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole. No direct appeal was taken.

On May 4, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss the petition, and appellant filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On July 7, 2006, the district court dismissed appellant's petition. This appeal followed.

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

Appellant filed his petition approximately three and one-half years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.² Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.³ A petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.⁴

In an attempt to demonstrate cause for the delay, appellant argued that he could not file his petition earlier because he was in federal custody and did not have any access to Nevada materials or his case files from his attorney. Appellant further claimed a fundamental miscarriage of justice would result if his claims were not reviewed on the merits because he was actually innocent.

Based upon our review of the record on appeal, we conclude that the district court did not err in dismissing his petition as procedurally time barred. Appellant failed to demonstrate that an impediment external to the defense prevented him from filing a timely petition.⁵ A claim that a defendant did not receive case files from counsel is not good cause.⁶ Finally, appellant failed to demonstrate that failure to consider his

²See NRS 34.726(1).

³See *id.*

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


⁵See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).


⁶See Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

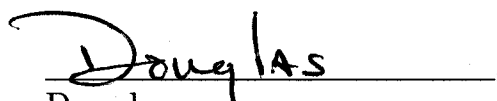
petition on the merits would result in a fundamental miscarriage of justice because appellant failed to demonstrate that he was actually innocent.⁷

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁹


_____, J.
Gibbons


_____, J.
Maupin


_____, J.
Douglas

⁷See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan, 112 Nev. at 842, 921 P.2d at 922; see also Bousley v. United States, 523 U.S. 614 (1998); Murray v. Carrier, 477 U.S. 478, 496 (1986).

⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁹We have reviewed all documents that appellant 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. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Stewart L. Bell, District Judge
Harold Kevin Despain
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk