

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL BYNUM A/K/A MICHEAL
BYNUM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48193

FILED

FEB 09 2007

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

ORDER OF AFFIRMANCE

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; Michelle Leavitt, Judge.

On June 27, 2003, the district court convicted appellant, pursuant to a guilty plea, of one count of burglary while in possession of a deadly weapon, one count of robbery with the use of a deadly weapon, and one count of possession of a firearm by an ex-felon. The district court sentenced appellant to serve in the Nevada State Prison a term of 48 to 120 months for the burglary count, two consecutive terms of 24 to 60 months for the robbery count, and a term of 25 to 72 months for the ex-felon in possession count. The district court imposed the sentences for the counts to run concurrently to one another and concurrently to a federal sentence. No direct appeal was taken.

On June 23, 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. Appellant filed a reply and a motion for the appointment of counsel. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. After the district court

orally denied the petition, appellant filed a motion for reconsideration. On September 19, 2006, the district court entered a written order denying appellant's petition and motion for counsel. On September 26, 2006, the district court orally denied the motion for reconsideration. This appeal followed.¹

Appellant filed his petition approximately three 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

In an attempt to demonstrate cause for the delay, appellant argued that he only recently learned in a yearly review with a prison counselor that his federal sentence was to run consecutively with his Nevada sentences. Appellant claimed that the fact that his federal sentence was running consecutively to his Nevada sentence was the result

¹To the extent that appellant appealed the decision of the district court denying his motion for the appointment of counsel, we conclude that the district court did not abuse its discretion in denying appellant's motion. See NRS 34.750.

To the extent that appellant appealed from the denial of the motion for reconsideration, a decision denying a motion for reconsideration is not appealable, and thus, this court lacks jurisdiction to consider an appeal from the denial of the motion for reconsideration. See Phelps v. State, 111 Nev. 1021, 900 P.2d 344 (1995); Castillo v. State, 106 Nev. 349, 792 P.2d 1133 (1990).

²See NRS 34.726(1).

³See id.

of a breach of the plea agreement by the State of Nevada and that his counsel failed to monitor the situation and inform him of the breach.

Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant had failed to demonstrate cause to excuse his delay. Appellant failed to demonstrate that an impediment external to the defense prevented him from filing a timely petition.⁴ Appellant failed to demonstrate that his claim relating to his federal sentence was not reasonably available to him within the one-year period for filing a timely post-conviction petition for a writ of habeas corpus.⁵ The Nevada judgment of conviction sets forth that the Nevada sentences were imposed to run concurrently with the federal sentence. It appears from a memorandum of a federal probation officer, filed in the district court record by appellant during the post-conviction proceedings, that the obstacle for running the sentences concurrently lies with the federal court and that appellant should seek amendment to his federal judgment of conviction.⁶ Because appellant failed to demonstrate an impediment external to the defense excused his delay, we affirm the order

⁴See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

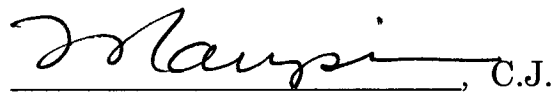
⁵See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003).

⁶We note that the memorandum is dated July 23, 2004, and that the memorandum indicates that it was initiated upon appellant's request for concurrent time. Thus, the record establishes that appellant knew of the problem with his sentences approximately two years prior to the filing of the instant petition. Appellant has not offered any reasonable explanation for why he was not able to present this claim within a reasonable time period from learning of the facts giving rise to the claim, and thus, appellant failed to demonstrate cause for the entire length of his delay.

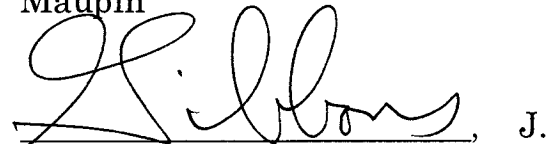
of the district court dismissing appellant's petition as procedurally time barred.

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.⁷ Accordingly, we

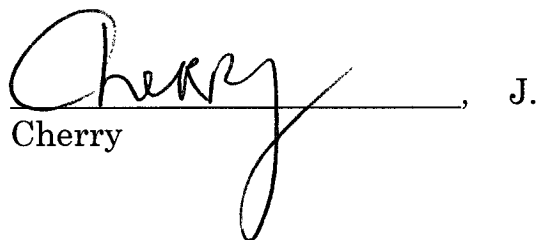
ORDER the judgment of the district court AFFIRMED.

 C.J.

Maupin

 J.

Gibbons

 J.

Cherry

cc: Hon. Michelle Leavitt, District Judge
Michael Bynum
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

⁷See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).