

IN THE SUPREME COURT OF THE STATE OF NEVADA

DARELL WAYNE KIRKWOOD, SR.,  
Appellant,  
vs.  
WARDEN, NORTHERN NEVADA  
CORRECTIONAL CENTER, DON  
HELLING,  
Respondent.

No. 48254

FILED

FEB 08 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Rubade*  
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. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

On January 28, 2003, the district court convicted appellant, pursuant to a guilty plea, of one count of grand larceny of a motor vehicle. The district court sentenced appellant to serve a term of four to ten years in the Nevada State Prison. The district court further ordered appellant to pay a \$2000 fine. On May 6, 2003, an amended judgment of conviction was entered removing the fine. Appellant voluntarily dismissed his direct appeal.<sup>1</sup>

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<sup>1</sup>Kirkwood v. State, Docket No. 40899 (Order Dismissing Appeal, July 16, 2003).

On March 31, 2006, appellant filed a document labeled "On Petition for Writ of Habeas Corpus (First Amendment Petition) Pursuant to the Provisions of N.R.S. 34.360 and N.R.S. 34.185" in the district court. The State filed a motion to dismiss the petition. Appellant filed a response. 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 October 4, 2006, the district court treated the petition as a post-conviction petition for a writ of habeas corpus and dismissed appellant's petition. This appeal followed.

Appellant argued below that his petition was not subject to the procedural requirements of a post-conviction petition for a writ of habeas corpus because he labeled his petition a "First Amendment Petition" and a petition pursuant to NRS 34.360. We conclude that the district court did not err in treating appellant's petition as a post-conviction petition for a writ of habeas corpus because he challenged the validity of his judgment of conviction and a post-conviction petition for a writ of habeas corpus is the exclusive remedy for such a challenge.<sup>2</sup> Thus,

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<sup>2</sup>See NRS 34.724(2)(b). Appellant may not circumvent the procedural requirements of a post-conviction petition for a writ of habeas corpus by attaching flawed labels to his petition. Because appellant was not challenging a prior restraint on his right to free speech, a "First Amendment Petition" filed pursuant to NRS 34.185 is an incorrect label for his petition. Similarly, because appellant challenged the validity of his judgment of conviction, appellant's petition was a post-conviction  
*continued on next page . . .*

his petition was subject to the procedural requirements governing a post-conviction petition for a writ of habeas corpus.

Appellant filed his petition almost three years after entry of the order granting his motion to voluntarily dismiss his appeal. Thus, appellant's petition was untimely filed.<sup>3</sup> Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.<sup>4</sup>

Appellant did not attempt to demonstrate good cause for the delay in filing his petition beyond his misguided attempt to circumvent the procedural bars. Thus, we conclude that the district court did not err in dismissing appellant's petition as procedurally time barred.

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*... continued*


petition for a writ of habeas corpus and not a petition for a writ of habeas corpus seeking true habeas corpus relief pursuant to NRS 34.360.

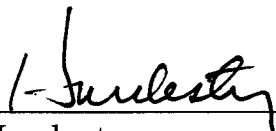
<sup>3</sup>See NRS 34.726(1); see also Gonzales v. State, 118 Nev. 590, 596 n.18, 53 P.3d 901, 904 n.18 (2002) (concluding that where a timely direct appeal is voluntarily dismissed, the one-year time period for filing a post-conviction petition for a writ habeas corpus commences from the date of entry of this court's order granting the motion to voluntarily dismiss the appeal).


<sup>4</sup>See id.

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.<sup>5</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>6</sup>

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Saitta

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<sup>5</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>6</sup>We 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.

On January 3, 2007, the respondent filed a motion for guidance. The respondent sought guidance as to whether it should respond to proper person documents filed in this court. In light of our disposition of this matter, the respondent is not required to respond to the proper person documents received in this court.

cc: Hon. Andrew J. Puccinelli, District Judge  
Darell Wayne Kirkwood Sr.  
Attorney General Catherine Cortez Masto/Carson City  
Elko County District Attorney  
Elko County Clerk