

IN THE SUPREME COURT OF THE STATE OF NEVADA

GERALD BURTON ELDERKIN, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48335

FILED

MAY 11 2007

MANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

On July 28, 2005, the district court convicted appellant, pursuant to a guilty plea, of one count of uttering a forged instrument. The district court sentenced appellant to serve a term of eighteen to forty-eight months in the Nevada State Prison. The district court further ordered appellant to pay restitution in the amount of \$7323.50, and the district court provided appellant with no credit for time served. No direct appeal was taken.

On September 28, 2005, appellant filed a proper person motion for an amended judgment of conviction. The State opposed the motion. On September 18, 2006, the district court denied the motion. No appeal was taken.

On August 14, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. 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 10, 2006, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of counsel, that he did not receive the sentence that he bargained for, that he did not receive credit for time served, and that he did not receive a hearing on the restitution amount.

To the extent that appellant claimed that his trial counsel was ineffective, that he did not receive the sentence that he bargained for and that he did not receive a hearing on the restitution amount, appellant's petition was untimely filed as it was filed more than one year after entry of the judgment of conviction.¹ Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.²

In an attempt to demonstrate cause for the delay, appellant argued that his access to the prison law library was limited due to the hours of operation, policies regarding materials and prison lockdowns.

¹See NRS 34.726(1).

²See id.

None of these reasons amounted to an impediment external to the defense, and thus, we conclude that the district court did not err in determining that appellant failed to demonstrate good cause for his untimely petition.³

Regarding appellant's claim for credit for time served, we conclude that the district court did not err in denying appellant's claim.⁴ First, appellant failed to provide any specific facts demonstrating that he was entitled to credit for time served in the instant case.⁵ Second, appellant was on probation when he committed the instant offense, and thus, he was not entitled to any credit for time served in the instant case.⁶

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

⁴In Griffin v. State, 122 Nev. ___, 137 P.3d 1165 (2006), this court held that a claim for credits must be filed in a post-conviction petition for a writ of habeas corpus in compliance with the procedural requirements of NRS chapter 34. Although appellant's petition was untimely filed, appellant's claim for credit was not procedurally barred as Griffin applies prospectively only.

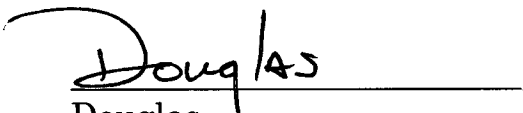
⁵See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

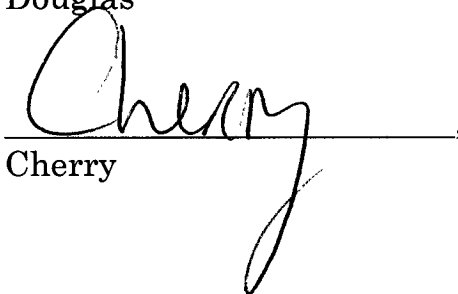
⁶See NRS 176.055(2)(b) (providing that a defendant who commits an offense while on probation from a Nevada conviction is not eligible for any credit on the sentence for the subsequent sentence).

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.⁸


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

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

⁸We 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. Jerome Polaha, District Judge
Gerald Burton Elderkin Jr.
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk