

IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRK JOHNSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48355

**FILED**

**MAY 08 2007**

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On August 12, 2004, the district court convicted appellant, pursuant to a guilty plea, of two counts of larceny from a person (Counts 1 and 2) and one count of larceny from a person 65 years of age or older (Count 3). The district court sentenced appellant to serve two consecutive terms in the Nevada State Prison of 12 to 36 months for Counts 1 and 2, and two consecutive terms of 12 to 36 months for Count 3. In addition, all of the terms of imprisonment were to run consecutive to a federal sentence that appellant was serving at the time of his sentencing. Appellant did not file a direct appeal.

On March 14, 2005, appellant filed a motion to vacate, correct or set aside his sentence arguing, among other things, that his counsel was ineffective for allowing him to be sentenced to consecutive sentences.

The State opposed the motion. The district court denied the motion, and this court affirmed the order of the district court.<sup>1</sup>

On June 26, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. 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 24, 2006, the district court denied appellant's petition as untimely. This appeal followed.

Appellant filed his petition more than one year and ten months after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.<sup>2</sup> Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.<sup>3</sup>

In an attempt to demonstrate cause for the delay, appellant argued that his counsel was ineffective for failing to inform him that his state sentences were imposed consecutive to his federal sentence and to each other. Appellant's claim was available within a year after his conviction, as evidenced by his filing of a motion to correct an illegal sentence based on the same grounds during that time, and thus it did not establish cause for appellant's delay in filing his petition.<sup>4</sup> Therefore, we

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<sup>1</sup>Johnson v. State, Docket No. 45192 (Order of Affirmance, July 22, 2005).

<sup>2</sup>See NRS 34.726(1).

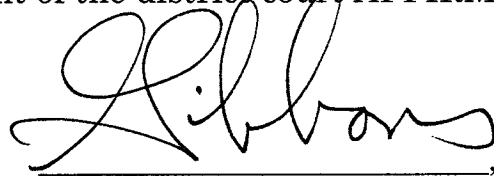
<sup>3</sup>See id.

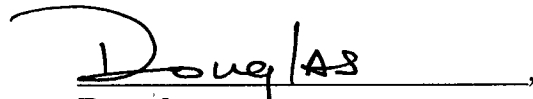
<sup>4</sup>Hathaway v. State, 119 Nev. 248, 253, 71 P.3d 503, 507 (2003) (holding that claims that were reasonably available during the statutory  
*continued on next page . . .*

conclude that the district court did not err in determining that the petition was procedurally time barred and without good cause.<sup>5</sup>

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>6</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Cherry

cc: Eighth Judicial District Court Dept. 6, District Judge  
Kirk Johnson  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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period for filing a petition do not constitute good cause for filing an untimely petition).

<sup>5</sup>Lozada v. State, 110 Nev. 349, 353, 871 F.2d 944, 946 (1994) (holding that good cause must be an impediment external to the defense).

<sup>6</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).