

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH TORRES, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48568

**FILED**

OCT 16 2007

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

ORDER OF AFFIRMANCE

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

On April 1, 2004, the district court convicted appellant Joseph Torres, Jr., pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. The district court sentenced him to serve two consecutive terms of life in prison with the possibility of parole in 10 years. On June 24, 2004, this court dismissed Torres's direct appeal as untimely.<sup>1</sup>

On April 4, 2005, Torres filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent him,<sup>2</sup> and a supplemental petition was filed. Without conducting an evidentiary hearing,<sup>3</sup> the district court later

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<sup>1</sup>Torres v. State, Docket No. 43362 (Order Dismissing Appeal, June 25, 2004).

<sup>2</sup>See NRS 34.750.

<sup>3</sup>See NRS 34.770.

issued a written order dismissing Torres's petition because it was untimely under NRS 34.726. This appeal followed.

Torres contends that the district court improperly dismissed his petition as procedurally barred for being untimely. We disagree.

Under NRS 34.726(1), a post-conviction petition for a writ of habeas corpus must be filed within one year from the issuance of the remittitur from a timely direct appeal, or from the date of the judgment of conviction if no timely direct appeal was filed.<sup>4</sup> Here, this court dismissed Torres's direct appeal as untimely. Thus, the date from which the one-year bar under NRS 34.726(1) began to run is the date of Torres's judgment of conviction, which was April 1, 2004. Because Torres did not file his petition in the district court until April 4, 2005, we conclude that it was properly procedurally barred by the district court as untimely.

However, an untimely petition may still be reviewed on its merits where the petitioner shows good cause and prejudice to overcome the procedural bar,<sup>5</sup> or shows that applying the bar would result in a fundamental miscarriage of justice.<sup>6</sup> Torres raises several arguments that his petition should not have been barred under NRS 34.726(1).

He first argues that he submitted a timely habeas corpus petition to the district court in February 2005 and that his April 4, 2005, petition should relate back to that initial submission. Yet the February

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<sup>4</sup>See Dickerson v. State, 114 Nev. 1084, 1086-88, 967 P.2d 1132, 1133-34 (1998).

<sup>5</sup>See NRS 34.726(1).

<sup>6</sup>See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

2005 petition Torres claims he submitted to the district court was a federal petition that relied upon the United States Code, not Nevada law. Assuming it could qualify as a state post-conviction petition under NRS 34.735, the petition was neither date-stamped nor stamped "received," let alone "filed," by the district court. Thus, Torres failed to demonstrate that a petition was ever filed in the district court in February 2005 to which his April 2005 petition could relate back.

Next, Torres argues that the one-year time frame for calculating when his post-conviction petition was due under NRS 34.726(1) should have been April 2, 2005, not April 1 of that year. Because April 2 was a Saturday, he contends that his petition was actually not due until Monday, April 4, 2005. However, Torres's judgment of conviction was entered April 1, 2004. The one-year bar is calculated under these facts from the date the judgment is entered, not the first day after entry of the judgment.<sup>7</sup> Torres's petition had to be filed by Friday, April 1, 2005. His argument contending otherwise is misplaced.

Torres also argues that his petition should not be procedurally barred because he was denied effective assistance of counsel on direct appeal. He frames his claim in two ways. Initially, Torres contends that his trial counsel, Ken McKenna, was not formally removed from his case until June 10, 2005, well after the times for filing his notice of direct appeal and post-conviction habeas petition had lapsed. He maintains that McKenna should have received a copy of this court's order dismissing his

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<sup>7</sup>See Gonzales v. State, 118 Nev. 590, 593 n.7, 53 P.3d 901, 902-03 n.7 (2002).

direct appeal. Torres, however, proceeded in proper person on direct appeal. He was not represented by McKenna.

The record shows that Torres was sent a copy of this court's order dismissing his direct appeal. Thus, in June 2004 he was placed on notice that his direct appeal was untimely, and he also received express notice later that month that McKenna was not representing him. Torres has failed to explain how the fact that McKenna may not have received a copy of this court's direct appeal decision establishes good cause and prejudice to overcome the bar to his instant petition.

Torres argues further that McKenna's failure to file a timely notice of appeal should provide him with remedies pursuant to Lozada v. State.<sup>8</sup> Assuming Torres had remedies available under Lozada for McKenna's alleged failure to file a timely notice of direct appeal, his claim that McKenna was ineffective in pursuing a direct appeal does not in itself establish good cause to excuse his instant untimely petition. Torres's claim that McKenna was ineffective on direct appeal was available to him well within the one-year time period.<sup>9</sup> Thus, Torres could have filed a timely petition raising this claim. We conclude that Torres has failed to demonstrate good cause to excuse his failure to do so.

Nevertheless, Torres argues that a fundamental miscarriage of justice will result by procedurally barring his petition. This exception

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<sup>8</sup>110 Nev. 349, 353, 871 P.2d 944, 946 (1994).

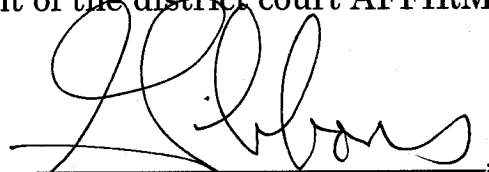
<sup>9</sup>Hathaway v. State, 119 Nev. 248, 253, 71 P.3d 503, 507 (2003); see Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1987).

“requires a colorable showing that constitutional error has resulted in the conviction of one who is actually innocent.”<sup>10</sup>

Here, to support his argument, Torres merely lists claims he wanted to raise on direct appeal and complains about the evidence admitted against him at trial. These generalized assertions do not demonstrate that Torres was actually innocent of second-degree murder. Neither this argument nor the others Torres raises on appeal are sufficient to overcome the procedural bar to his untimely petition.

We conclude that the district court properly denied Torres post-conviction relief. Accordingly, we

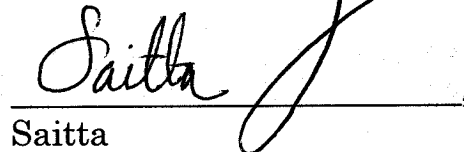
ORDER the judgment of the district court AFFIRMED.

 J.

Gibbons

 J.

Cherry

 J.

Saitta

cc: Hon. Jerome Polaha, District Judge  
Karla K. Butko  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

<sup>10</sup>Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 526 (2003).