

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT WILLIAM MCLEAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48986

FILED

SEP 11 2007

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing appellant Robert William McLean's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On November 18, 2003, McLean was convicted, pursuant to a jury verdict, of felony driving under the influence. The district court sentenced McLean to a prison term of 18 to 72 months and awarded him 179 days credit for time served. We affirmed the judgment of conviction on direct appeal.¹ The remittitur issued on September 22, 2004.

On August 20, 2004, McLean filed a "motion to amend sentence regarding credit for time served" in the district court. The State opposed the motion. McLean filed a reply. On March 9, 2005, the district court entered an amended judgment of conviction granting McLean one additional day of credit. McLean did not file a direct appeal from the amended judgment of conviction.

¹McLean v. State, Docket No. 42465 (Order of Affirmance, August 27, 2004).

On May 3, 2005, McLean filed a “motion for amended judgment of conviction to include all prison and jail time credits.” The State opposed the motion. On June 8, 2005, the district court denied McLean’s motion.

On October 19, 2005, McLean filed a proper person post-conviction petition for a writ of habeas corpus contending, among other things, that the amended judgment of conviction did not include all jail time credits. On September 21, 2006, with assistance of counsel, McLean filed a supplemental petition. On January 24, 2007, the district court dismissed McLean’s petition as procedurally barred. This appeal follows.

We conclude that the district court did not err in determining that McLean’s petition was procedurally barred. McLean filed his petition over one year after the remittitur issued in his direct appeal.² Thus, McLean’s claims involving the first judgment of conviction are untimely. Further, McLean’s claim for presentence credits, although timely from the amended judgment of conviction, was successive because he had previously presented this issue in prior petitions³ and determinations

²See NRS 34.726(1).

³We note that McLean previously raised his claim for credits in motions. Nonetheless, in Pangallo v. State, we held that the district court should construe a motion for presentence credit as a petition for a writ of habeas corpus and that “the procedural label per se is not crucial” 112 Nev. 1533, 1535, 930 P.2d 100, 102 (1996), overruled by Griffin v. State, 122 Nev. 737, 137 P.3d 1165 (2006). A post-conviction petition for a writ of habeas corpus is “the only remedy available to an incarcerated person to challenge the computation of time that he has served pursuant to a judgment of conviction.” NRS 34.724(2)(c).

were made on the merits.⁴ Therefore, McLean's petition was procedurally barred absent a showing of good cause and prejudice.⁵

"[G]ood cause necessary to overcome a procedural bar must be some impediment external to the defense."⁶ Generally, a lower court's determination regarding the existence of good cause will not be disturbed absent an abuse of discretion.⁷ Without good cause for the delay, this court will excuse the procedural bar only if the petitioner can demonstrate that a failure to consider his claims would result in a fundamental miscarriage of justice *i.e.*, where a constitutional violation has probably resulted in the conviction of someone who is actually innocent.⁸ This requires a petitioner to "show that it is more likely than not that no reasonable juror would have convicted him."⁹

McLean contends that there is good cause to excuse his procedural defects because he is not educated in the law and did not have counsel to assist him. However, the record does not indicate that an impediment external to the defense prevented him from filing a timely

⁴See NRS 34.810(2).

⁵NRS 34.726(1); NRS 34.810(3).

⁶Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998).

⁷See Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989).

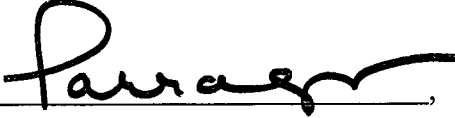
⁸See Bousley v. U.S., 523 U.S. 614 (1998); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); *cf.* NRS 34.800(1)(b).

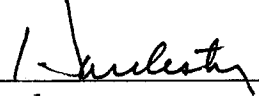
⁹Bousley, 523 U.S. at 623 (quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995)).

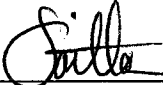
petition. McLean's ignorance of the law does not constitute good cause.¹⁰ Moreover, the record does not indicate that failure to examine McLean's claims would result in a fundamental miscarriage of justice.

Having concluded that the district court did not err in dismissing McLean's petition, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Parraguirre


_____, J.
Hardesty


_____, J.
Saitta

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

¹⁰See Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988).