

IN THE SUPREME COURT OF THE STATE OF NEVADA

HUGO ERNESTO ORTEGA-AGUILAR,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49560

**FILED**

DEC 10 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY S. Young  
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; Jackie Glass, Judge.

On January 6, 2005, the district court convicted appellant, pursuant to a guilty plea, of one count of sexual assault and one count of lewdness with a minor under the age of 14. The district court sentenced appellant to serve a term of 10 to 25 years for sexual assault and a term of life with the possibility of parole after 10 years for lewdness with a minor under the age of 14 in the Nevada State Prison. Appellant did not file a direct appeal. An amended judgment of conviction was filed on May 8, 2007.<sup>1</sup>

On July 5, 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, the district court

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<sup>1</sup>At the sentencing hearing appellant was orally sentenced to a term of 10 to 25 years for sexual assault however the original judgment erroneously sentenced appellant to a term of life with the possibility of parole after 10 years for sexual assault. On May 8, 2007, an amended judgment was entered to correct the district court's clerical error.

declined to appoint counsel to represent appellant. On April 27, 2007, the district court conducted a limited evidentiary hearing to address appellant's appeal deprivation claim in the context of good cause. On May 18, 2007, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than one year after the 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 asserted that his trial counsel failed to file an appeal after being requested to do so by appellant. At the evidentiary hearing on the appeal deprivation claim, appellant testified that he asked trial counsel to file an appeal on the day he was sentenced but she did not respond to this request. Appellant testified that once he was incarcerated he sent trial counsel letters requesting an appeal but received no response. Conversely, appellant's trial counsel testified that she was never asked to file an appeal and that she did not recall receiving the letters that appellant claimed he sent her from prison. Appellant's trial counsel also testified that there were not any letters from appellant in her file. Appellant's trial counsel testified further that she reviewed the guilty plea agreement with appellant and that they specifically discussed the waiver of appeal provision set forth in agreement.

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

<sup>3</sup>See id.

This court has held that trial counsel's failure to file an a direct appeal after a defendant has requested or expressed a desire for a direct appeal may be good cause where appellant had a reasonable but mistaken belief that counsel filed an appeal on his behalf and filed a petition for a writ of habeas corpus in a reasonable time after learning no direct appeal was filed.<sup>4</sup>

The district court determined that defendant's trial counsel was a more credible witness and that defendant did not establish that he reasonably believed his trial counsel was actually pursuing an appeal. Based upon our review of the record on appeal, we conclude that the district court's determination was supported by substantial evidence and was not clearly wrong.<sup>5</sup> Therefore, appellant failed to demonstrate that his appeal deprivation claim constituted good cause in the instant case. Because appellant failed to otherwise demonstrate adequate cause for the delay, some impediment external to the defense, appellant's petition was appropriately denied.<sup>6</sup>

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<sup>4</sup>Hathaway v. State, 119 Nev. 248, 254-55, 71 P.3d 503, 507-08 (2003).

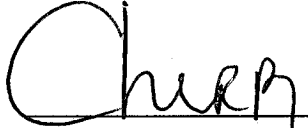
<sup>5</sup>Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).


<sup>6</sup>See Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997); Mazzan v. Warden, 112 Nev. 838, 921 P.2d 920 (1996); Passanisi v. Director, Dep't Prisons, 105 Nev. 63, 769 P.2d 72 (1989); see also Murray v. Carrier, 477 U.S. 478 (1986).

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>7</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

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

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

cc: Hon. Jackie Glass, District Judge  
Hugo Ernesto Ortega-Aguilar  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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