

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDRES HERNANDEZ-ALVARADO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49827

FILED

MAR 06 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

This is an appeal from a district court order dismissing a post-conviction petition for a writ of habeas corpus and denying motions to vacate an illegal sentence and strike a lifetime supervision provision. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On August 10, 2004, the district court convicted appellant Andres Hernandez-Alvarado, pursuant to a guilty plea, of two counts of lewdness with a child under the age of 14 years. The district court sentenced Hernandez-Alvarado to serve two concurrent terms of life in prison with the possibility of parole after 10 years and imposed a special sentence of lifetime supervision. Hernandez-Alvarado filed a proper person notice of appeal from the judgment of conviction on April 13, 2006, which this court dismissed for lack of jurisdiction.¹

On April 20, 2006, Hernandez-Alvarado filed a proper person post-conviction petition for a writ of habeas corpus and a proper person

¹Hernandez-Alvarado v. State, No. 47126 (Order Dismissing Appeal, May 23, 2006).

motion to vacate illegal sentence in the district court. Hernandez-Alvarado filed a second proper person motion to vacate illegal sentence on June 5, 2006. The district court eventually appointed counsel to represent Hernandez-Alvarado, and counsel filed a supplemental petition and a motion to strike the lifetime supervision provision from the judgment of conviction. In response to the filings, the State filed several motions to dismiss the petition as untimely under NRS 34.726 and to dismiss the motions to strike or vacate the lifetime supervision provision. Pursuant to NRS 34.770, the district court declined to conduct an evidentiary hearing. On May 31, 2007, the district court dismissed the petition and motions to strike or vacate the lifetime supervision provision. This appeal followed.

The district court denied the motions to strike or vacate an illegal sentence on the ground that Hernandez-Alvarado had not demonstrated that the lifetime supervision sentence is facially illegal. On appeal, Hernandez-Alvarado does not specifically challenge that decision and instead argues the merits of the issues raised in the motions. We conclude that the district court did not err in denying the motions because the district court had jurisdiction to impose a special sentence of lifetime supervision and the lifetime supervision sentence was required by statute² and therefore the lifetime supervision sentence is not facially illegal.³

²NRS 176.0931(1) (“If a defendant is convicted of a sexual offense, the court shall include in sentencing . . . a special sentence of lifetime supervision.”); NRS 176.0931(5)(c) (defining “sexual offense” as including a violation of NRS 201.230 (lewdness with a child under 14 years of age)).

³See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996) (explaining that motion to correct an illegal sentence may only challenge the facial legality of the sentence—either the district court was without
continued on next page . . .

The district court dismissed the habeas petition as untimely, concluding that Hernandez-Alvarado had not demonstrated good cause to excuse the delay. Hernandez-Alvarado's post-conviction habeas petition is untimely and procedurally barred absent a showing of good cause and prejudice because it was filed almost two years after entry of the judgment of conviction.⁴ Hernandez-Alvarado argues that the district court erred in dismissing the petition as untimely because he showed good cause and prejudice to overcome the procedural default. In particular, he suggests that he had good cause to excuse his delay because he believed his trial counsel had filed a direct appeal attacking the constitutionality of the

... continued

jurisdiction to impose a sentence or the sentence was imposed in excess of the statutory maximum).

⁴See NRS 34.726(1). To the extent that Hernandez-Alvarado argues that his petition was timely filed within one year after this court issued its remittitur in his direct appeal, we conclude that the argument lacks merit because his appeal was not timely filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998). Further, to the extent that Hernandez-Alvarado argues that his petition is not subject to NRS 34.726 because it was filed under NRS 34.360, we conclude that this argument lacks merit because the petition challenges the validity of the judgment of conviction. See NRS 34.720(1) (providing that the provisions of NRS 34.720 to 34.830 apply to petitions that request "relief from a judgment of conviction or sentence in a criminal case"); NRS 34.724(2)(b) (stating that a post-conviction petition for a writ of habeas corpus "[c]omprehends and takes the place of all other common law, statutory or other remedies which have been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them"); see also Hathaway v. State, 119 Nev. 248, 254 n.13, 71 P.3d 503, 507 n.13 (2003).

lifetime supervision sentence.⁵ This allegation of good cause warrants an evidentiary hearing.

In his petition and supplements, Hernandez-Alvarado claimed that his counsel was ineffective for failing to file an appeal challenging the lifetime supervision sentence.⁶ He further alleged in his petition filed in April 2006 that he had asked counsel to pursue a direct appeal, he believed that counsel had filed a direct appeal, he did not learn until March 2006 that counsel had not pursued a direct appeal, and he promptly thereafter filed the habeas petition. These allegations are not belied by the record, and if they are true, Hernandez-Alvarado has demonstrated good cause for the delay under NRS 34.726(1).⁷ Accordingly, we remand for an evidentiary hearing to determine whether Hernandez-Alvarado can demonstrate good cause pursuant to Hathaway v. State.⁸ If Hernandez-Alvarado “demonstrates good cause based on his ineffective assistance of

⁵See Hathaway, 119 Nev. at 255, 71 P.3d at 508 (holding that a petitioner can establish good cause to excuse delay in filing a habeas petition “if the petitioner establishes that the petitioner reasonably believed that counsel had filed an appeal and that the petitioner filed a habeas corpus petition within a reasonable time after learning that a direct appeal had not been filed”). Hernandez-Alvarado also suggests that he had good cause to excuse his delay because he had a difficult time retrieving his files from his attorney. As we held in Hood v. State, 111 Nev. 335, 338, 890 P.2d 797, 798 (1995), such a claim does not constitute good cause to excuse a procedural default.

⁶See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

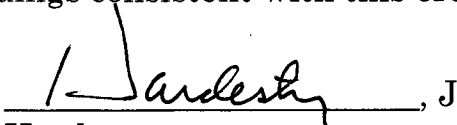
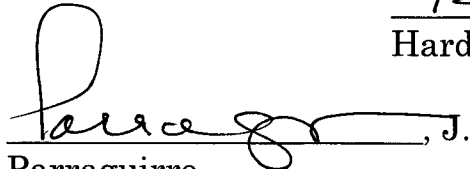
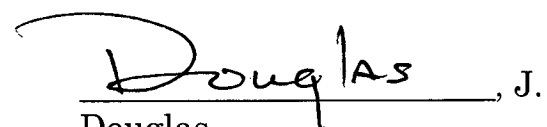
⁷See Hathaway, 119 Nev. at 255, 71 P.3d at 508.

⁸Id.

counsel claim, he will have necessarily established undue prejudice to excuse the procedural time-bar.”⁹

Having considered the arguments on appeal, we conclude that the district court properly denied the motions to strike or vacate an illegal sentence but that the district court erred by failing to conduct an evidentiary hearing to determine whether Hernandez-Alvarado can demonstrate good cause to excuse the delay in filing his petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹⁰


Hardesty, J.

Parraguirre, J.

Douglas, J.

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

⁹Id.

¹⁰Because we conclude that an evidentiary hearing is necessary, we express no opinion on the merits of any of the claims raised in the petition or supplements. Any final order entered by the district court shall address those claims. This is our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.