

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREG D. MYERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49901

FILED

DEC 21 2007

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

ORDER OF AFFIRMANCE

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 October 7, 2005, the district court convicted appellant, pursuant to a guilty plea, of one count of battery with an intent to commit a crime. The district court sentenced appellant to serve a term of 36 to 90 months in the Nevada State Prison. Appellant did not file a direct appeal.

On November 6, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court denied the petition as untimely on February 7, 2007. No appeal was taken from this order. Appellant then filed an "amended" proper person post-conviction petition for a writ of habeas corpus in the district court on April 26, 2007.¹ The State opposed this second petition, and appellant filed a reply. Pursuant to NRS 34.750 and 34.770, the

¹Appellant labeled his April 26, 2007, petition as an "amended" petition for a writ of habeas corpus. Because appellant had previously filed a post-conviction petition for a writ of habeas corpus in the district court, we conclude appellant's April 26, 2007, petition was properly construed as a second petition.

district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On August 2, 2007, the district court denied appellant's petition. This appeal followed.

Appellant filed his April 26, 2007, petition approximately 18 months after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.² Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.³

In an attempt to excuse his procedural defects, appellant appeared to argue that his use of psychotropic medications prevented him from having the mental capacity to understand or function properly to file a timely petition. However, appellant failed to demonstrate how the medication prevented him from filing a timely petition.⁴ Therefore, his use of medications did not constitute good cause.

Appellant also argued that regardless of any procedural default, the district court must still consider his petition to avoid a

²See NRS 34.726(1). Appellant argued he did not receive notice of his judgment of conviction until November 2, 2006, and therefore, the period for filing a direct appeal and presumably the statutory one-year period for filing a post-conviction habeas corpus petition did not begin to run until this date. This argument lacked merit. In a criminal case, the notice of appeal must be filed in the district court within thirty days after the entry of the judgment. See NRAP 4(b). Additionally, the statutory one-year period for filing a post-conviction habeas corpus petition begins to run from the entry of the judgment of conviction, not from service of this judgment. See *Dickerson v. State*, 114 Nev. 1084, 967 P.2d 1132 (1998). Accordingly, the statutory period began to run on October 7, 2005.

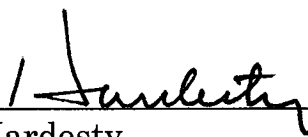
³See NRS 34.726(1).

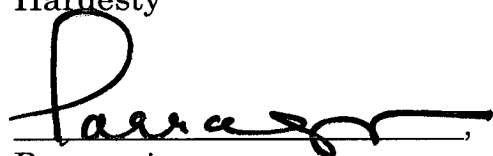
⁴See *Phelps v. Director, Prisons*, 104 Nev. 656, 764 P.2d 1303 (1988) (organic brain damage and reliance on untrained inmate law clerk do not constitute good cause for procedural default).

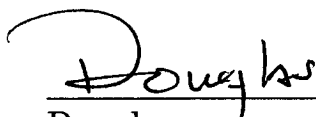
fundamental miscarriage of justice. This court will not look at the merits of an unexcused, procedurally-barred habeas petition other than to determine whether there was a fundamental miscarriage of justice. "The fundamental miscarriage of justice standard requires a colorable showing that constitutional error has resulted in the conviction of one who is actually innocent."⁵ Here, appellant failed to present any colorable argument that a constitutional error resulted in the conviction of an innocent person. Therefore, based upon our review of the record on appeal, we conclude the district court did not err in denying appellant's petition.

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.⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

⁵Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 526 (2003).

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

cc: Hon. Jackie Glass, District Judge
Greg D. Myers
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk