

IN THE SUPREME COURT OF THE STATE OF NEVADA

KAHLID SPEARS A/K/A ANTHONY  
SYON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50111

**FILED**

MAR 06 2008

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

ORDER OF AFFIRMANCE

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

On December 15, 2000, appellant Kahlid Spears was convicted, pursuant to a nolo contendere plea, of one count of attempted sexual assault. The district court sentenced Spears to serve a prison term of 24 to 60 months. Spears did not file a direct appeal.

On April 1, 2004, Spears, with the assistance of counsel, filed a post-conviction motion to withdraw the guilty plea. The State opposed the motion. The district court denied the motion, finding that the guilty plea was knowing, voluntary, and intelligent, and that Spears had failed to establish that a manifest injustice occurred.

On October 12, 2006, Spears filed a proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel, and counsel filed a supplement to the petition. The State filed a motion to dismiss the petition, and Spears filed an opposition to the motion to dismiss. The State filed a reply to the motion to dismiss.

Without conducting a hearing, the district court dismissed the petition. Spears filed this timely appeal.

First, Spears contends that the district court erred in dismissing his petition as untimely without conducting an evidentiary hearing. Spears alleges that he had good cause for the delay in filing the petition because he was unaware that lifetime supervision was mandatory and defense counsel was ineffective for not advising him of his right to a direct appeal.<sup>1</sup> Spears also contends that he was actually innocent of the sexual assault because the intercourse was consensual, and the victim “would finally tell the truth and recant her statement.” Finally, Spears argues that defense counsel was ineffective for not advising him of his right to a direct appeal.

We conclude that the district court did not err in dismissing the untimely petition. Spears failed to show that an impediment external to the defense prevented him from complying with the procedural requirements of NRS chapter 34.<sup>2</sup> Spears also did not demonstrate that

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<sup>1</sup>Spears also contends that the lifetime supervision requirement is unconstitutional. Spears waived this issue by failing to pursue it in a direct appeal. See NRS 34.810(1)(b); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (“claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings”), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

<sup>2</sup>See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

the failure to consider his petition would result in a fundamental miscarriage of justice because he was actually innocent of the offense.<sup>3</sup>

Second, Spears contends that the district court erred in dismissing his claim for credit for time served without conducting an evidentiary hearing. Citing to Johnson v. State,<sup>4</sup> and Nieto v. State,<sup>5</sup> Spears argues that he was entitled to presentence incarceration credit in district court cases CR040025 and CR052884 because the district court ordered the sentences in the two cases to run concurrently, and the district court's refusal to grant his request for credit "rendered the concurrent nature of the two sentences a nullity." The district court did not err in rejecting Spears' claim based on its finding that he was not entitled to presentence incarceration credit in the two cases. Spears' reliance on Johnson is misplaced. Johnson mandates presentence incarceration credit for sentences ordered to run concurrently within a single judgment of conviction.<sup>6</sup> It does not, however, mandate presentence incarceration credit where the sentences are ordered to run concurrently in separate judgments of conviction.<sup>7</sup>

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<sup>3</sup>See Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001); Mazzan v. Warden, 112 Nev. 838, 841-42, 921 P.2d 920, 922 (1996); see also Murray v. Carrier, 477 U.S. 478, 496 (1986).

<sup>4</sup>120 Nev. 296, 89 P.3d 669 (2004).

<sup>5</sup>119 Nev. 229, 70 P.3d 747 (2003).

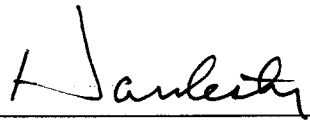
<sup>6</sup>Johnson, 120 Nev. at 298, 89 P.3d at 670.

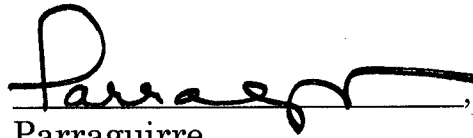
<sup>7</sup>See NRS 176.055(1) (providing that a defendant will be given credit for the amount of time spent in confinement before the conviction unless

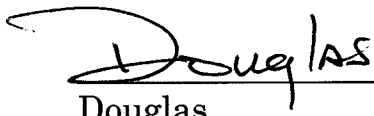
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Having considered Spears' contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

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

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*... continued*

the confinement was pursuant to the judgment of conviction for another offense).