

IN THE SUPREME COURT OF THE STATE OF NEVADA

VICTOR D. HOLMES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50379

FILED

APR 10 2008

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

On May 1, 2003, the district court convicted appellant, pursuant to a jury verdict, of one count of burglary while in possession of a firearm, one count of conspiracy to commit robbery, and one count of robbery with the use of a deadly weapon. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve three concurrent terms of life in the Nevada State Prison with the possibility of parole. This court affirmed the judgment of conviction on direct appeal.¹ The remittitur issued on February 3, 2004. The district court entered multiple amended judgments of conviction to correct the clerical error in the judgment of conviction.

¹Holmes v. State, Docket No. 41484 (Order Affirming but Remanding for Entry of a Corrected Judgment of Conviction, January 9, 2004).

On July 11, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss, and appellant filed a response. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On September 25, 2007, the district court dismissed appellant's petition. This appeal followed.

Appellant filed his petition more than three years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.² Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.³ A petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.⁴ In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence.⁵

In an attempt to demonstrate cause for the delay, appellant argued that he was not served with a copy of the judgment of conviction until April 26, 2007. Appellant further claimed that a fundamental miscarriage of justice should excuse the procedural defects because: (1) he received ineffective assistance of counsel; (2) the State failed to file a notice of intent to seek habitual criminal adjudication; (3) other errors

²See NRS 34.726(1).

³See id.

⁴Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

⁵Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

occurred relating to the habitual criminal adjudication; (4) other errors relating to the information and the charged offenses; (5) the judgment of conviction had not been amended to completely correct the clerical errors and should not have been amended without notice to appellant; and (6) any error in the judgment of conviction rendered the judgment illegal.

Based upon our review of the record on appeal, we conclude that the district court did not err in dismissing the petition as procedurally time barred. The alleged late service of a judgment of conviction in the instant case is not good cause for the more than three-year delay.⁶ Appellant's claims challenging the validity of the judgment of conviction were reasonably available within the one-year period for filing a timely petition; thus, these claims would not provide good cause for the late petition in the instant case.⁷ Entry of an amended judgment of conviction to correct a clerical error is not good cause for the late filing of this petition.⁸ Appellant failed to demonstrate that he was actually innocent; thus, he failed to demonstrate a fundamental miscarriage of justice excused his procedural defects. Therefore, we affirm the order of the district court.

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

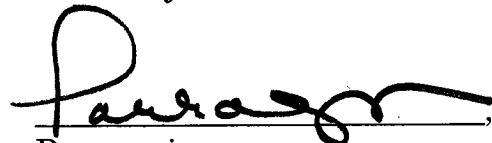
⁷See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003).

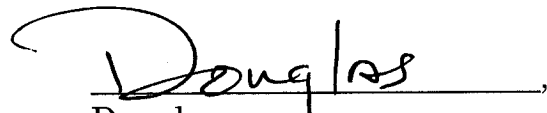
⁸See Sullivan v. State, 120 Nev. 537, 96 P.3d 761 (2004). To the extent that appellant believed that the judgment of conviction still contained a clerical error, appellant's proper avenue of relief is a motion to correct a clerical error pursuant to NRS 176.565.

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.⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁰


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. James M. Bixler, District Judge
Victor D. Holmes
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁰We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.