

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM JAMES GARDNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50583

FILED

OCT 13 2008

THOMAS LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing appellant William James Gardner's post-conviction petition for a writ of habeas corpus. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

On March 27, 2002, the district court convicted Gardner, pursuant to a guilty plea, of trafficking in a controlled substance in district court case number 3684. The district court sentenced Gardner to serve a prison term of 72 to 180 months. Gardner did not file a direct appeal.

On February 7, 2003, Gardner filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to assist Gardner. While his petition was pending in the district court, Gardner filed a post-conviction petition for a writ of habeas corpus in this court. He claimed that post-conviction counsel was ineffective and the district court had failed to address all of

his post-conviction claims. We denied Gardner's petition.¹ Gardner then filed a proper person appeal from a purported decision of the district court denying his habeas petition. We concluded that the district court had not ruled on the habeas petition and we dismissed Gardner's appeal as premature.²

On August 1, 2006, Gardner filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. Thereafter, Gardner filed an amended habeas petition, the State filed an answer, and Gardner filed a reply. The district court appointed counsel to represent Gardner, and counsel filed a supplement to Gardner's petition.

On November 2, 2007, the district court denied Gardner's request for an evidentiary hearing and dismissed his petition after finding that he "pled guilty to the crimes for which he was sentenced, and he has made no showing that the plea was entered involuntarily or unknowingly, or that he had ineffective assistance of counsel." This appeal followed.

First, Gardner contends that the district court erred by dismissing his habeas petition because his conviction and sentence in district court case number 3741 are void and he is actually innocent of the charge as his actions did not constitute a crime. However, neither the district court's order nor Gardner's notice of appeal reference district court

¹Gardner v. Warden, Docket No. 44857 (Order Denying Petition, April 1, 2005).

²Gardner v. State, Docket No. 48132 (Order Dismissing Appeal, November 28, 2006).

case number 3741. Accordingly, we conclude that this contention is not properly before us and decline to consider it in this appeal.³

Second, Gardner contends that the district court erred by dismissing his habeas petition because his conviction and sentence in district court case 3684 are void and he is actually innocent of the charge as his actions did not constitute a crime. Gardner specifically claims that he did not violate NRS 453.3385 by merely possessing Pseudoephedrine powder from common household cold medications and that defense counsel did not inform him of the elements of the crime prior to the entry of his guilty plea.

“The burden to make a proper appellate record rests on appellant.”⁴ Here, the district court found that Gardner “pled guilty to the crimes for which he was sentenced, and he has made no showing that the plea was entered involuntarily or unknowingly, or that he had ineffective assistance of counsel.” Gardner has failed to provide us with the written guilty plea agreement, plea canvas transcript, and judgment of conviction. We conclude that without these documents Gardner is unable to demonstrate that the district court erred by denying his request for an evidentiary hearing and dismissing his petition.

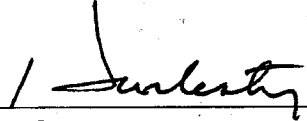
³We have previously considered Gardner’s contention in district court case number 3741 and concluded that he was not entitled to relief. Gardner v. State, Docket No. 48148 (Order of Affirmance, July 23, 2007).

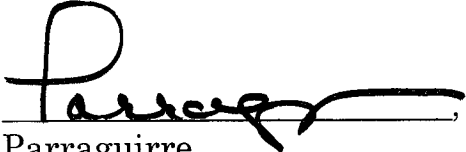
⁴Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980); see also Thomas v. State, 120 Nev. 37, 43 & n.4, 83 P.3d 818, 822 & n.4 (2004) (“[a]ppellant has the ultimate responsibility to provide this court with ‘portions of the record essential to determination of issues raised in appellant’s appeal’”) (quoting NRAP 30(b)(3)).

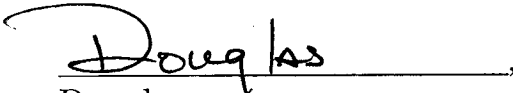
Third, Gardner contends that the district court erred by finding that his petition was untimely filed and therefore procedurally barred. However, the district court's order merely observed that "[t]he State points out that Petitioner filed his petition more than four (4) years after his sentencing and therefore the petition is untimely." The district court denied Gardner's claims on their merits and did not conclude that the petition was procedurally barred pursuant to NRS 34.726(1). Accordingly, this contention is without merit.

Having considered Gardner's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Robert W. Lane, District Judge
David H. Neely III
Attorney General Catherine Cortez Masto/Carson City
Nye County District Attorney/Pahrump
Nye County District Attorney/Tonopah
Nye County Clerk