

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN HENRY PAGE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50770

FILED

APR 24 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY Alvarado
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; Valorie Vega, Judge.

On March 15, 1983, the district court convicted appellant, pursuant to a guilty plea, of one count of second degree murder. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole. Appellant did not file a direct appeal.

On June 13, 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, arguing the petition was untimely. The State further specifically pleaded laches. Appellant filed a reply. 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 November 29, 2007, the district court dismissed appellant's petition. This appeal followed.

Appellant's petition was filed more than 24 years after entry of the judgment of conviction and more than thirteen years after the effective date of NRS 34.726.¹ Thus, appellant's petition was untimely.² Appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice.³ Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.

First, appellant claimed that NRS 34.726 did not apply to him because he was not filing a post-conviction petition for a writ of habeas corpus but a Lozada⁴ petition remedying the loss of a direct appeal. Appellant's claim was patently without merit. Petitioner's claim that he was deprived of a direct appeal without his consent is a challenge to the validity of the judgment of conviction that must be raised in a post-conviction petition for a writ of habeas corpus.⁵ The Lozada petition is reserved to those criminal defendants who have been determined by the court to have been deprived of a direct appeal and who have timely

¹See 1991 Nev. Stat., ch. 44, §§ 5, 33, at 75-76, 92; see also Pellegrini v. State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001).

²See NRS 34.726(1) (providing that a petition for a writ of habeas corpus must be filed within one year after entry of the judgment of conviction, if no direct appeal was taken).

³See id.

⁴Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

⁵See NRS 34.724(2)(b).

litigated the claim or provided good cause for the failure to litigate the appeal deprivation claim in a timely petition.⁶ Appellant did not raise his claim in a timely petition and he failed to demonstrate good cause for his failure to do so.

In an attempt to demonstrate cause for the delay, appellant asserted that his trial counsel failed to inform him of his right to appeal the judgment of conviction and therefore he was deprived of a direct appeal without his consent. This court has held that “an allegation that trial counsel was ineffective in failing to inform a claimant of the right to appeal from the judgment of conviction, or any other allegation that a claimant was deprived of a direct appeal without his or her consent, does not constitute good cause to excuse the untimely filing of a petition pursuant to NRS 34.726.”⁷ Because appellant failed to otherwise demonstrate adequate cause for the delay, some impediment external to the defense, appellant’s petition was properly determined to be procedurally time-barred.⁸ Further, appellant failed to overcome the presumption of prejudice to the State. Therefore, we conclude that the district court properly dismissed the petition.

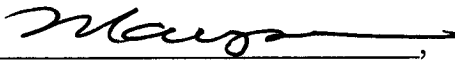
⁶Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003).

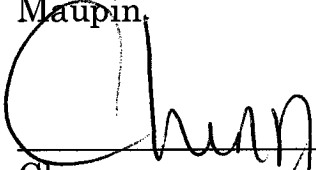
⁷Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998) compare Hathaway, 119 Nev. at 254, 71 P.3d at 507-08 (holding that a petitioner may demonstrate good cause for a late petition where a petitioner has a reasonable but mistaken belief that trial counsel has filed an appeal on his behalf and the petitioner files the petition litigating the issue within a reasonable time from learning no direct appeal was filed).

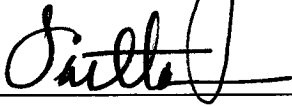
⁸See Lozada, 110 Nev. 349, 871 P.2d 944.

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.


_____, J.
Maupin


_____, J.
Cherry


_____, J.
Saitta

cc: Hon. Valorie Vega, District Judge
John Henry Page
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).