

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANGEL JAVIER DIAZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50826

FILED

APR 25 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 denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On December 14, 2000, the district court convicted appellant, pursuant to a guilty plea, of one count of second-degree murder with the use of a deadly weapon and one count of battery with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole after 10 years for the second-degree murder conviction, to be served concurrently with a term of 24 to 96 months for the battery conviction. Appellant did not file a direct appeal.

On July 14, 2003, appellant, with the assistance of counsel, filed an untimely post-conviction petition for a writ of habeas corpus in the district court. In this petition, Diaz argued that his guilty plea was not voluntarily entered because he was denied the right to pursue a legal insanity defense at trial. Diaz contended that he did not raise this claim during the statutory time period for filing a post-conviction habeas corpus

petition because this court did not issue its decision in Finger v. State¹ until 2001. Diaz further argued that his delay in filing the petition after the issuance of Finger was due to his lack of counsel and unfamiliarity with the law. On November 5, 2003, the district court denied appellant's petition, concluding that it was procedurally barred. On appeal, this court affirmed the district court's decision because appellant's petition was untimely and appellant failed to demonstrate cause for the delay.²

On October 17, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, arguing that it was untimely. Moreover, the State specifically pleaded laches. 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 January 11, 2008, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition approximately 7 years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.³ Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.⁴ Further, because the

¹117 Nev. 548, 27 P.3d 66 (2001). In Finger, this court held that the 1995 legislative amendments abolishing the insanity defense were unconstitutional. Id. at 575, 27 P.3d at 84; see also 1995 Nev. Stat., ch. 637, at 2448-85.

²Diaz v. State, Docket No. 42598 (Order of Affirmance, November 15, 2004).

³See NRS 34.726(1).

⁴See id.

State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.⁵

In an attempt to demonstrate cause for the delay, appellant argued he received ineffective assistance of counsel because his counsel failed to notify him of this court's 2001 decision in Finger until two years after the decision became final and he was unable to gain access to the prison library so he did not have other means of learning of the Finger decision.

Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's petition. Appellant was not entitled to the effective assistance of post-conviction counsel; therefore, post-conviction counsel's failure to inform appellant of the Finger decision until 2003 is not good cause.⁶ Finally appellant's lack of access to the law library is not an impediment external to the defense, and thus, is not good cause for his untimely petition.⁷ Moreover, circumstances such as limited intelligence, illiteracy, and inadequate assistance by inmate law clerks do not establish cause to overcome procedural default.⁸ Appellant further failed to overcome the presumption

⁵See NRS 34.800(2).

⁶See Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997); McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996). Trial counsel was not obligated to inform appellant of changes in the law after appellant's conviction.

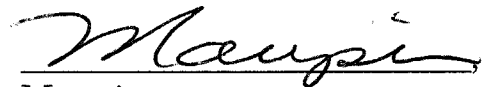
⁷See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

⁸See Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988).

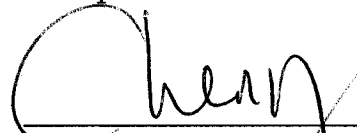
of prejudice to the State. Therefore, we conclude that the district court did not err in denying the petition as procedurally time barred and barred by laches.

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

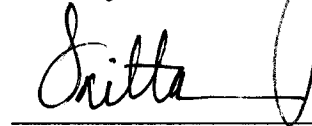
ORDER the judgment of the district court AFFIRMED.¹⁰

 J.

Maupin

 J.

Cherry

 J.

Saitta

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.

cc: Hon. Sally L. Loehrer, District Judge
Angel Javier Diaz
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk