

IN THE SUPREME COURT OF THE STATE OF NEVADA

CESAR VICTOR VALENZUELA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50876

FILED

JUL 16 2008

TRACIE A. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a “motion to set aside conviction.” Eighth Judicial District Court, Clark County; Michael Villani, Judge.

On March 1, 1999, the district court convicted appellant, pursuant to a guilty plea, of one count of second-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of 10 to 25 years in the Nevada State Prison. No direct appeal was taken.

On December 18, 2007, appellant filed a proper person document labeled “motion to set aside conviction” in the district court. The State opposed the motion. On January 16, 2008, the district court denied appellant’s motion. This appeal followed.

In his motion, appellant claimed that his trial counsel was ineffective for failing to inform him of his direct appeal rights and failing to perfect a direct appeal without his consent.

The district court denied the motion as the claim should have been raised in a post-conviction petition for a writ of habeas corpus and

the motion was untimely. Based upon our review of the record on appeal, we conclude that the district court did not err in denying the motion.

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.¹ As a post-conviction petition for a writ of habeas corpus, appellant's motion was deficient in several respects: the document was not verified,² the motion was not in substantial compliance with the form petition required,³ and the motion was not served upon the Attorney General.⁴ Although none of these defects would require the dismissal of

¹NRS 34.724(2)(b) (stating that a post-conviction petition for a writ of habeas corpus "[c]omprehends and takes the place of all other common-law, statutory or other remedies which have been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them"). There is no statute authorizing a "motion to set aside conviction," and this court's case law does not recognize such a motion as incidental to the trial proceedings. See NRS 34.724(2)(a) (recognizing that a post-conviction petition for a writ of habeas corpus is not a substitute for remedies incidental to the trial court proceedings); *Hart v. State*, 116 Nev. 558, 562-63 and n.4, 1 P.3d 969, 971-72 and n.4 (2000) (recognizing as incidental to the proceedings a motion to withdraw the guilty plea, a motion to modify a sentence based on narrow due process grounds, a motion to correct a facially illegal sentence and a motion for a new trial).

²NRS 34.730(1).

³NRS 34.735.

⁴NRS 34.730(2).

the motion as they were curable, appellant's motion was also in violation of the time requirements set forth in NRS 34.726.⁵

Appellant filed his motion more than eight years after entry of the judgment of conviction. Thus, appellant's motion was untimely filed.⁶ Appellant's motion was procedurally barred absent a demonstration of cause for the delay and prejudice.⁷

It appears that appellant argued that he had good cause for the delay because trial counsel did not file an appeal on his behalf.

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."⁸ Because appellant failed to otherwise demonstrate adequate cause for the delay, some impediment external to the defense, appellant's

⁵See Miles v. State, 120 Nev. 383, 387, 91 P.3d 588, 590 (2004) (holding that an inadequate verification of a petition for a writ of habeas corpus is an amendable rather than jurisdictional defect that the district court should allow the petitioner to cure).

⁶NRS 34.726(1).


⁷Id.

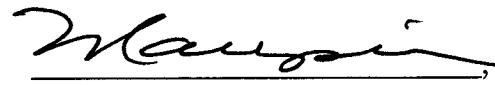
⁸Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998) compare Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507-08 (2003) (holding that a petitioner may demonstrate good cause for a late petition where a petitioner has a reasonable but mistaken belief that trial counsel has filed an appeal on his behalf and the petitioner files the petition litigating the issue within a reasonable time from learning no direct appeal was filed).

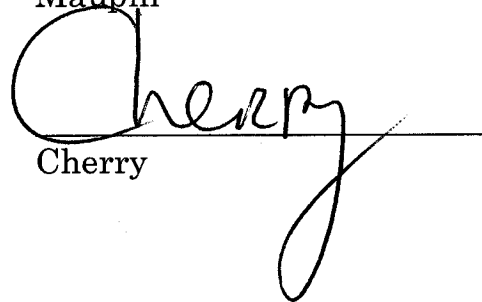
motion was procedurally time-barred.⁹ Therefore, we affirm the order of the district court denying the motion.

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.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Maupin


_____, J.
Cherry

cc: Hon. Michael Villani, District Judge
Cesar Victor Valenzuela
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

⁹See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

¹⁰See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).