

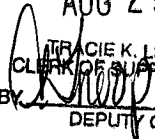
IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD T. MOORE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51036

FILED

AUG 29 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On October 3, 2005, the district court convicted appellant, pursuant to a jury verdict, of one count of discharging a weapon where a person might be endangered, one count of discharging a firearm at or into a structure, and two counts of attempted murder with the use of a deadly weapon. The district court sentenced appellant to serve a total of four consecutive terms of 24 to 120 months in the Nevada State Prison. This court affirmed the judgment of conviction on direct appeal.¹ The remittitur issued on July 25, 2006.

¹Moore v. State, Docket No. 46020 (Order of Affirmance, June 29, 2006).

On July 31, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant filed an amended petition on September 24, 2007, and a supplemental petition on October 2, 2007. The State filed a motion to dismiss the petition. Appellant filed a response. Pursuant to NRS 34.750, the district court declined to appoint counsel to represent appellant. On March 14, 2008, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

In his petitions, appellant claimed: (1) his trial counsel was ineffective for failing to suppress the gun powder residue test results as he did not consent to the test; (2) his trial counsel was ineffective for failing to investigate exculpatory information given to police by Bradley Timothy Weaver Jr., Andre Kethen, Teressa Hobson, and Anthony Mitchell that appellant was not the shooter, and all but one of these individuals identified Nick Abernathy as the shooter; (3) no medical report was presented to verify that the victims were shot by the gun found at the crime scene; and (4) no line-up was ever conducted.

Appellant filed his petition more than one year 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

²See NRS 34.726(1).

³See id.

In an attempt to demonstrate cause for the delay, appellant argued that his trial counsel never informed him that his direct appeal had been resolved and that he only learned of the denial of his direct appeal when he wrote the Nevada Supreme Court. At the evidentiary hearing appellate counsel testified that at the beginning of July 2006 he sent a letter to appellant regarding the resolution of the direct appeal and enclosed a copy of the order of affirmance and that letter was presented as an exhibit to the court. Appellant brought a document from the prison indicating that no legal mail had been logged from his appellate counsel during the month of July 2006. Appellant claimed he found out about the resolution of his direct appeal late in February 2007 or early March 2007 after he contacted this court. Instead of filing a post-conviction petition for a writ of habeas corpus at that time, appellant filed a bar grievance against his appellate counsel. Appellant acknowledged that during the pendency of the direct appeal, he received legal mail sent through the United States Post Office from his appellate counsel. The July 2006 letter informing appellant about the resolution of his direct appeal was also sent through the United States Post Office.

Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's petition as procedurally time barred. Appellant failed to demonstrate that an impediment external to the defense explained his delay.⁴ NRS 47.250(13)

⁴See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

sets forth a disputable presumption that “a letter duly directed and mailed was received in the regular course of the mail.” Although appellant claimed that he did not receive trial counsel’s letter regarding the resolution of his direct appeal, and appellant submitted an inmate request to prison staff to inform appellant whether he received legal mail from his appellate counsel in July 2006, we conclude that the district court did not err in concluding that appellant failed to overcome the presumption. The response in the inmate request form, “No[,] none logged” did not sufficiently overcome the presumption that the letter was received in the regular course of mail. This statement does not indicate that legal mail could have been received, but not logged, and no testimony was presented regarding the mailroom procedures. Even assuming that appellant overcame the presumption of NRS 47.250(13), appellant could have filed a post-conviction petition for a writ of habeas corpus within the time period for filing a timely petition, but instead appellant filed a bar grievance and waited almost five months to file his petition. Thus, appellant failed to demonstrate that his delay was reasonable in the instant case.

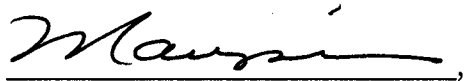
Moreover, even assuming that appellant demonstrated cause for the delay, appellant failed to demonstrate that he was unduly prejudiced by the dismissal of his petition in the instant case. Claims three and four were waived as they should have been raised on direct appeal and appellant failed to demonstrate good cause for his failure to do so.⁵ Appellant further failed to demonstrate that there was a reasonable

⁵See NRS 34.810(1)(b).

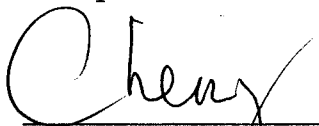
probability of a different outcome at trial if trial counsel had filed a successful motion to suppress the gun shot residue test and investigate the allegedly exculpatory information from the four individuals set forth earlier. Five witnesses identified appellant as the shooter, one witness testified that she saw appellant with a gun after the shots were fired, but she did not see who fired the shots, and one witness identified appellant at the scene of the crime as the shooter but could not identify appellant during the trial because of the passage of time. Two additional witnesses placed appellant near the area where the gun was fired. The gun was recovered in the yard of a vacant home in the neighborhood. Appellant was apprehended when witnesses spotted appellant with the bystanders while the police were processing the crime scene and taking witness statements. Appellant failed to provide any specific facts regarding the aforementioned individuals, such as their relationship to appellant and where the individuals were at the time of the shooting. There was testimony presented regarding Nick Abernathy at trial and, in particular, testimony about Abernathy's appearance and clothing. As stated above, five witnesses identified appellant as the shooter. Appellant failed to demonstrate that further investigation of the aforementioned individuals would have resulted in the discovery of evidence that had a reasonable probability of altering the outcome of the trial in light of the witness testimony and the gun shot residue found on the front and back of appellant's right hand. Therefore, we conclude that the district court did not err in denying the petition as procedurally barred and without good cause.

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.⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 _____, J.

Maupin

 _____, J.

Cherry

 _____, J.

Saitta

cc: Hon. Valerie Adair, District Judge
Richard T. Moore
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).