

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL LEWIS HERRERA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51057

FILED

JUL 10 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 a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

On July 25, 2000, the district court convicted appellant, pursuant to a guilty plea, of two counts of attempted lewdness with a child under the age of fourteen. The district court sentenced appellant to serve two consecutive terms of 24 to 96 months in the Nevada State Prison. The district court suspended the sentence and placed appellant on probation for a period of 5 years and included as a condition of probation that appellant serve 1 year in the Clark County Detention Center. No appeal was filed.

On May 12, 2004, the district court entered an order revoking probation, executing the original sentence and providing appellant with 320 days of credit for time served. No appeal was filed.

On August 17, 2006, the district court entered an amended order revoking probation correcting the name of appellant's counsel. On June 21, 2007, the district court entered an amended judgment of conviction setting forth the 320 days of credit for time served previously

awarded in the May 12, 2004 order revoking probation and deleting the probationary term and its conditions.¹

On October 18, 2005, appellant filed a post-conviction petition for a writ of habeas corpus in the district court complaining that he had not been provided transcripts. On January 12, 2006, the district court denied the petition. This court affirmed the order of the district court on appeal as appellant's claim regarding transcripts was not cognizable in a petition for a writ of habeas corpus.²

On July 11, 2007, appellant filed a document labeled "Time Computation Petition for a Writ of Habeas Corpus." This petition has not yet been resolved by the district court.

On October 29, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. In his petition appellant challenged the validity of his judgment of conviction, the revocation of probation, and the computation of time served as calculated by the Department of Corrections. The Attorney General filed a motion to dismiss the computation of time served claim as a petitioner may not challenge both the validity of the judgment of conviction and the computation of time served in the same petition pursuant to NRS 34.738(3). The District Attorney filed a motion to dismiss the petition on the ground that it was untimely. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to

¹The amended order revoking probation also set forth the award of 320 days of credit for time served.

²Herrera v. State, Docket No. 46830 (Order of Affirmance, July 25, 2006).

conduct an evidentiary hearing. The district court orally denied the Attorney General's motion to dismiss as moot, and on January 30, 2008, the district court denied appellant's petition in its entirety on the ground that the petition was procedurally time barred. This appeal followed.

Preliminarily, we note that the district court improperly denied the Attorney General's motion to dismiss as moot. NRS 34.738(3) expressly provides:

A petition must not challenge both the validity of a judgment of conviction or sentence and the computation of time that the petitioner has served pursuant to that judgment. If a petition improperly challenges both the validity of a judgment of conviction or sentence and the computation of time that the petitioner has served pursuant to that judgment, the district court for the appropriate county shall resolve that portion of the petition that challenges the validity of the judgment of conviction or sentence and dismiss the remainder of the petition without prejudice.

Notably, a petition challenging the computation of time served is not subject to the procedural time bar set forth in NRS 34.726(1). Thus, the Attorney General properly filed a motion to dismiss the claim relating to the computation of time served. The district court abused its discretion in denying the motion to dismiss as moot and denying the petition in its entirety on the ground that the petition was untimely filed. Nevertheless, we conclude that the district court reached the correct result as that portion of the petition challenging the computation of time served should have been dismissed without prejudice and that portion of the petition

challenging the validity of the judgment of conviction and order revoking probation was procedurally timed barred.³

To the extent that appellant challenged the validity of the judgment of conviction and sentence and the revocation of probation, appellant's petition was untimely filed.⁴ Appellant filed his petition more than seven years after entry of the judgment of conviction and more than three years after his probation was revoked. Appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice.⁵

Appellant did not attempt to demonstrate good cause to excuse the late filing of his petition and appeared to believe that his petition was timely filed from the amended judgment of conviction. This court has recognized that all claims that are reasonably available to the petitioner during the statutory time period should be raised in a timely petition and would not provide good cause for the late filing of a petition.⁶ An amended judgment of conviction may provide good cause if the claims presented in the late petition challenge a substantive amendment to the judgment of conviction, thus those claims challenging the substantive amendment

³See Kraemer v. Kraemer, 79 Nev. 287, 291, 382 P.2d 394, 396 (1963) (holding that a correct result will not be reversed simply because it is based on the wrong reason).

⁴See NRS 34.726(1).

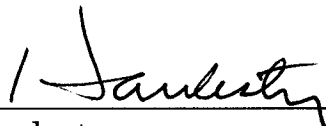
⁵Id.


⁶Hathaway v. State, 119 Nev. 248, 253, 71 P.3d 503, 506 (2003).

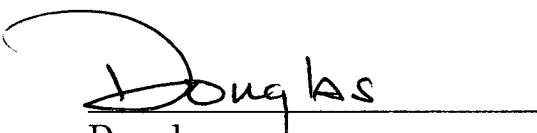
could not have been raised in a timely petition prior to the amendment.⁷ In the instant case, appellant provided no argument that he was challenging a substantive argument in the amended judgment of conviction. Therefore, we conclude that the district court did not err in denying that portion of the petition that challenged the validity of the judgment of conviction and the order revoking probation as procedurally time barred.

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.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

⁷Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).

⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Stewart L. Bell, District Judge
Daniel Lewis Herrera
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk