

IN THE SUPREME COURT OF THE STATE OF NEVADA

ZACHARY BLAKE SIMMONS A/K/A  
ZACHERY BLAKE SIMMONS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51667

**FILED**

OCT 13 2008

THOMAS 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 dismissing a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

On March 9, 2006, the district court convicted appellant, pursuant to a jury verdict, of one count of robbery of a victim over the age of sixty years. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole. This court affirmed the judgment of conviction on appeal.<sup>1</sup> The remittitur issued on February 6, 2007. On February 12, 2007, the district court entered an amended judgment of conviction to correct a clerical error in the original judgment of conviction.

On February 7, 2008, 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 the petition, and appellant filed a response.

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<sup>1</sup>Simmons v. State, Docket No. 47027 (Order of Affirmance, January 9, 2007).

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 April 29, 2008, the district court dismissed appellant's petition as procedurally barred because the petition was untimely filed and without good cause. This appeal followed.

Appellant filed his petition more than one year after this court issued the remittitur from his direct appeal.<sup>2</sup> Thus, appellant's petition was untimely filed.<sup>3</sup> Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.<sup>4</sup>

In an attempt to demonstrate cause for the delay, appellant argued that he had delivered the petition to prison officials for mailing on February 2, 2008. Appellant claimed that the clerk of the district court must have failed to file the petition on the day that it was received.

Based upon our review of the record on appeal, we conclude that the district court did not err in dismissing the petition as procedurally barred. Appellant's petition was untimely filed and without good cause. The mailbox rule permitting a filing date to be determined by the date of delivery to prison officials is inapplicable to habeas corpus proceedings; rather a habeas corpus petition must be filed in the district court within the applicable statutory period.<sup>5</sup> Appellant failed to

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<sup>2</sup>Appellant's petition was filed one day late. The deadline for filing a timely petition was February 6, 2008, a Wednesday.

<sup>3</sup>NRS 34.726(1).

<sup>4</sup>Id.

<sup>5</sup>Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002) (declining to extend the mailbox rule to the filing of a habeas corpus petition).

demonstrate that any state official interfered with the timely filing of his petition.<sup>6</sup> Entry of the amended judgment of conviction did not excuse the procedural defects in the instant case as the amended judgment of conviction merely corrected a clerical error and appellant raised no claims challenging the correction of his judgment of conviction.<sup>7</sup> Appellant failed to demonstrate that an impediment external to the defense prevented the timely filing of his petition.<sup>8</sup>

Moreover, appellant failed to demonstrate that he would be unduly prejudiced by the dismissal of his petition as procedurally barred because his grounds for relief lacked merit. Appellant claimed that his trial counsel was ineffective for failing to challenge his habitual criminal adjudication as a violation of Apprendi v. New Jersey<sup>9</sup> as the issue was not presented to a jury and trial counsel was ineffective for failing to adequately investigate his prior convictions to discover they were stale and involved non-violent crimes. Appellant failed to demonstrate that his trial counsel's performance was deficient or that he was prejudiced.<sup>10</sup> This court has clarified that the just and proper determination relates to the discretion to dismiss a count and does not serve to increase the punishment, and thus, the district court could sentence appellant as a habitual criminal without submission of the issue before a jury upon

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<sup>6</sup>Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

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

<sup>8</sup>Hathaway, 119 Nev. at 252, 71 P.3d at 506.

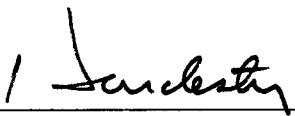
<sup>9</sup>530 U.S. 466 (2000).

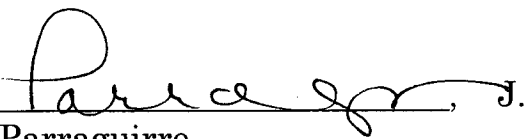
<sup>10</sup>Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

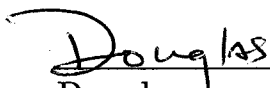
presentation and proof of the requisite number of prior convictions.<sup>11</sup> The record contains proof of at least four prior felony judgments of conviction. This satisfied the requirements of NRS 207.010(1)(b). Any objection to the prior convictions on the grounds of remoteness or nonviolence would not have changed the outcome as NRS 207.010 makes no specific allowance for stale or nonviolent prior felony convictions.<sup>12</sup> Therefore, we conclude that the district court did not err in dismissing the petition as procedurally 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.<sup>13</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

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<sup>11</sup>O'Neill v. State, 123 Nev. 9, 16, 153 P.3d 38, 43 (2007).

<sup>12</sup>Tillema v. State, 112 Nev. 266, 271, 914 P.2d 605, 608 (1996).

<sup>13</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

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