IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT ALAN VAUGHN, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52001

FILED

DEC 30 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 dismissing a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On March 28, 2001, the district court convicted appellant, pursuant to a guilty plea, of two counts of burglary, one count of grand larceny auto, and one count of conspiracy to commit burglary. The district court sentenced appellant to serve two concurrent terms of 16 to 72 months for the burglary counts, a concurrent term of 16 to 120 months for the grand larceny count, and a concurrent term of 12 to 48 months for the conspiracy count. The district court suspended the sentence and placed appellant on probation for a period not to exceed 4 years. No direct appeal was taken. On December 1, 2003, the district court revoked appellant's probation, executed the original sentence, and provided appellant with 7 days of credit for time served. No appeal was taken.

On April 3, 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. Appellant filed a response, and the State filed a reply. 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 June 24, 2008, the district court dismissed the petition. This appeal followed.

In his petition, appellant claimed that he was not provided with 335 days of credit for time served while in an in-patient treatment program while on probation. Appellant also appeared to claim that he was entitled to good time credit for this period pursuant to NRS 209.4465.

This court has held that a claim for credit for time served is a challenge to the validity of the judgment of conviction and sentence that must be raised on direct appeal or in a timely post-conviction petition for a writ of habeas corpus.[1] Appellant filed his petition approximately seven years after entry of the original judgment of conviction, four and one-half years after entry of the amended judgment of conviction, and almost two years after this court's decision in Griffin v. State. Thus, appellant's petition was untimely filed.[2] Appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice.[3]

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[1]See Griffin v. State, 122 Nev. 737, 137 P.3d 1165 (2006).

[2]See NRS 34.726(1).

[3]See id.

In an attempt to demonstrate cause for the delay, appellant argued that he had good cause because he did not receive the proper amount of credit for time served, and the provisions of NRS 209.4465, NRS 209.4886 were amended in 2007.

Based upon our review of the record on appeal, we conclude that the district court did not err in determining that the petition was procedurally barred and without good cause. Appellant failed to demonstrate that an impediment external to the defense prevented him from filing his claim for credit for time served within one year from the amended judgment of conviction setting forth the credit for time served or within one year from the decision in Griffin v. State.[4] Appellant's claim that he had good cause because he had not received the credit for time served is circular and is not good cause. Any amendments to NRS 209.4465 and NRS 209.4886 in 2007 did not relate to credit for time served in the instant case, and thus, did not provide good cause.[5]

Moreover, appellant failed to demonstrate that he would be unduly prejudiced by the dismissal of his petition because his claim for credit for time served lacked merit. NRS 176.055(1) provides that a

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

[5]To the extent that appellant was seeking statutory good time credit, which is a challenge to the computation of time served, such a claim cannot be raised in the same petition raising a challenge to the validity of the judgment of conviction and sentence. See NRS 34.738(3).

defendant is entitled to credit for time served "for the amount of time which the defendant has actually spent in confinement before conviction."[6] This court has recognized, however, that a defendant is not entitled to credit for time served in residential confinement because it is time spent "outside of incarceration."[7] This court has observed that a defendant would only be entitled to credit for time served in a residential treatment facility that so restrains a defendant's liberty that it "is tantamount to incarceration in a county jail."[8] Appellant failed to demonstrate that his time in the West Care Program was tantamount to incarceration in county jail. The provisions regarding statutory credit pursuant to NRS 209.4465 are not applicable to a claim for credit for time served.[9] Therefore, we affirm the order of the district court dismissing the petition.

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[6]Emphasis added. See also Kuykendall v. State, 112 Nev. 1285, 926 P.2d 781 (1996) (holding that purpose of NRS 176.055(1) is to ensure that a criminal defendant receives credit for all time served).

[7]See Webster v. State, 109 Nev. 1084, 1085, 864 P.2d 294, 295 (1993) (discussing residential confinement as a condition of probation).

[8]Grant v. State, 99 Nev. 149, 151, 659 P.2d 878, 879 (1983).

[9]Even assuming that appellant was permitted to raise a statutory good time credit in the instant petition, appellant's claim was without merit as he failed to demonstrate that his treatment program qualified as a judicial program or correctional program pursuant to NRS 209.4886 and NRS 209.4888. Notably, those programs involve offenders referred by the Director of the Department of Corrections and who are within two years from probable release from prison. See NRS 209.4886(1)(c); NRS 209.4888(1)(c).

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.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

cc: Hon. Donald M. Mosley, District Judge
Robert Alan Vaughn Jr.
Attorney General Catherine Cortez Masto/Carson City
Attorney General Catherine Cortez Masto/Las Vegas
Eighth District Court Clerk

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