

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDRES HERNANDEZ-ALVARADO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52256

**FILED**

OCT 21 2009

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

On August 10, 2004, the district court convicted appellant, pursuant to a guilty plea, of two counts of lewdness with a child under the age of 14 years. The district court sentenced appellant to serve two concurrent terms of life with the possibility of parole after 10 years in the Nevada State Prison and imposed a special sentence of lifetime supervision. This court dismissed appellant's untimely appeal from his judgment of conviction and sentence for lack of jurisdiction. Hernandez-Alvarado v. State, No. 47126 (Order Dismissing Appeal, May 23, 2006).

On April 20, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus and a motion to vacate an illegal sentence in the district court. On June 5, 2006, appellant filed a second proper person motion to vacate an illegal sentence in the district court. The district court appointed counsel to represent appellant, and counsel filed a supplemental petition and a motion to strike the lifetime supervision provision from the judgment of conviction. In response to the

filings, the State filed several motions to dismiss the petition as untimely under NRS 34.726 and to dismiss the motions to strike or vacate the lifetime supervision provision. Pursuant to NRS 34.770, the district court declined to conduct an evidentiary hearing. On May 31, 2007, the district court dismissed the petition pursuant to NRS 34.726 because the petition was filed outside of the one-year time limit for filing a petition and dismissed the motions to strike or vacate the lifetime supervision provision because they fell outside the narrow scope of a motion to correct an illegal sentence.

On appeal, this court affirmed the district court's dismissal of the motions to strike or vacate an illegal sentence but determined that the district court erred by failing to conduct an evidentiary hearing to determine whether appellant could demonstrate good cause for his delay based on appellant's claim that he requested trial counsel file an appeal. This court reversed and remanded the matter to the district court to hold an evidentiary hearing solely on the issue of whether trial counsel's failure to file a direct appeal provided good cause to file an untimely petition. On remand, the district court conducted an evidentiary hearing and denied the petition at the conclusion of the hearing. This appeal followed.

On appeal, appellant argues that the district court erred in determining that appellant failed to demonstrate good cause and prejudice to overcome the procedural bars. Appellant also claims that his sentence of lifetime supervision was unconstitutional because it violated the double jeopardy clause, violated the constitutional right to travel and the Equal Protection Clause, and violated his first amendment rights.

Appellant filed his petition approximately two years after entry of the judgment of conviction. Thus, appellant's petition was

untimely filed. See NRS 34.726(1). Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice. See id.

In an attempt to demonstrate cause for the delay, appellant argues that he has good cause because he requested trial counsel file an appeal but an appeal was never filed. In Harris v. Warden, this court 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." 114 Nev. 956, 959, 964 P.2d 785, 787 (1998). In Hathaway v. State, this court later clarified its holding in Harris and held that "an appeal deprivation claim is not good cause if that claim was reasonably available to the petitioner during the statutory time period." Hathaway v. State, 119 Nev. 248, 253, 71 P.3d 503, 507 (2003). A petitioner may, however, establish good cause for the delay "if the petitioner establishes that the petitioner reasonably believed that counsel had filed an appeal and that the petitioner filed a habeas corpus petition within a reasonable time after learning that a direct appeal had not been filed." Id. at 255, 71 P.3d at 508.

Appellant failed to demonstrate that he requested an appeal and that he reasonably believed that trial counsel had filed an appeal. At the evidentiary hearing, the district court heard from both trial counsel and appellant. Trial counsel testified that she explained to appellant the limited right to appeal in a guilty plea case and would have explained any potential appealable issues. Further, trial counsel testified that had appellant requested an appeal she would have filed the notice of appeal

and had she received a letter from appellant requesting an appeal, it would have been in the file and she would have forwarded it to the appellate division at the public defender's office. Appellant testified that he requested an appeal and sent trial counsel a letter asking her to file an appeal. Further, appellant provided an affidavit, signed in 2006, from a fellow inmate who was at appellant's sentencing which stated that he heard appellant ask his attorney for an appeal. However, at the hearing, appellant testified that he had not seen this inmate since his sentencing in 2004 and could not explain how he received this affidavit in 2006. Appellant also admitted that the inmate who helped him with his petition may have created the affidavit. Based on the testimony provided at the hearing, the district court determined that trial counsel was credible and appellant was not. The district court found that appellant failed to demonstrate that he told trial counsel that he wanted to appeal or that he sent trial counsel a letter requesting an appeal. We conclude that the district court's findings were based upon substantial evidence and are not clearly wrong. See Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994) (district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal). Because appellant failed to demonstrate good cause and prejudice, he failed to overcome the procedural bars. Therefore, we conclude that the district court did not err in denying appellant's petition as procedurally barred.<sup>1</sup>

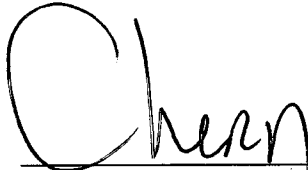
---


<sup>1</sup>Because the petition was procedurally barred, this court will not consider the merits of the lifetime supervision claims as raised in the proceedings below.

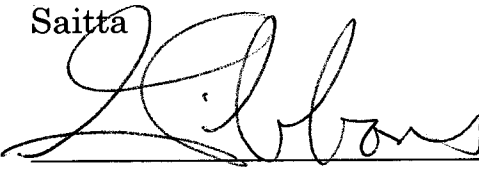
Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge  
Karla K. Butko  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk