

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52568

FILED

JAN 07 2010

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; Michael Villani, Judge.

Appellant filed his petition on May 23, 2008, more than one year after entry of the judgment of conviction on September 26, 2006.¹ 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.

As cause for the delay, appellant argued that trial counsel failed to consult with him regarding an appeal. Appellant failed to demonstrate good cause because counsel was not required to consult with appellant about an appeal absent a request from appellant or where there exists a direct appeal claim that has a reasonable likelihood of success. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223, (1999); Davis v.

¹Appellant did not file a direct appeal.

State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999); Roe v. Flores-Ortega, 528 U.S. 470 (2000).

Appellant also claimed that he had good cause because trial counsel withheld the SAINT exam report from him until January of 2008, and failed to inform him that the exam of the victim came back “negative.” Appellant claimed that the report demonstrated that he was actually innocent of sexual assault. Appellant failed to demonstrate good cause because he failed to demonstrate an impediment external to the defense and failed to demonstrate that he was actually innocent. See Hathaway, 119 Nev. at 252, 71 P.3d at 506 (an impediment external to the defense may be demonstrated by showing “that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable”) (quotation marks omitted); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994); see also Mazzan v. Warden, 112 Nev. 838, 841-42, 921 P.2d 920, 922 (1996) (petitioner may be entitled to review of defaulted claims if failure to review would result in fundamental miscarriage of justice); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) (fundamental miscarriage of justice requires a colorable showing of actual innocence—“more likely than not that no reasonable juror would have convicted him absent a constitutional violation”). While the SAINT exam did not find that the victim had been injured, a sexual assault victim’s testimony alone is sufficient to be convicted of sexual assault. See Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005).

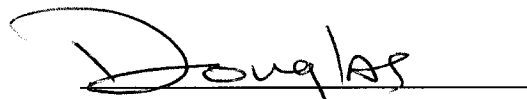
Finally, appellant claimed that he had good cause because he does not speak or write English and feared revealing the nature of his conviction to other prisoners in order to receive help in filing a petition. Appellant failed to demonstrate good cause because he failed to

demonstrate an impediment external to the defense. See Hathaway, 119 Nev. at 252, 71 P.3d at 506; Lozada, 110 Nev. at 353, 871 P.2d at 946.

Because appellant failed to demonstrate good cause to excuse his procedural default, the district court did not err in denying the petition. We therefore conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Michael Villani, District Judge
Juan Garcia
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.