

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES FRANCISCO NELSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53082

FILED

AUG 21 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
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; James M. Bixler, Judge.

On October 6, 2006, the district court convicted appellant, pursuant to a jury verdict, of two counts of trafficking in a controlled substance, three counts of manufacturing or compounding a controlled substance, one count of possession of a controlled substance, and one count of conspiracy to manufacture a controlled substance. The district court sentenced appellant to serve two concurrent terms of life with the possibility of parole for the trafficking counts, three concurrent terms of 60 to 180 months for the manufacturing counts, a concurrent term of 12 to 48 months for the possession count, and a concurrent term of 12 to 48 months for the conspiracy count. This court affirmed the judgment of conviction on direct appeal. Nelson v. State, Docket No. 48320 (Order of Affirmance, September 7, 2007). The remittitur issued on October 2, 2007.

On October 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, and appellant filed a response. 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 January 22, 2009, the district court dismissed appellant's petition as procedurally time-barred. This appeal followed.

In order to be timely, a post-conviction petition for a writ of habeas corpus must be filed within one year after this court issues the remittitur from a timely direct appeal. NRS 34.726(1); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998). Notably, the mailbox rule, which allows the date of delivery to prison officials to count in determining the timeliness of a notice of appeal, does not apply to a post-conviction petition for a writ of habeas corpus. Gonzales v. State, 118 Nev. 590, 595, 53 P.3d 901, 903-04 (2002). Appellant's petition, taking into account that 2008 was a leap year, was due on October 2, 2008. Appellant's petition was filed one day late on October 3, 2008. Thus, appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice. See id. Good cause can be demonstrated by a showing that an impediment external to the defense prevented the timely filing of the petition. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994).

Appellant argued his petition should be considered timely filed because the petition was mailed on September 29, 2008, and it should

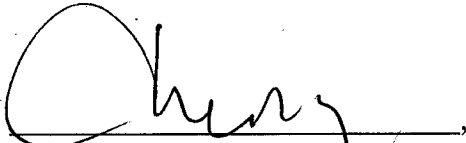
have only taken 3 days to arrive in the district court, instead of the four days it actually took to arrive in this case. Appellant noted that federal courts recognize the mailbox rule. Finally, appellant claimed that the date the remittitur issued should not count, and he believed that this date was erroneously counted in determining timeliness.

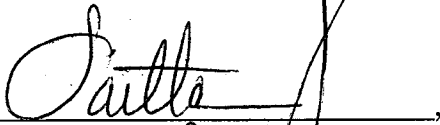
Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant's petition was procedurally time-barred and without good cause. Appellant, who was given an opportunity to allege good cause in the response to the motion to dismiss, did not provide any arguments or otherwise demonstrate that an impediment external to the defense prevented him from filing a timely petition. The petition contains a stamp that the petition was received in the district court on October 3, 2008, the same date that the petition was filed in the district court. Appellant's suggestion that a four-day mailing time is too long fell short of demonstrating an impediment external to the defense prevented the timely filing of his petition. As noted earlier, the prison mailbox rule does not apply to determining the date for the filing of a timely post-conviction petition for a writ of habeas corpus. Gonzales, 118 Nev. at 595, 53 P.3d at 903-04. The date the remittitur issued was not counted in determining that the petition was filed 367 days after the issuance of the remittitur. Therefore, we affirm the order of the district court dismissing the petition was 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. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Cherry J.


Saitta J.


Gibbons J.

cc: Hon. James M. Bixler, District Judge
James Francisco Nelson
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk