

IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMY EARL DOWNS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53290

FILED

SEP 25 2009

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; Kenneth C. Cory, Judge.

On June 28, 2000, the district court convicted appellant, pursuant to a guilty plea, of two counts of forgery. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve two concurrent terms of life in the Nevada State Prison with the possibility of parole. This court affirmed appellant's judgment of conviction and sentence on direct appeal. Downs v. State, Docket No. 36503 (Order of Affirmance, July 12, 2001). The remittitur issued on August 22, 2001.

On September 12, 2000, appellant, with the assistance of counsel, filed a motion for credit for presentence confinement in the district court. Appellant sought 824 days of credit for time served. After conducting a hearing on the motion, the district court granted the motion in part and provided appellant with 654 days of credit for time served. The district court declined to provide credit for time in custody from December 7, 1999, through the sentencing date in this case because that

credit was applied in district court case number C151063; appellant was sentenced in district court case number C151063 on December 7, 1999, and began serving that sentence on that date.¹ On October 9, 2000, the district court entered an amended judgment of conviction providing appellant with 654 days of credit for time served. No appeal was taken from the amended judgment of conviction.

On January 18, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus. Among other things, appellant claimed that his due process rights were violated and his guilty plea was invalid because he was denied 283 presentence credits for time served from December 7, 1999 through September 15, 2000. On March 14, 2002, appellant re-filed the same petition in the district court. The State opposed the petition. On June 4, 2002, the district court denied the petition, noting in particular that the 283 days of credit at issue had already been determined to have been applicable to district court case number C151063 and not applicable in this case pursuant to NRS 176.055. This court affirmed the order of the district court denying the petition. Downs v. State, Docket No. 39757 (Order of Affirmance, April 10, 2003).

On January 17, 2007, appellant filed a proper person motion for an amended judgment of conviction to include all presentence credits. In his motion, appellant again sought credit for time served from December 7, 1999, through September 15, 2000. The State opposed the

¹NRS 176.055(1) provides that a defendant is entitled to credit for time served unless his presentence confinement was pursuant to a judgment of conviction in another case. When he was sentenced on December 7, 1999, in district court case number C151063 his confinement was necessarily pursuant to that judgment of conviction.

motion. On April 12, 2007, the district court denied the motion. This court dismissed the subsequent appeal because the notice of appeal was untimely filed. Downs v. State, Docket No. 49606 (Order Dismissing Appeal, July 24, 2007).

On October 16, 2007, appellant filed a proper person motion to correct an illegal sentence in the district court. In his motion, appellant claimed that the failure to provide him with 283 days of credit for time served rendered his sentence illegal. On November 27, 2007, the district court denied appellant's motion. This court affirmed the order of the district court on appeal. Downs v. State, Docket No. 50704 (Order of Affirmance, April 25, 2008).

On August 8, 2008, appellant filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant 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 January 21, 2009, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that he was entitled to 283 days of credit for time served from December 7, 1999 through September 15, 2000. Appellant claimed that his appellate counsel was ineffective in this regard.

A claim for additional presentence credits is a claim challenging the validity of the judgment of conviction and sentence that must be raised on direct appeal or in a post-conviction petition for a writ of habeas corpus in compliance with NRS chapter 34. Griffin v. State, 122 Nev. 737, 744, 137 P.3d 1165, 1169 (2006). Appellant filed his petition almost seven years after this court issued the remittitur from his direct

appeal. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus raising a claim for 283 days of credit for time served and that claim was denied on the merits. See NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(3).

In an attempt to excuse his procedural defects, appellant argued he only recently learned of this court's decisions in Griffin and Johnson v. State, 120 Nev. 296, 89 P.3d 669 (2004). Appellant claimed that the prison failed to provide direct physical access to the law library or access to persons trained in the law. Appellant further claimed that he had filed his claim for credits in previously acceptable vehicles. Finally, he claimed that he could not have raised a claim for presentence credits in his prior habeas corpus petition because NRS 34.738 precludes a petitioner from raising computation of time served claims in a petition for a writ of habeas corpus challenging a judgment of conviction based upon a guilty plea.

Based upon our review of the record on appeal, we conclude the petition was procedurally time barred, successive and without good cause. Preliminarily, we note that appellant's claim that he could not have raised a claim for presentence credits prior to the 2008 petition is belied by the record on appeal as he repeatedly, unsuccessfully sought the credits at issue in this case. Appellant's claim that the decisions in Griffin and Johnson provided good cause is without merit in the instant case. Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003). First, appellant's August 2008 petition was not timely from the decisions in Griffin and

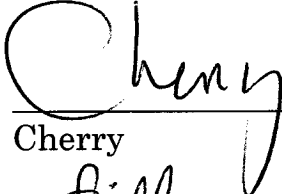
Johnson as these cases were decided in 2006 and 2004.² Thus, even assuming the applicability of these decisions to appellant, they did not provide good cause for the entire length of his delay as a claim for credits based upon Griffin and Johnson was reasonably available within one year after each decision. Further, the decision in Johnson is inapplicable in the instant case because Johnson dealt with the applicability of presentence credits to concurrent sentences in a single judgment of conviction not the applicability of presentence credits between judgments of conviction imposed to run concurrently with one another. 120 Nev. at 297-98, 89 P.3d at 669-70. Thus, regardless of the timing, Johnson would not provide good cause in the instant case. Appellant failed to demonstrate that any actions by the prison prevented him from raising a claim for credits in a timely petition. Appellant's attempt to seek credits through motions for additional credits and a motion to correct an illegal sentence were not proper at the time he filed the motions. See Edwards v. State, 112 Nev. 704, 918 P.2d 321 (1996); Pangallo v. State, 112 Nev. 1533, 930 P.2d 100 (1996), overruled by Griffin, 122 Nev. 737, 137 P.3d 1165. As explained in Griffin, a post-conviction petition for a writ of habeas corpus challenging a judgment of conviction is one of the vehicles available to seek additional presentence credits. Id. at 744, 137 P.3d at 1169. Appellant did in fact seek 283 days of presentence credits in his first petition. This court considered and rejected that claim. The doctrine of the law of the case prevents further litigation of this issue. See Hall v. State, 91 Nev. 314,


²We note that appellant cited to the Johnson decision in his 2007 motion for an amended judgment of conviction and in his 2007 motion to correct an illegal sentence.

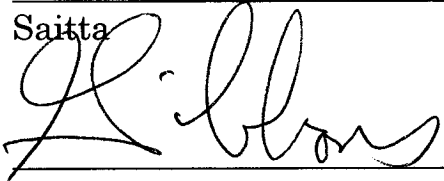
535 P.2d 797 (1975). Therefore, we affirm the order of the district court denying the petition.³

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.⁴


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

³The district court reached the merits of the claims raised in the petition. However, as explained previously, the petition was procedurally barred and without good cause. Because the district court reached the correct decision in denying the petition, we affirm the decision to deny the petition. Kraemer v. Kraemer, 79 Nev. 287, 291, 382 P.2d 394, 396 (1963) (holding that a correct result will not be reversed simply because it is based on the wrong reason).

⁴We 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.

cc: Hon. Kenneth C. Cory, District Judge
Jimmy Earl Downs
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk