

IN THE SUPREME COURT OF THE STATE OF NEVADA

ADAM R. GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53293

FILED

NOV 13 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 appellant Adam R. Garcia's post-conviction petition for a writ of habeas corpus. Ninth Judicial District Court, Douglas County; David R. Gamble, Judge.

On August 31, 2004, Garcia was convicted, pursuant to a guilty plea, of one count each of attempted sexual assault with the use of a deadly weapon and indecent exposure. The district court sentenced Garcia to serve two consecutive prison terms of 72-240 months and a concurrent prison term of 12-30 months.

On November 9, 2007, Garcia filed an untimely proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss Garcia's petition based on its untimeliness. See NRS 34.726(1) ("Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction."). Court-appointed counsel filed an opposition to the motion to dismiss and the State filed a reply. At the beginning of the evidentiary hearing on the petition, the district court stated that it could not "in good conscience find that there was good cause for the delay," but nevertheless "want[ed] the issue to be heard on the merits" and denied the State's motion to dismiss.

On January 9, 2009, the district court entered an order denying Garcia's petition. This timely appeal followed.

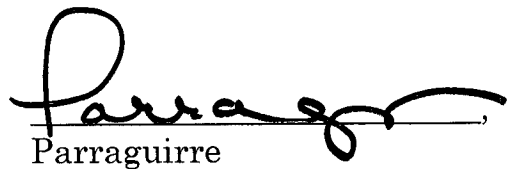
Garcia contends that the district court erred by finding that counsel was not ineffective for failing to file a direct appeal on his behalf. At the evidentiary hearing on his petition, Garcia claimed that he requested an appeal immediately after his sentencing and in a subsequent letter to counsel because he was unhappy with the severity of his sentence. We conclude that Garcia is not entitled to relief.

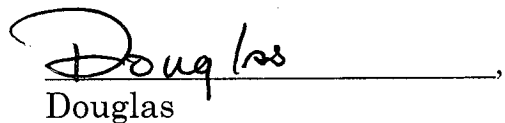
Initially, we note that application of the procedural default rules to post-conviction petitions for writs of habeas corpus is mandatory. See State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). Garcia filed his habeas petition more than three years after the entry of his judgment of conviction. Thus, Garcia's petition was untimely filed and procedurally barred absent a demonstration of good cause for the delay and prejudice. See NRS 34.726(1). As noted above, the district court specifically found that Garcia failed to demonstrate good cause sufficient to excuse the untimeliness of his petition. Moreover, Garcia failed to meet his burden by pleading specific facts demonstrating that a failure to consider his petition would result in a fundamental miscarriage of justice. See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); cf. NRS 34.800(1)(b). Therefore, we conclude that the district court should have granted the State's motion to dismiss Garcia's petition based on procedural grounds alone.

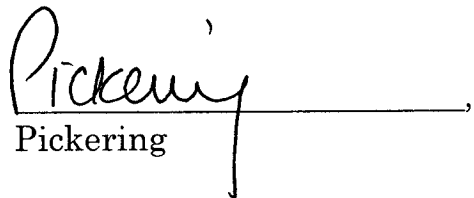
As a separate and independent ground for denying relief, Garcia's claim lacked merit. The district court conducted an evidentiary hearing and heard from Garcia, his mother, and former counsel. Former counsel testified that she discussed appellate rights with Garcia and denied that he ever asked her to file an appeal. Counsel informed the

court that she received two post-sentencing letters from Garcia, but neither mentioned pursuing an appeal. The district court stated that former counsel's testimony was more credible and found that Garcia "did not make a timely request of counsel to lodge an appeal." See Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994) ("an attorney has a duty to perfect an appeal when a convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction"). The district court's factual findings are entitled to deference when reviewed on appeal. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). The district court's findings of fact are supported by substantial evidence and are not clearly wrong. Moreover, Garcia has not demonstrated that the district court erred as a matter of law. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. David R. Gamble, District Judge
Kay Ellen Armstrong
Attorney General Catherine Cortez Masto/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk