

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARC ANTHONY MCJOY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54114

FILED

MAR 10 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.¹ Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Appellant filed a proper person post-conviction petition in the district court on January 26, 2009, more than four years after the judgment of conviction was filed on September 8, 2004.² Thus, appellant's petition was untimely filed. See NRS 34.726(1). Appellant's petition was procedurally barred absent a demonstration of cause and actual prejudice. Id.

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²No direct appeal was taken.

To excuse the procedural defects, appellant claimed that he had cause to raise his claims in an untimely petition because he was in the prison's youthful offender program where he did not have access to the library or to law clerks and because his trial counsel informed him he could not file an appeal from a guilty plea. Appellant failed to demonstrate an impediment external to the defense that prevented him from filing a timely petition. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). As appellant previously filed a proper person motion, the prison's alleged failure to provide access to the prison law library or to prison law clerks due to appellant's participation in the youthful offender program did not explain the entire four-year delay. See Cobas v. Burgess, 306 F.3d 441, 444 (6th Cir. 2002). In addition, that counsel informed appellant that he could not file a direct appeal in a case involving a guilty plea also did not excuse the delay in filing an untimely post-conviction petition for a writ of habeas corpus.

Next, appellant claimed that he is actually innocent because he shot the victim in defense of a friend and he did not intend to kill the victim. We conclude that appellant failed to demonstrate a fundamental miscarriage of justice to overcome application of the procedural bar. See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Given the facts of the offense set forth in the record, appellant failed to demonstrate that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt had he argued he shot in defense of his friend or argued he did not possess the intent to kill the victim. Schlup v. Delo,

513 U.S. 298, 327 (1995). Therefore, the district court did not err in denying the petition as procedurally barred.

Having considered appellant's contentions and concluding that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Stefany Miley, District Judge
Marc A. McJoy
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk