

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID EDWARD EUGENO ABARA,
Appellant,
vs.
WARDEN JIM BENEDETTI AND THE
STATE OF NEVADA,
Respondents.

No. 54810

FILED

SEP 10 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appellant filed his petition on May 20, 2008, more than one year after this court's May 2, 2007, issuance of the remittitur from his direct appeal. See Abara v. State, Docket No. 47408 (Order Affirming in Part, Vacating in Part and Remanding, April 6, 2007). Appellant's petition was therefore untimely filed and, absent a demonstration of good cause and prejudice, procedurally barred. See NRS 34.726(1). An appellant is entitled to an evidentiary hearing on his procedural-bar claims only when they are supported by specific factual allegations that, if true and not repelled by the record, would entitle him to relief. Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

Appellant first argues that he had good cause to excuse his procedural bar and that the district court erred in dismissing this claim without an evidentiary hearing. Appellant did not meet the burden for an evidentiary hearing and thus did not demonstrate good cause. Appellant argues that the district court clerk, in returning his timely initial petition

as incomplete for failing to include the social security number affirmation, was an impediment external to the defense that prevented his compliance with the procedural default rules. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). However, in his petition below, appellant did not claim that his initial petition was timely received by the district court—that is, on or before the May 2, 2008, deadline—but only argued that his initial petition was executed in a timely manner. As a petition’s timeliness is determined not by its execution or mailing date but by the date it is received by the court, Gonzales v. State, 118 Nev. 590, 595, 53 P.3d 901, 904 (2002), even if appellant’s assertion were true, he would not have been entitled to relief. Accordingly, appellant was not entitled to an evidentiary hearing on this argument.¹

Appellant also argues that his procedural bar should be excused because he is actually innocent such that denying consideration of

¹On appeal, appellant states that he executed and mailed the petition on May 1, 2008, and that it was received by the district court sometime before May 8, 2008. As this information was not presented below, we will not consider it on appeal. Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004). However, even had this information been presented below, it would not have been sufficient to warrant an evidentiary hearing as appellant still does not claim that the petition was received by the court prior to the May 2, 2008, deadline. Moreover, the district court’s finding that nothing in the record corroborates appellant’s allegations that the petition had been previously returned is supported by the record and is not clearly wrong. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

Appellant also argues on appeal that the district court should have issued an order to show cause to the court clerk regarding receipt of an earlier petition. However, the burden of proof in a post-conviction proceeding rests on appellant, not the district court.

his substantive claims would result in a fundamental miscarriage of justice, see Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996), and that the district court erred in denying his petition without an evidentiary hearing on this claim. Appellant did not meet the burden for an evidentiary hearing and thus did not demonstrate actual innocence. To demonstrate actual innocence, appellant must show that “it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.” Calderon v. Thompson, 523 U.S. 538, 559 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)). Appellant’s evidence merely indicated that he arrived at a Hayward, California, residence some 18 hours after the commission of the crimes. Further, the evidence at trial was that appellant stated he was cashing the check because he was going to visit relatives in California. Accordingly, even if appellant’s alleged facts were true, he would not have been entitled to relief because his new evidence was consistent with that presented at trial such that there would be no possibility that a reasonable juror would not have convicted him in light of that evidence.

For the foregoing reasons, we conclude that the district court did not err in denying appellant’s petition as procedurally barred without first holding an evidentiary hearing. We therefore

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Steven P. Elliott, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk