

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES GREG MCKEE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35314

FILED

JUL 13 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court granting a motion to dismiss appellant's post-conviction petition for a writ of habeas corpus.

On August 14, 1997, a jury found appellant guilty of driving under the influence. Prior to sentencing, appellant filed a motion for a new trial based on newly discovered evidence and discovery violations. The district court denied the motion, concluding that the evidence was not newly discovered and that, even if it was newly discovered evidence it would not have rendered a different result probable on retrial. Thereafter, the court sentenced appellant to twelve (12) to thirty (30) months in prison. The court entered the judgment of conviction on November 24, 1997.

Appellant filed a notice of appeal from the judgment of conviction on December 31, 1997. Because the notice of appeal appeared to be untimely, this court ordered appellant to show cause why the appeal should not be dismissed for lack of jurisdiction. *McKee v. State*, Docket No. 31645 (Order, January 13, 1998). On February 2, 1998, counsel for appellant filed a motion seeking to voluntarily withdraw the appeal. This court granted the motion and dismissed the appeal. *McKee*

v. State, Docket No. 31645 (Order Dismissing Appeal, February 19, 1998).

On October 1, 1998, appellant, represented by counsel, filed a post-conviction petition for a writ of habeas corpus. On January 25, 1999, the State filed a motion to dismiss the petition pursuant to NRS 34.810(1)(b). After appellant failed to respond to the motion as required by NRS 34.750(4), the State filed a request to submit the motion for decision. The district court set a hearing on the motion. At that time, the court ordered the parties to file points and authorities. Thereafter, the court granted the motion to dismiss the petition because appellant had failed to oppose the motion to dismiss and because appellant had failed to demonstrate cause and prejudice pursuant to NRS 34.810(1). This timely appeal followed.

Appellant contends that the district court erred in dismissing the petition based on NRS 34.810(1)(b). In particular, appellant alleges that the ground for the petition could not have been raised on direct appeal because there was not a sufficient record to raise the issue on direct appeal. We disagree.

The ground for relief alleged in the petition is the same as that raised in the motion for a new trial. Appellant could have challenged the denial of the motion for a new trial on direct appeal from the judgment of conviction. See NRS 177.045; cf. Hargrove v. State, 100 Nev. 498, 502 n.3, 686 P.2d 222, 225 n.3 (1984). Moreover, appellant failed to demonstrate cause for the failure to pursue a direct appeal. See Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994) ("To establish good cause to excuse a procedural default, a defendant must demonstrate that some impediment external to the defense prevented him from complying with the

procedural rule that has been violated."). Accordingly, the district court did not err in dismissing the petition. See NRS 34.810(1)(b) (providing that district court shall dismiss post-conviction habeas petition where petitioner's conviction was result of trial and grounds for petition could have been raised in direct appeal unless court finds both cause for failure to present grounds in direct appeal and actual prejudice to petitioner). We therefore

ORDER this appeal dismissed.¹

Young J.
Young
Agosti J.
Agosti
Leavitt J.
Leavitt

cc: Hon. David A. Huff, District Judge
Attorney General
Lyon County District Attorney
William J. Routsis, II
Lyon County Clerk

¹Because we have concluded that the district court did not err in dismissing the petition based on NRS 34.810(1)(b), we need not reach the other issues raised by appellant.