

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL A. FRIMMEL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 61487

FILED

DEC 12 2013

TRACIE K. LINDEMAN  
CLERK OF THE SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Appellant filed his petition on December 7, 2010, more than one year after entry of the judgment of conviction on April 16, 2009.<sup>1</sup> Thus, appellant's petition was untimely filed and procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See* NRS 34.726(1).

In his petition, appellant claimed he had cause for the delay because he mistakenly believed that his trial counsel had filed a notice of appeal. This claim was initially denied by the district court, but on appeal this court ordered the district court to conduct an evidentiary on the claim. *Frimmel v. State*, Docket No. 58190 (Order Affirming in Part, Reversing in Part and Remanding, September 30, 2011). The district court then conducted an evidentiary hearing and appellant's trial counsel testified

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<sup>1</sup>No direct appeal was taken.

that he had explained the appeal process to appellant, but that appellant did not ask him to file a direct appeal until well past the appeal period. Counsel stated that he informed appellant that it was too late to file a notice of appeal in a letter dated July 1, 2009. Despite knowledge in July 2009 that counsel had not filed a notice of appeal, appellant did not file his post-conviction petition for a writ of habeas corpus until December 7, 2010. Based on this information, the district court concluded that appellant did not demonstrate cause for the delay and dismissed the petition on that basis.

Appellant now argues that the district court did not conduct a full and fair hearing pursuant to *Mack v. Cupp*, 564 F.2d 898 (9th Cir. 1977), because it did not allow him to present evidence related to his claim that his counsel was ineffective at the sentencing hearing because counsel did not present evidence of appellant's mental health issues as mitigation evidence.<sup>2</sup> Appellant's claim is without merit. Appellant's petition was procedurally barred and the district court properly conducted an evidentiary hearing solely regarding appellant's attempt to demonstrate cause for the delay. See *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Appellant's claim of ineffective assistance of counsel at the sentencing hearing was itself procedurally barred and appellant did not provide cause for the delay in raising that claim. See *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). As appellant did not demonstrate cause for the delay, he was not entitled to have procedurally

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<sup>2</sup>The State argues that appellant did not properly preserve this issue for appeal. We conclude that appellant sufficiently preserved this issue for appeal during the evidentiary hearing.

barred claims considered at the evidentiary hearing. Therefore, he fails to demonstrate that the district court erred by refusing to expand the hearing to consider a procedurally barred claim. *See Mack*, 564 F.2d at 901 (discussing that a state court's conclusion that an evidentiary was not necessary for certain claims does not mean that the state court did not fully and fairly consider those claims); *see also United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003) (a petitioner is not entitled to an evidentiary hearing when his allegations "do not state a claim for relief" (internal quotations omitted)). Therefore, appellant fails to demonstrate that the district court erred in dismissing his petition as procedurally barred.

Having concluded that appellant is not entitled to relief, we  
ORDER the judgment of the district court AFFIRMED.

Pickering, C.J.  
Pickering

Hardesty, J.  
Hardesty

Cherry, J.  
Cherry

cc: Hon. Jessie Elizabeth Walsh, District Judge  
The Kice Law Group, LLC  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk