IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN LEE RUSH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63229

FILED

DEC 17 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
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; Elizabeth Goff Gonzalez, Judge.

Appellant filed his petition on December 17, 2012, more than three years after entry of the judgment of conviction on October 13, 2009. Thus, appellant's petition was untimely filed. *See* NRS 34.726(1). Appellant's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.*

In an attempt to demonstrate cause for the delay,[2] appellant argued that newly discovered evidence demonstrated that counsel was

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[1]This 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).

[2]We note that appellant cited to *Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309 (2012), *Missouri v. Frye*, 566 U.S. ___, 132 S. Ct. 1399 (2012), and *Strickland v. Washington*, 466 U.S. 668 (1984), to support his

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ineffective in advising him to accept a plea offer to a felony charge when counsel knew that the State did not have a receipt to prove the value of the items taken. Appellant failed to demonstrate that the alleged "newly discovered evidence" was in fact newly discovered or that it was not reasonably available to appellant within the one-year period for filing a timely habeas corpus petition. *See Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). We therefore conclude that the district court did not err by denying this claim.

Next, appellant claimed that his counsel told him he would file an appeal and failed to do so and that appellant learned of counsel's inaction prior to January 11, 2011, the date he filed his own notice of appeal. Even assuming, without deciding, that appellant believed counsel was pursuing an appeal on his behalf and that his belief was reasonable, appellant failed to demonstrate that he filed the petition within a reasonable time after learning that a direct appeal had not been filed. *See Hathaway*, 119 Nev. at 255, 71 P.3d at 508. Therefore, the district court did not err in denying this claim.

Finally, appellant argued that he was actually innocent of burglary. Appellant did not demonstrate actual innocence because he failed to show that "it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298,

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. . . continued

argument that his petition is not time barred; however, he provided no cogent argument how these cases apply and/or explain the delay.

327 (1995); *see also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Therefore, we conclude that the district court did not err in denying the petition as procedurally barred.[3] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Pickering, C.J.
Pickering

/ Hardesty, J.
Hardesty

Cherry, J.
Cherry

cc: Hon. Elizabeth Goff Gonzalez, District Judge
John Lee Rush
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[3]To the extent that appellant's claim can be construed as a motion to correct an illegal sentence, appellant failed to demonstrate that his sentence was facially illegal or that the district court lacked jurisdiction over him. *See Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).