

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARVIN J. JOHNSON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 36078

**FILED**

NOV 17 2000

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On January 26, 1994, the district court convicted appellant, pursuant to a jury trial, of one count of first degree murder, one count of robbery, and one count of attempted sexual assault. The district court sentenced appellant to serve a term of life without the possibility of parole and determinate consecutive terms totaling fifteen years in the Nevada State Prison. This court dismissed appellant's direct appeal. Johnson v. State, Docket No. 25951 (Order Dismissing Appeal, November 30, 1995). The remittitur issued on December 19, 1995.

On October 16, 1995, appellant filed a motion for a new trial in the district court. The State opposed the motion. On July 15, 1996, the district court denied appellant's motion. This court dismissed appellant's subsequent appeal. Johnson v. State, Docket No. 29564 (Order Dismissing Appeal, March 26, 1999).

On February 25, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the

district court.<sup>1</sup> The State opposed the petition. Appellant filed a response. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On May 24, 2000, the district court denied appellant's petition. This appeal followed.

In his petition, appellant contended that he was denied the effective assistance of counsel that his counsel's inadequate performance resulted in a violation of his due process rights and right to a fair trial. Specifically, appellant claimed that his counsel was ineffective for: (1) failing to challenge the sufficiency of the information as it related to the attempted sexual assault count, (2) failing to challenge the "circumstantial evidence" jury instruction that appellant believed created an impermissible presumption of intent, (3) failing to present available evidence at trial and on appeal which conclusively demonstrated purposeful and systematic discrimination against African Americans in jury service, and (4) failing to properly investigate, locate and interview potential defense witnesses.

Appellant's petition was filed more than four years after the remittitur issued from appellant's direct appeal. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice. See id.

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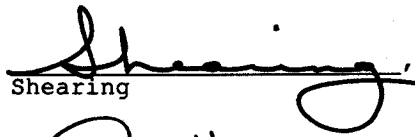
<sup>1</sup>On January 25, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. We decline to consider appellant's January 25, 2000 petition because it appears from our review of the record on appeal that the district court has not ruled on appellant's petition.

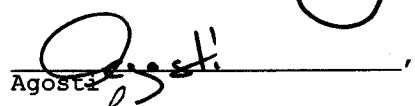
In an attempt to demonstrate cause for the delay, appellant argued that his appellate counsel misinformed him about the time for filing a post-conviction petition for a writ of habeas corpus. Appellant argued that his appellate counsel incorrectly informed him that he could file a timely habeas corpus petition within one year of the remittitur from an appeal from an order denying a motion for a new trial. Appellant further argued that his counsel refused to provide appellant with his case file so that appellant could timely file a habeas corpus petition.

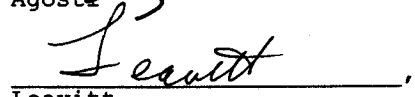
NRS 34.726(1) provides that a habeas corpus petition must be filed within one year of entry of the judgment of conviction, if no direct appeal was taken, or within one year of the issuance of the remittitur from a timely direct appeal. See also Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132 (1998). Appellant's counsel, in essence, misinformed appellant that a motion for a new trial tolled the time for filing a timely habeas corpus petition; the timely filing of a motion for a new trial based upon newly discovered evidence does not toll the time for filing a timely habeas corpus petition. However, even assuming, without deciding, that appellant demonstrated cause for the delay because of counsel's misinformation, we conclude that the district court properly determined appellant's petition was procedurally barred because appellant failed to demonstrate that dismissal of the petition would unduly prejudice appellant. See NRS 34.726(1). Appellant's ineffective assistance of counsel claims lacked merit. See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996). Therefore, we conclude that the district court did not err in denying the petition.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976). Accordingly, we affirm the order of the district court.

It is so ORDERED.<sup>2</sup>

  
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Shearing J.

  
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Agosta J.

  
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Leavitt J.

cc: Hon. Mark W. Gibbons, District Judge  
Attorney General  
Clark County District Attorney  
Marvin J. Johnson  
Clark County Clerk

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<sup>2</sup>We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.