

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THOMAS EDWARD O'DONNELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 68258✓

FILED

DEC 29 2015

TRACIE H. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
C. DEPUTY CLERK
No. 68259

THOMAS EDWARD O'DONNELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

ORDER OF AFFIRMANCE

Docket No. 68258 is an appeal from district court orders denying motions to “vacate illegal sentence.” Docket No. 68259 is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; William D. Kephart, Judge. We elect to consolidate these appeals for disposition. *See* NRAP 3(b)(2).

¹These appeals have been submitted for decision without oral argument and we conclude the records are sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).

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In his March 2, 2015, May 12, 2015, and May 15, 2015, motions and various supplements,² appellant Thomas Edward O'Donnell first asserted the district court improperly relied upon errors in the presentence investigation report when imposing his sentence. However, the Nevada Supreme Court has already considered and rejected this claim. *O'Donnell v. State*, Docket No. 65386 (Order of Affirmance, September 18, 2014). The doctrine of the law of the case prevents further litigation of this issue and "cannot be avoided by a more detailed and precisely focused argument." *See Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

Next, O'Donnell claimed he should have been fined rather than sentenced to a prison term, the judgment of conviction did not comply with NRS 176.105(c), and his sentence violated his equal protection rights. O'Donnell also asserted the State improperly informed the district court O'Donnell had not offered to pay restitution to the victims, implied his military record was false, improperly stated O'Donnell had assured the victims the securities were FDIC insured, implied his medical issues were false, and did not inform the district court regarding O'Donnell's aid to gaming control agents. These claims fell outside the narrow scope of claims permissible in a motion to modify or correct an illegal sentence. *See Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

²We conclude the district court properly construed O'Donnell's motions as motions to modify sentence or motions to correct an illegal sentence.

Therefore, without considering the merits of any of the claims raised, we conclude the district court did not err in denying the motions.

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O'Donnell filed his petition on December 2, 2014, more than one year after this court issued its order granting O'Donnell the voluntary dismissal of his direct appeal on September 25, 2013. *O'Donnell v. State*, Docket No. 62496 (Order Dismissing Appeal and Granting Motion to Withdraw as Counsel, September 25, 2013). Thus, O'Donnell's petition was untimely filed. *See* NRS 34.726(1); *see also Gonzales v. State*, 118 Nev. 590, 596 n.18, 53 P.3d 901, 904 n.18 (2002) (recognizing that where a timely direct appeal is voluntarily dismissed, the one-year time period for filing a postconviction petition for a writ of habeas corpus commences from the date of entry of this court's order granting the motion to voluntarily dismiss the appeal). O'Donnell's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.*

First, O'Donnell claimed his health problems should provide cause to excuse his delay. However, O'Donnell's health issues did not constitute an impediment external to the defense that prevented him from complying with the procedural time bar. *See Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that petitioner's claim of organic brain damage, borderline mental retardation and reliance on assistance of inmate law clerk unschooled in the law did not constitute good cause for the filing of a successive post-conviction petition).

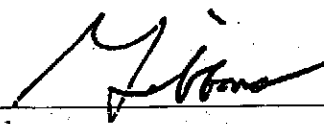
Second, O'Donnell claimed his appellate counsel misadvised him regarding the proper procedure to challenge his conviction and the improper advice should provide cause for the delay. A procedurally barred claim of ineffective assistance of counsel cannot constitute good cause for additional claims. *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). O'Donnell's claim of ineffective assistance of appellate counsel was reasonably available to be raised in a timely petition, and therefore, O'Donnell failed to demonstrate an impediment external to the defense prevented him from complying with the procedural time bar. *See id.* at 252-53, 71 P.3d at 506.


Third, O'Donnell claimed he had cause for his delay because he waited until the Nevada Supreme Court issued its decision in a previous appeal before he pursued habeas relief. O'Donnell's claims were reasonably available to be raised in a timely petition and O'Donnell did not demonstrate his choice to wait until the conclusion of a prior appeal constituted an impediment external to the defense. *See id.*

Fourth, O'Donnell claimed he had cause for the delay because his access to the prison law library was limited due to a prison lockdown. O'Donnell failed to demonstrate lack of access to the library deprived him of meaningful access to the courts. *See Bounds v. Smith*, 430 U.S. 817, 828 (1977), *limited by Lewis v. Casey*, 518 U.S. 343, 354-56 (1996). O'Donnell filed numerous motions and documents in the district court, which indicated his access to the court was not improperly limited by restrictions on use of the prison law library or due to prison law library policies. Accordingly, O'Donnell failed to demonstrate official interference caused him to be unable to comply with the procedural time bar. *See*

Hathaway, 119 Nev. at 252, 71 P.3d at 506. Therefore, the district court did not err in denying the petition as procedurally barred.

Having concluded O'Donnell is not entitled to relief, we
ORDER the judgments of the district court AFFIRMED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. William D. Kephart, District Judge
Thomas Edward O'Donnell
Attorney General/Carson City
Attorney General/Las Vegas
Clark County District Attorney
Eighth District Court Clerk

³We have reviewed all documents O'Donnell has submitted, and we conclude no relief based upon those submissions is warranted. To the extent O'Donnell has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we decline to consider them in the first instance.