

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DWIGHT KIRKENDOFF,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70097

FILED

DEC 14 2016

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Dwight Kirkendoff appeals from an order of the district court denying his postconviction petition for a writ of habeas corpus filed on August 28, 2014. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Kirkendoff claims the district court erred by denying his petition as procedurally barred. We disagree.

Kirkendoff filed his petition more than one year after entry of the judgment of conviction on January 7, 2013.¹ Thus, Kirkendoff's petition was untimely filed. *See* NRS 34.726(1). Kirkendoff's petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.*

Kirkendoff claims the district court erred by finding he failed to demonstrate good cause and actual prejudice to overcome the


¹No direct appeal was filed.


procedural bar. Below, Kirkendoff claimed he had good cause for filing an untimely petition because his counsel deprived him of a direct appeal by misadvising him of his right to file a direct appeal and pursue postconviction remedies. He also claimed he had good cause because he lacked knowledge regarding his postconviction remedies.

The district court held an evidentiary hearing on Kirkendoff's appeal deprivation claim, found counsel credible, and concluded Kirkendoff never asked counsel to file an appeal, a motion to withdraw the guilty plea, or a habeas petition, and there was no reason to think he would want to pursue any of these options. The district court concluded Kirkendoff "was not deprived of an appeal, or of any postconviction remedy, by the actions of his counsel." The district court also concluded Kirkendoff "failed to show an impediment external to the defense, because nothing outside of his own delay prevented him from filing a postconviction petition within one year from the date of his judgment of conviction." We conclude substantial evidence supports the decision of the district court. *See Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005); *see also Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003); *Toston v. State*, 127 Nev. 971, 978, 267 P.3d 795, 800 (2011) (the constitutional duty to file a direct appeal only arises when requested to do so and when the defendant expresses dissatisfaction with his conviction); *Miranda v. Castro*, 292 F.3d 1063, 1066-68 (9th Cir. 2002) (holding a defendant has no right to advice regarding habeas relief from direct appeal counsel); *Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656,

660, 764 P.2d 1303, 1306 (1988). Accordingly, we conclude the district court did not err in denying the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Carolyn Ellsworth, District Judge
Ornoz, Ericsson & Gaffney, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk