

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAMARR ROWELL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36693

FILED

APR 10 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Bloom*
CHIEF DEPUTY CLERK

LAMARR ROWELL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37210

LAMARR ROWELL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37242

ORDER OF AFFIRMANCE AND DISMISSING APPEAL AND LIMITED REMAND FOR
CORRECTION OF JUDGMENT OF CONVICTION

Docket No. 36693 is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Docket No. 37210 is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Docket No. 37242 is a proper person appeal from an order of the district court denying appellant's motion for credit and request for appointment of counsel. We elect to consolidate these appeals for disposition.¹

On April 26, 1999, the district court convicted appellant, pursuant to a guilty plea, of one count of drawing and passing a check without sufficient funds in drawee bank with the intent to defraud. The district court sentenced appellant to

¹See NRAP 3(b).

serve a minimum term of twelve months to a maximum term of thirty-six months in the Nevada State Prison. The district court suspended the sentence and placed appellant on probation for a period of time not to exceed three years. The district court awarded appellant 78 days of credit for presentence incarceration. On August 6, 1999, the district court entered an order revoking appellant's probation and executing the sentence originally imposed. This court dismissed appellant's untimely appeal from his judgment of conviction and sentence for lack of jurisdiction.²

Docket No. 36693

On June 9, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a number of documents in support of and to supplement his petition, including: (1) August 2, 2000, "Motion to Submit Amended Petition for Writ of Habeas Corpus: (Post-Conviction)"; (2) August 2, 2000, "Petition for Writ of Habeas Corpus (Post Conviction Amended)"; (3) August 7, 2000, "Motion to Submit Amended Petition for Writ of Habeas Corpus: (Post-Conviction)"; and (4) August 7, 2000, "Answer/Affidavit #2 to State's Opposition for Writ of Habeas Corpus: (Post-Conviction)". 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 September 1, 2000, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than one year after entry of the judgment of conviction. NRS 34.726(1) provides that a post-conviction petition for a writ of habeas corpus must be filed within one year after entry of the judgment of conviction, if no direct appeal is taken. NRS 34.726(1) further provides that, if a direct appeal is taken, such a petition may be filed within one year after this court issues remittitur for the

²Rowell v. State, Docket No. 35960 (Order Dismissing Appeal, May 2, 2000).

appeal. This latter provision does not, however, apply to the instant case because it is only applicable in cases where a timely direct appeal from the judgment of conviction is taken.³ Thus, appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.⁴

In an attempt to demonstrate cause for the delay, appellant argued that his counsel failed to advise him of his appeal rights and failed to advise him of an alleged breach of the plea agreement. These arguments do not amount to sufficient cause to excuse appellant's delay.⁵ Thus, we conclude that the district court did not err in denying appellant's petition, and we affirm the order of the district court.

Docket No. 37210

On September 13, 2000, appellant filed a second post-conviction petition for a writ of habeas corpus in the district court.⁶ The State opposed the petition. 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 December 8, 2000, the district court denied appellant's petition. This appeal followed.

Appellant's second petition was filed more than one year after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.⁷ Moreover, appellant raised a new claim in his petition. Thus, appellant's petition was successive because it was an abuse of the writ.⁸ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁹

³Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

⁴See NRS 34.726(1).

⁵See Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

⁶Appellant labeled his petition a "petition for writ of habeas corpus (post-conviction) (re-amended)."

⁷See NRS 34.726(1).

⁸See NRS 34.810(2).

⁹See NRS 34.726(1); NRS 34.810(3).

In an attempt to excuse his procedural defects, appellant argued that his counsel failed to advise him of his appeal rights, post-conviction procedures, and the alleged breach of the plea agreement. These arguments do not amount to sufficient cause to excuse appellant's procedural defects.¹⁰ Thus, the district court did not err in denying his petition, and we affirm the order of the district court.

Docket No. 37242

On October 20, 2000, appellant filed a motion for amended judgment of conviction to include jail time credits. The State opposed the motion. On October 30, 2000, the district court orally denied the motion, and on November 9, 2000, the district court entered a written order denying the motion. Appellant did not file an appeal.

On November 8, 2000, appellant filed a document labeled, "motion to obtain 109 days served under jurisdiction and sentence of probation." On November 8, 2000, appellant also filed a request for the appointment of counsel. The State opposed the motion and request. On December 8, 2000, the district court summarily denied appellant's motion and request. This appeal followed.

Our review of the record on appeal reveals a jurisdictional defect. Appellant's motion was essentially a motion for reconsideration of the district court's order denying his first motion for credits. The right to appeal is statutory; where no statute or court rule provides for an appeal, no right to appeal exists.¹¹ No statute or court rule provides for an appeal from an order of the district court denying a motion for reconsideration and request for appointment of counsel. Accordingly, we conclude that we lack jurisdiction to consider

¹⁰See Harris, 114 Nev. 956, 964 P.2d 785; Lozada, 110 Nev. 349, 871 P.2d 944.

¹¹See Castillo v. State, 106 Nev. 349, 792 P.2d 1133 (1990).

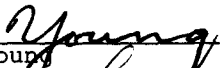
this appeal.¹²


Conclusion


In reviewing the documents before this court, we observed that the judgment of conviction did not include an order of restitution. The district court minutes for the sentencing hearing conducted on March 11, 1999, however, indicate that the district court ordered appellant to pay \$610.88 in restitution. NRS 176.105(c) provides that the judgment of conviction must set forth the amount of restitution ordered against appellant. Accordingly, we remand this matter for the limited purpose of correcting the judgment of conviction to include restitution.

Having reviewed the records on appeal, and for the reasons set forth above, we conclude that briefing and oral argument are unwarranted.¹³ Accordingly, we

ORDER the judgments of the district court AFFIRMED in Docket Nos. 36693 and 37210, DISMISS the appeal in Docket No. 37242 and REMAND THIS MATTER TO THE DISTRICT COURT FOR THE LIMITED PURPOSE OF CORRECTING THE JUDGMENT OF CONVICTION AS DIRECTED ABOVE.


_____, J.
Young


_____, J.
Leavitt


_____, J.
Becker

cc: Hon. Jeffrey D. Sobel, District Judge
Attorney General
Clark County District Attorney
Lamarr Rowell
Clark County Clerk

¹²To the extent that appellant raises a new claim that he was entitled to 5 days of additional credit for time spent on probation, we conclude that the district court did not err in denying this claim. See Van Dorn v. Warden, 93 Nev. 524, 569 P.2d 938 (1977).

¹³See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).