IN THE SUPREME COURT OF THE STATE OF NEVADA

TYRONE GIVENS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37141

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 October 5, 1992, the district court convicted appellant, pursuant to a jury verdict, of attempted robbery with the use of a deadly weapon, victim 65 years of age or older (count I), attempted murder with the use of a deadly weapon, victim 65 years of age or older (count II), and attempted murder with the use of a deadly weapon (count III). The district court sentenced appellant to serve the following terms in the Nevada State Prison: for count I, two consecutive terms of seven and one-half years for the primary offense and the elderly enhancement; for count II, two consecutive terms of twenty years for the primary offense and the elderly enhancement; and for count III, two consecutive terms of twenty years for the primary offense and the deadly weapon enhancement. The terms for each count were to be served consecutively.

On appeal, this court upheld the validity of the convictions but concluded that the district court erroneously applied the elderly enhancement in counts I and II pursuant to NRS 193.167.[1] This court remanded the matter to the district court for entry of an amended judgment of conviction and instructed the district court to vacate the elderly enhancement in counts I and II and instead apply the deadly

[1]At the time he committed his offense, NRS 193.167 was not applicable to the offenses of attempted robbery or attempted murder. See 1991 Nev. Stat., ch.403, § 7, at 1059. In 1999, the legislature amended NRS 193.167 to apply the elderly enhancement to the crime of attempted murder. See 1999 Nev. Stat., ch. 18, § 1, at 42.

weapon enhancement.[2] On December 30, 1993, the district court entered an amended judgment of conviction reflecting that counts I and II were enhanced pursuant to the deadly weapon enhancement and not the elderly enhancement.

On December 3, 1997, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. On December 24, 1997, the district court denied appellant's motion. This court dismissed appellant's subsequent appeal.[3]

On November 19, 1998, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court.[4] 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 March 15, 1999, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition approximately five years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.[5] Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.[6]

In an attempt to demonstrate cause for the delay, appellant argued that his present petition should not be dismissed as procedurally barred because he originally filed a petition on June 24, 1994, but the district court never resolved his petition. In support of this argument, appellant provided a copy of the 1994 petition which shows that it has not

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[2]Givens v. State, Docket No. 23955 (Order of Remand, November 3, 1993).

[3]Givens v. State, Docket No. 31672 (Order Dismissing Appeal, March 17, 2000).

[4]Appellant labeled his petition "motion showing cause and perjudice to file writ of habeas corpus." Because appellant challenged his conviction and sentence, we conclude that the district court properly construed appellant's petition as a post-conviction petition for a writ of habeas corpus. See NRS 34.724(2)(b) (stating that post-conviction petition for a writ of habeas corpus "[c]omprehends and takes the place of all other common law, statutory or other remedies which have been available for challenging the validity of conviction or sentence, and must be used exclusively in place of them").

[5]See NRS 34.726(1).

[6]See id.

been filed stamped in the district court. In opposing the petition, the State argued that appellant never filed his petition in the district court but only mailed it to the Attorney General's office in 1994. This court has held that good cause to excuse a procedural default must be an impediment external to the defense.[7] We conclude that appellant failed to demonstrate good cause to excuse the untimely filing of his petition. It appears that appellant never filed his petition with the district court. Attached to appellant's unfiled 1994 petition is a certificate of mailing which shows that he only mailed his petition to the Attorney General's office. Appellant has not demonstrated that an impediment external to the defense prevented his access to the courts.[8] Thus, we conclude that the district court properly denied 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.[9] Accordingly, we

ORDER the judgment of the district court AFFIRMED.[10]

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Joseph S. Pavlikowski, Senior Judge
Attorney General/Carson City
Clark County District Attorney
Tyrone Givens
Clark County Clerk

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[7]See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

[8]See Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988); see also Lozada, 110 Nev. 349, 871 P.2d 944.

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

[10]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.