

IN THE SUPREME COURT OF THE STATE OF NEVADA

ORLANDO EDWARD TRUJILLO,

No. 37143

Appellant,

vs.

WARDEN, LOVELOCK
CORRECTIONAL CENTER, CRAIG
FARWELL,

Respondent.

FILED

JAN 09 2002

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

ORDER OF AFFIRMANCE

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

On May 27, 1994, the district court convicted Trujillo, pursuant to an Alford¹ plea, of one count of first-degree murder. The district court sentenced Trujillo to serve a term of life in the Nevada State Prison without the possibility of parole. This court dismissed Trujillo's untimely direct appeal for lack of jurisdiction.²

On April 23, 1998, Trujillo filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed, arguing that the petition was untimely and that Trujillo failed to demonstrate good cause for the delay. The district court agreed and denied the petition. This court affirmed the district court's decision.³

¹North Carolina v. Alford, 400 U.S. 25 (1970).

²Trujillo v. State, Docket No. 36299 (Order Dismissing Appeal, August 3, 2000).

³Trujillo v. State, Docket No. 32799 (Order of Affirmance, October 11, 2000).

On November 1, 2000, Trujillo filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. The district court denied the petition as untimely. This appeal followed.

Trujillo filed his petition more than six years after entry of the judgment of conviction. Thus, the petition was untimely filed.⁴ Trujillo's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.⁵

Trujillo asserted several justifications for his delay in filing the instant petition. After reviewing the record on appeal, we conclude that the district court properly concluded that Trujillo failed to demonstrate cause for filing an untimely petition.

First, Trujillo contended that his petition is not subject to the one-year time limit outlined in NRS 34.726 because his petition "is no longer a post-conviction challenge" but a "constitutional petition for a writ of habeas corpus." This contention is without merit. Trujillo's petition challenges his conviction and sentence on the ground that his counsel provided constitutionally ineffective assistance. Because Trujillo sought post-conviction relief in the petition, it is subject to NRS 34.726(1)'s time limit.

Trujillo next claimed that his trial attorney was responsible for his delay in filing the instant petition. Specifically, Trujillo claimed that he asked his attorney about his right to appeal and that his attorney told him that he could not appeal. Therefore, Trujillo argues that the limitations period either should have been tolled until he discovered the truth or should not apply to him. This explanation fails to demonstrate that an impediment external to the defense prevented Trujillo from complying with the one-year deadline.⁶ Even assuming that counsel erroneously informed Trujillo that he waived his appeal rights by entry of the guilty plea, Trujillo was not prevented from investigating post-

⁴See NRS 34.726(1).

⁵See *id.*

⁶See *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994).

conviction deadlines and filing the petition within the one-year time period.⁷

Trujillo next argued that his delay in filing the instant petition is justified because of the United States Supreme Court's recent decision in Roe v. Flores-Ortega.⁸ Trujillo claimed that the Court's ruling should have applied to him.

In Flores-Ortega, the Supreme Court explained how to evaluate an ineffective assistance of counsel claim based on counsel's failure to file a notice of appeal without the defendant's consent under the two-part test of Strickland v. Washington.⁹ The Court first reaffirmed its previous holdings that it is professionally unreasonable for counsel to disregard a defendant's specific instructions to file a notice of appeal.¹⁰ The Court then addressed a more difficult question: "Is counsel deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other?"¹¹

The Court's answer is irrelevant to the instant case because Trujillo bases his claims of ineffective assistance on counsel's failure to file a notice of appeal after he expressed a desire to appeal. The law on this issue was well-established before Flores-Ortega and before Trujillo filed the instant petition.¹² Therefore, the Supreme Court's recent decision does not justify Trujillo's delay in filing this petition.

Trujillo next argued that his delay should have been excused because he has consistently and diligently sought habeas relief since he discovered that counsel erroneously told him that he was not able to

⁷Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998).

⁸528 U.S. 470 (2000).

⁹466 U.S. 668 (1984).

¹⁰Flores-Ortega, 528 U. S. at 477.

¹¹Id.

¹²See, e.g., Lozada, 110 Nev. at 354, 871 P.2d at 947 (citing Fawaz v. State, 105 Nev. 682, 783 P.2d 425 (1989); Downs v. Warden, 93 Nev. 475, 568 P.2d 575 (1977)).

appeal from his judgment of conviction and sentence. While it is true that in the last few years Trujillo has aggressively pursued his claims, this diligence did not start until almost four years after the district court filed the judgment of conviction. We conclude that Trujillo's recent diligence does not explain how an impediment external to the defense prevented him from complying with the one-year deadline.

Trujillo also argued that prison officials prevented him from complying with the one-year deadline by not providing him with adequate law libraries and trained legal assistants. This is not good cause either; a petitioner's limited intelligence and inability to obtain legal assistance is not sufficient to overcome a procedural bar.¹³

Trujillo additionally asserted several grounds that are completely unrelated to his delay in filing the instant petition. Therefore, we see no reason to address them.

Finally, Trujillo argued that he is not guilty of first-degree murder and that not addressing the merits of his claims would result in manifest injustice. We disagree. This court may forgive a petitioner's failure to show good cause to excuse a procedural defect when the prejudice from a failure to consider a petitioner's claim amounts to a fundamental miscarriage of justice.¹⁴ When the injustice is based upon a claim of actual innocence, the petitioner must make "a colorable showing he is actually innocent of the crime."¹⁵ Trujillo has set forth no facts that support his claim that he is not guilty of murdering of his son. In fact, nothing has changed since Trujillo conceded that the State had sufficient evidence for a jury to find him guilty and pleaded guilty in order to avoid a potential death sentence. Therefore, we conclude that Trujillo has not

¹³Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988).

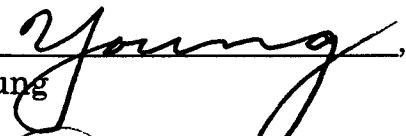
¹⁴Pellegrini v. State, 117 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. 71, November 15, 2001) (citing Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); Hogan v. Warden, 109 Nev. 952, 959, 860 P.2d 710, 715-16 (1993)).

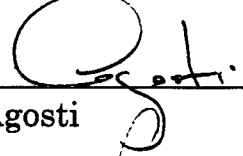
¹⁵Id.


demonstrated that a fundamental miscarriage of justice would result from not considering his claims on the merits.

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.¹⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁷


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Janet J. Berry, District Judge
Attorney General/Carson City
Washoe County District Attorney
Orlando Edward Trujillo
Washoe County Clerk

¹⁶See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁷We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.