

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THOMAS WRAY HERNDON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79354-COA

FILED

JUL 24 2020

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

ORDER OF AFFIRMANCE

Thomas Wray Herndon appeals from a district court order dismissing a postconviction petition for a writ of habeas corpus filed on August 24, 2018. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Herndon claims the district court abused its discretion by denying his motion for an enlargement of time in which to file a supplemental petition for a writ of habeas corpus. He notes that requests for continuances are left to the sound discretion of the district court and suggests that requests for extensions of time should be reviewed under the same standard. And he argues that his reasons for needing additional time to file the supplemental petition were set forth in his motions, the State did not oppose the motions, and the State did not suffer any prejudice.

The State agrees with Herndon's suggested standard of review, and we concur. We review a district court's decision to grant or deny a motion for a continuance for an abuse of discretion. *Higgs v. State*, 126 Nev. 1, 9, 222 P.3d 648, 653 (2010). "Each case turns on its own particular facts, and much weight is given to the reasons offered to the trial judge at the time the request for a continuance is made." *Id.* "However, if a defendant

fails to demonstrate that he was prejudiced by the denial of the continuance, then the district court's decision to deny the continuance is not an abuse of discretion." *Id.*


Here, the record demonstrates Herndon's postconviction habeas petition was filed more than one year after the remittitur was entered and the petition did not allege good cause for the delay.¹ The district court appointed postconviction counsel and granted counsel's first two motions for an enlargement of time. In his third motion for an enlargement of time, counsel claimed additional time was necessary because the record in this case is extensive, he has other cases in his private practice, and many of his other "cases have upcoming hearings, trials, and pleadings due." Counsel did not claim Herndon would be prejudiced if the motion was denied, and the instant appeal does not demonstrate Herndon was prejudiced by the district court's decision to deny the motion. Given this record, we conclude the district court did not abuse its discretion by denying Herndon's third motion for an enlargement of time.

Herndon also claims the district court erred by dismissing his postconviction petition for a writ of habeas corpus because the prison mailbox rule should apply to petitions for postconviction relief and he should have been given an opportunity to show good cause to overcome the procedural default. However, the Nevada Supreme Court has determined the prison mailbox rule does not apply to the filing of postconviction habeas petitions and those petitions must be filed in the district court within the one year time period set forth in NRS 34.726(1). *Gonzales v. State*, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002). And Herndon's claim that he did not get

¹The remittitur on direct appeal issued on August 22, 2017.

an *opportunity* to show good cause is belied by the record, which plainly demonstrates the district court appointed postconviction counsel to assist Herndon with his postconviction proceedings and granted two of counsel's motions for enlargement of time in which to file a supplemental habeas petition. Accordingly, we conclude the district court did not err by dismissing Herndon's untimely postconviction habeas petition. See NRS 34.726(1); *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) ("Application of the statutory procedural default rules to postconviction habeas petitions is mandatory.").

Having concluded Herndon is not entitled to relief, we
ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

²The district court erred by finding that dismissal would also have been warranted under NRS 34.810(1)(b)(2) because Herndon could have raised his ineffective-assistance-of-counsel claims on direct appeal. See *Rippo v. State*, 122 Nev. 1086, 1095, 146 P.3d 279, 285 (2006) ("Claims of ineffective assistance of trial or appellate counsel are properly raised for the first time in a timely first post-conviction petition."); *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding a correct result will not be reversed simply because it is based on the wrong reason).

cc: Hon. David A. Hardy, District Judge
David Kalo Neidert
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk