


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BILLY CEPERO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 82571-COA

FILED

SEP 24 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

*ORDER OF AFFIRMANCE AND REMANDING TO CORRECT
JUDGMENT OF CONVICTION*

Billy Cepero appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

First, Cepero argues the district court erred by denying his September 28, 2020, petition. In his petition, Cepero challenged his 2010 conviction of battery on an officer. As a result of that conviction, Cepero was sentenced to serve a term of 12 months in the Clark County Detention Center concurrent with his sentences for unrelated convictions. The district court found that Cepero expired his sentence and was no longer in custody pursuant to the 2010 conviction when he filed his petition. The record supports the district court's findings.

Because Cepero was not in custody due to his conviction for battery on an officer when he filed his petition, a postconviction petition for a writ of habeas corpus was not an available remedy. *See* Nev. Const. art. 6, § 6(1) (setting forth a custody requirement for habeas corpus); NRS 34.724(1) (providing that a habeas petition is available to a person under a

sentence of imprisonment or death); *Jackson v. State*, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999) (concluding that a petitioner was not entitled to file a postconviction petition for a writ of habeas corpus when he was no longer incarcerated pursuant to the judgment of conviction contested). Therefore, we conclude the district court did not err by denying the petition.

Second, Cepero appears to argue on appeal that the district court erred by denying the petition without considering his reply. The State filed its motion to dismiss Cepero's petition December 4, 2020, and affirmed that it served Cepero with its motion on that same date. Pursuant to NRS 34.750(4), Cepero had 15 days after service of the State's motion to dismiss with which to file his response. However, Cepero filed his reply on January 12, 2021, well after his time period for filing a reply had passed. Moreover, as explained previously, a postconviction petition for a writ of habeas corpus was not an available remedy because Cepero was not in custody for the challenged conviction when he filed the petition. And thus, any failure to consider Cepero's reply was harmless. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Therefore, Cepero is not entitled to relief based upon this claim.

Third, Cepero appears to argue on appeal that the district court erred by denying the petition without conducting an evidentiary hearing concerning the merits of his claims. To warrant an evidentiary hearing, a petitioner must raise claims supported by specific allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). The district court

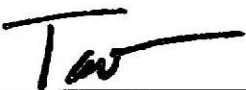
concluded Cepero was not entitled to an evidentiary hearing because he was not in custody for the challenged conviction and thus could not properly pursue postconviction relief. The record before this court reveals the district court's conclusions in this regard were proper. Therefore, the district court properly denied the petition without conducting an evidentiary hearing.

Fourth, Cepero appears to argue on appeal that the district court erred by denying his request for the appointment of postconviction counsel. The appointment of counsel in this matter was discretionary. *See* NRS 34.750(1). When deciding whether to appoint counsel, the district court may consider factors, including whether the issues presented are difficult, whether the petitioner is unable to comprehend the proceedings, or whether counsel is necessary to proceed with discovery. *Id.*; *Renteria-Novoa v. State*, 133 Nev. 75, 76, 391 P.3d 760-61 (2017). The record demonstrated that the issues in this matter were not difficult, Cepero was able to comprehend the proceedings, and discovery with the aid of counsel was not necessary. Therefore, we conclude the district court did not err by denying the motion for the appointment of counsel.

Finally, our review of the judgment of conviction reveals an error. The judgment of conviction contains a clerical error as it states that Cepero entered a guilty plea, when he was actually convicted of battery on an officer pursuant to a jury verdict. Because the district court has the authority to correct a clerical error at any time, *see* NRS 176.565, we direct the district court to enter a corrected judgment of conviction clarifying that Cepero was convicted of battery on an officer pursuant to a jury verdict. Accordingly, we

ORDER the judgment of the district court AFFIRMED AND REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Tierra Danielle Jones, District Judge
Billy Cepero
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk