IN THE SUPREME COURT OF THE STATE OF NEVADA

RUSSELL W. MILLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38114

FILED

APR 25 2002

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

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 June 13, 1996, the district court convicted appellant, pursuant to a guilty plea, of attempted robbery. The district court sentenced appellant to serve a term of 120 months in the Nevada State Prison with minimum parole eligibility after 48 months to be served consecutively to district court case no. C132820. This court dismissed appellant's untimely appeal from his judgment of conviction and sentence for lack of jurisdiction.[1]

On March 9, 1998, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On March 20, 1998, appellant filed a motion to dismiss his petition. On April

[1]Miller v. State, Docket No. 31963 (Order Dismissing Appeal, March 25, 1998).

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15, 1998, the district court granted appellant's motion and dismissed appellant's petition without reaching the merits of his petition.

On June 3, 1999, appellant filed a motion for the modification and/or restructuring of his sentence in the district court. The State opposed the motion. On August 3, 1999, the district court denied appellant's motion. Appellant did not file an appeal.

On March 23, 2001, 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 reply. 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 June 1, 2001, the district court denied appellant's petition.[2] This appeal followed.[3]

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[2]We note that it appears the district court order contained a clerical error. Specifically, the order stated that "the court . . . filed an Amended Judgment of conviction which ordered that the defendant's instant case run concurrent with Case No. C132820." The record reveals, however, that no amended judgment of conviction was ever entered by the district court in district court case no. C134668.

[3]To the extent that appellant appeals from the oral denial of his June 7, 2001 "motion for reconsideration and/or motion to alter or amend this court's order dismissing petitioner's petition for writ of habeas corpus, post-conviction," the decision denying his motion is unappealable. See Castillo v. State, 106 Nev. 349, 792 P.2d 1133 (1990); Phelps v. State, 111 Nev. 1021, 900 P.2d 344 (1995).

Appellant filed his petition nearly five years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.[4] Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.[5]

Appellant raised several arguments in an attempt to demonstrate cause for the delay. First, he argued that his trial counsel failed to inform him of his right to appeal his judgment of conviction and sentence. A claim that appellant was inadequately advised of his right to pursue a direct appeal does not constitute good cause to excuse the filing of an untimely petition.[6]

Next, appellant argued that he had an "intense history of psychological problems" and that he was admitted to the prison psychiatric ward which prevented him from competently acknowledging "any appeal or any other petition." We conclude that appellant failed to demonstrate good cause.[7] Appellant fails to show how his psychological problems prevented him from filing a timely petition. Appellant failed to

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[4]See NRS 34.726(1).

[5]See id.

[6]See Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998).

[7]See Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988) (limited intelligence and poor assistance from an inmate law clerk did not demonstrate good cause to excuse the procedural default); see also Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

state what his psychological problems were, the time frame that he had these problems, and the dates that he spent in the psychiatric ward.

Next, he argued that his March 9, 1998 petition was dismissed after an inmate law clerk filed a motion to dismiss appellant's petition and forged appellant's signature on the motion without the knowledge or permission of appellant. We conclude that appellant failed to demonstrate good cause. Even assuming appellant could demonstrate some impropriety regarding the dismissal of his March 9, 1998 petition, this petition was untimely filed and appellant failed to demonstrate good cause to excuse it's untimeliness.[8] Thus, appellant failed to show that the actions of this inmate law clerk prevented him from filing a timely petition.[9]

Lastly, appellant argued that another inmate law clerk erroneously advised him to file a meritless motion for transcripts and a meritless motion for modification and/or restructuring of his sentence. We

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[8]See Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998) (holding that the one-year period for filing a timely petition begins to run from the issuance of the remittitur from an timely direct appeal to this court from the judgment of conviction or from entry of the judgment of conviction).

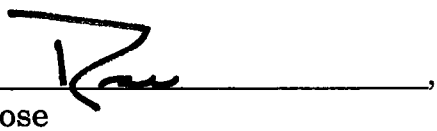
[9]See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994) (good cause must be an impediment external to the defense).

conclude that appellant failed to demonstrate good cause. Poor assistance from an inmate law clerk does not excuse the procedural default.[10]

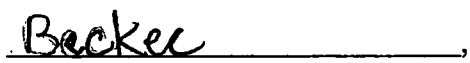
Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.[11] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing



_____, J.
Rose



_____, J.
Becker

cc: Hon. Donald M. Mosley, District Judge
Attorney General/Carson City
Clark County District Attorney
Russell W. Miller
Clark County Clerk

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[10]See Phelps, 104 Nev. 656, 764 P.2d 1303.

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