

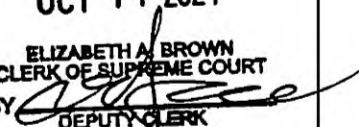
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
TROY LOWERY,
Respondent.

No. 87524-COA

FILED

OCT 14 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

The State of Nevada appeals from a district court order granting respondent Troy Lowery's "motion/post-conviction petition to amend and correct sentence regarding calculation of credit for time served" filed on July 31, 2023. Eighth Judicial District Court, Clark County; Jennifer L. Schwartz, Judge.

In his pleading below, Lowery cited caselaw considering presentence credit and sought additional credit because "he ha[d] not received credit for time served for what was supposed to be concurrent State/Federal time while he was serving a federal sentence." The district court granted Lowery additional credit for time served in an amount commensurate to the length of his federal sentence. The State argues Lowery's pleading could only be considered a postconviction petition for a writ of habeas corpus challenging the validity of the conviction and sentence and was thus subject to the procedural bars of NRS chapter 34.

"[A] claim for presentence credit is a challenge to the validity of the judgment of conviction and sentence" and "may be raised on direct appeal or in a post-conviction petition for a writ of habeas corpus in compliance with the procedural requirements of NRS chapter 34." *Griffin*

v. State, 122 Nev. 737, 746, 137 P.3d 1165, 1170-71 (2006). As Lowery relied solely on caselaw discussing the award of presentence credit and as he requested his judgment of conviction or sentence be amended to award him credit, the district court properly construed Lowery’s pleading as a postconviction habeas petition challenging his conviction and sentence. The petition was thus subject to the procedural requirements of NRS chapter 34.

The State contends that Lowery’s petition was untimely and that he failed to demonstrate good cause to overcome the mandatory procedural bar. Lowery’s petition was filed more than four years after the entry of the fourth amended judgment of conviction awarding Lowery presentence credit on November 28, 2018.¹ Thus, Lowery’s petition was untimely filed. *See* NRS 34.726(1). Lowery’s petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.* To establish good cause, “a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules.” *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). “An impediment external to the defense may be demonstrated by a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.” *Id.* (internal quotation marks omitted). “We give deference to the district court’s factual findings regarding good cause but we will review the court’s application of the law to those facts de novo.” *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012).

¹Lowery did not appeal from the fourth amended judgment of conviction.

Although we question whether Lowery demonstrated cause for the delay, *see State v. Bennett*, 119 Nev. 589, 605 n.40, 81 P.3d 1, 12 n.40 (2003) (reminding district courts that orders in postconviction matters must contain specific findings of fact supporting the court's decision and noting "unintended difficulties" in appellate review can result from the failure to address and specifically resolve all claims presented), because Lowery was not entitled to the additional credit he sought, he is unable to demonstrate prejudice, *cf. Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018) ("A showing of undue prejudice necessarily implicates the merits of the . . . claim."). Years after he was convicted and sentenced in the instant case, Lowery was convicted and sentenced in a federal matter that was unrelated to his conviction in the instant case. Thus, he was not entitled to presentence credit for any time he served pursuant to the judgment of conviction in the federal case. *See* NRS 176.055(1) (providing that a defendant is entitled to presentence credit for time served "for the amount of time which the defendant has actually spent in confinement before conviction, unless the defendant's confinement was pursuant to a judgment of conviction for another offense"); *Nieto v. State*, 119 Nev. 229, 232, 70 P.3d 747, 748 (2003) (providing that "a defendant is entitled to credit for time served in presentence confinement in another jurisdiction when that confinement was solely pursuant to the charges for which he was ultimately convicted"). Therefore, we conclude Lowery failed to demonstrate good cause to overcome the procedural bar, and the district court erred by considering Lowery's petition on the merits.²

²Lowery appears to argue for the first time on appeal that the district court properly considered his petition on the merits, despite it being untimely, in order to correct a manifest injustice. Lowery did not raise this


On appeal, Lowery argues that his sentence has expired and thus this court should deny the State's appeal as moot. In support of this claim, Lowery includes in his appendix a printout from the Nevada Department of Corrections website which was not part of the record below.

Even were the court to consider the printout, *see Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (providing that this court lacks the "power to look outside of the record of a case" and "cannot consider matters not properly appearing in the record on appeal"), expiration of Lowery's sentence does not necessarily render this appeal moot. Although we recognize that a challenge to the computation of time served is rendered moot when a defendant expires the sentence, *see Johnson v. Dir., Nev. Dep't of Prisons*, 105 Nev. 314, 316, 774 P.2d 1047, 1049 (1989), a claim requesting presentence credits is not treated as a challenge to the computation of time served, *see Griffin*, 122 Nev. at 740-44, 137 P.3d at 1167-70 (overruling caselaw that had determined a claim for presentence credit was a challenge to the computation of time served). We further recognize that a challenge to the sentence imposed may be rendered moot by the defendant's completion of the sentence. *See Martinez-Hernandez v. State*, 132 Nev. 623, 627 n.1, 380 P.3d 861, 864 n.1 (2016). However, we conclude the relief requested by the State in this appeal has not been rendered moot by Lowery's purported expiration of the sentence, particularly where the parties disagree whether Lowery expired his sentence independent of the district court's erroneous consideration of the petition on the merits and subsequent award of presentence credits.

claim below, and we decline to consider it in the first instance. *See State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989).

On remand, and as suggested by the State, the district court should resolve the factual dispute as to whether Lowery expired his sentence independent of the erroneous award of presentence credits based on an unrelated conviction. For the foregoing reasons, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Jennifer L. Schwartz, District Judge
Attorney General/Carson City
Clark County District Attorney
Liberators Criminal Defense
Eighth District Court Clerk