

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY MCDOWELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38750

FILED

JUL 11 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY: *[Signature]*
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 January 10, 1986, the district court convicted appellant, after a jury trial, of one count of conspiracy to commit burglary, one count of conspiracy to commit robbery, one count of conspiracy to commit murder, and two counts of first degree murder with the use of a deadly weapon. The district court sentenced appellant to serve four consecutive terms of life in the Nevada State Prison with the possibility of parole.¹ This court affirmed appellant's judgment of conviction on appeal.² The remittitur issued on November 10, 1987.

¹The remaining terms were imposed to run concurrently. On June 15, 1988, the district court entered an amended judgment of conviction clarifying the sentences.

²McDowell v. State, 103 Nev. 527, 746 P.2d 149 (1987).

On August 14, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. 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 October 19, 2000, the district court denied appellant's petition. Appellant did not file an appeal from this decision.

On February 11, 2001, appellant filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. 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 October 18, 2001, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than thirteen years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.³ Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.⁴ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁵

In an attempt to excuse his procedural defects, appellant argued that he had lost his court records after pursuing a federal habeas

³See NRS 34.726(1).

⁴See NRS 34.810(1)(b)(2); NRS 34.810(2).

⁵See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

corpus petition between 1988-1990. Appellant further argued that he received ineffective assistance of counsel throughout the trial and appellate proceedings, that he was not being given the same consideration in pursuing post-conviction relief as two of his co-defendants, and that he was presenting newly discovered evidence. Finally, appellant claimed that he was actually innocent.

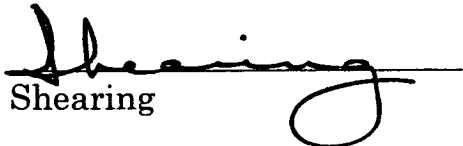
Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate adequate cause to excuse the procedural defects.⁶ Moreover, appellant did not demonstrate that failure to consider his petition would result in a fundamental miscarriage of justice; appellant's claim of actual innocence is not credible.⁷

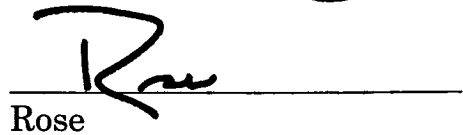
⁶See Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995) (holding that trial counsel's failure to send the petitioner his file did not constitute good cause to excuse to excuse the procedural default); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994) (holding that good cause must be an impediment external to the defense); Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989) (stating that a prisoner's pursuit of federal habeas relief did not constitute good cause for his failure to file a post-conviction petition within the one-year time period required by statute); see generally Edwards v. Carpenter, 529 U.S. 446 (2000) (holding that a procedurally defaulted ineffective assistance of counsel claim can serve as cause to excuse the procedural default of another habeas corpus claim only if the habeas petitioner can satisfy the "cause and prejudice" standard with respect to the ineffective-assistance claim itself).

⁷Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996) (stating that a petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice).

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.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Shearing

 J.
Rose

 J.
Becker

cc: Hon. Michael L. Douglas, District Judge
Attorney General/Carson City
Clark County District Attorney
Roy McDowell
Clark County Clerk

⁸Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).