IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED
MAR 0 5 2000
JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

WILLIAM C. FRANKELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39518

WILLIAM C. FRANKELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39597

ORDER DISMISSING APPEALS IN PART

AND AFFIRMANCE IN PART

Docket No. 39518 is a proper person appeal from orders of the district court denying a motion for sentence modification, a motion for the appointment of counsel, and a post-conviction petition for a writ of habeas corpus. Docket No. 39597 is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. We elect to consolidate these appeals for disposition.[1]

On January 27, 1983, the district court convicted appellant, pursuant to a jury trial, of one count of sexual assault with the use of a deadly weapon, one count of attempted robbery, and one count of first degree kidnapping. The district court sentenced appellant to serve terms totaling thirty years in the Nevada State Prison. This court dismissed

[1]NRAP 3(b).

03-03689

appellant's direct appeal from his judgment of conviction.[2] The remittitur issued on April 18, 1984.

Docket No. 39518

On January 24, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court.[3] On February 13, 2002, appellant also filed a proper person motion for sentence modification and a motion for the appointment of counsel.[4] The State opposed the petition and motions. On March 7, 2002, the district court entered an order denying appellant's motion for sentence modification. On March 27, 2002, April 2, 2002, and April 17, 2002, the district court entered written orders denying appellant's habeas corpus petition and motion for the appointment of counsel. This appeal followed.[5]

Motions for Sentence Modification

The notice of appeal designating the order denying appellant's motions for sentence modification was filed on April 15, 2002, after the thirty-day appeal period prescribed by NRAP 4(b). Because it appeared possible that appellant's notice of appeal might be deemed timely filed, as

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[2]Frankell v. State, Docket No. 14717 (Order Dismissing Appeal, March 30, 1984).

[3]On March 18, 2002, appellant filed an additional post-conviction petition for a writ of habeas corpus challenging his parole revocation proceedings.

[4]Appellant also filed a nearly identical motion for sentence modification on February 19, 2002.

[5]To the extent that appellant appealed from the order denying his motion for the appointment of counsel, we conclude that the district court did not abuse its discretion in denying appellant's motion. See NRS 34.750.

it was dated within the appeal period, this court directed the attorney general to provide this court with copies of any available prison records indicating the actual date upon which appellant delivered his notice of appeal to a prison official.[6] In response, the attorney general informed this court that appellant used the outgoing legal mail log on April 10, 2002, and argued that appellant's use of the outgoing legal mail log on April 10, 2002, coupled with the filing date of April 15, 2002, indicates that the notice of appeal was delivered to prison officials after the appeal period prescribed by NRAP 4(b). The response includes a copy of the outgoing legal mail log maintained at the Nevada State Prison where appellant is incarcerated.[7] Appellant submitted a proper person response in which he argues that he filed the notice of appeal without delay. He argues that he was transferred to a different prison and was without legal supplies or paperwork for a portion of the time. He claimed that he delivered the notice of appeal to a prison official on April 8, 2002.

We conclude that this court lacks jurisdiction to consider this portion of appellant's appeal in Docket No. 39518.[8] This court's decision in

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[6]See Kellogg v. Journal Communications, 108 Nev. 474, 835 P.2d 12 (1992) (holding that a notice of appeal shall be deemed filed on the date it is delivered to a prison official).

[7]The outgoing legal mail log does not specify whether a notice of appeal was mailed on that date. However, the outgoing legal mail log does indicate that the Clark County Clerk was the recipient of legal mail sent by appellant on April 10, 2002.

[8]Even assuming that appellant had delivered his notice of appeal in a timely fashion, and this court had jurisdiction over this portion of the appeal, as a separate and independent ground to deny relief, we conclude that the district court did not err in denying appellant's motions for

continued on next page . . .

Kellogg contemplates that the date of delivery of the notice of appeal to a prison official will be determined by the date recorded in the prison mail log.[9] Appellant has not demonstrated that he did not have sufficient access to the notice of appeal or outgoing legal mail logs. The outgoing legal mail log indicates untimely delivery by appellant. Therefore, the April 15, 2002 filing date of the notice of appeal in the district court controls, and we dismiss this portion of the appeal for lack of jurisdiction.[10]

Post-Conviction Petitions for Writs of Habeas Corpus

Appellant first argued that his right of access to the courts was violated. "We have repeatedly held that a petition for writ of habeas corpus may challenge the validity of current confinement, but not the conditions thereof."[11] Thus, the district court did not err in denying this claim because this claim was not cognizable.

Second, appellant claimed that he was not being given a proper amount of credits. Appellant failed to provide sufficient specific facts demonstrating that he was entitled to additional credits.[12] Therefore, we conclude that the district court did not err in denying this claim.

. . . continued
sentence modification. See Edwards v. State, 112 Nev. 704, 918 P.2d 321 (1996).

[9]Kellogg, 108 Nev. at 476-77, 835 P.2d at 13.

[10]Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

[11]Bowen v. Warden, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984).

[12]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Third, appellant claimed that he was denied his right to counsel during the parole revocation proceedings. Appellant appeared to claim that he should have been appointed counsel for the preliminary inquiry to determine whether there was probable cause to believe that he had violated a condition of his parole. In Gagnon v. Scarpelli,[13] the United States Supreme Court determined that there is no absolute right to the appointment of counsel for a preliminary inquiry or final parole revocation hearing.[14] Rather, the court held that counsel is required if the parolee requests counsel and makes a timely and colorable claim that (1) he did not commit the alleged violations; or (2) that there are justifying or mitigating circumstances which make revocation inappropriate and that these circumstances are complex or difficult to develop.[15] Even assuming that appellant demonstrated that he was entitled to the appointment of counsel at the preliminary inquiry, we conclude that the district court did not err in denying this claim. The record before this court reveals that appellant's parole was ultimately reinstated upon approval of a parole release plan and that appellant was represented by counsel at the later parole revocation proceedings. Thus, appellant cannot demonstrate any prejudice relating to alleged errors at the preliminary inquiry.

Fourth, appellant claimed that the formal parole revocation hearing was not conducted in a timely manner. The record on appeal does not support this claim.[16] At the time that appellant filed his petition,

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[13]411 U.S. 778 (1973).

[14]Id.

[15]Id. at 790.

[16]See Hargrove, 100 Nev. 498, 686 P.2d 222.

a formal parole revocation hearing had not been conducted due to requests made by his retained counsel to continue the hearing. Thus, the district court did not err in denying this claim.

Fifth, appellant claimed that he was not provided Miranda[17] warnings when he was questioned by parole officers and the Department of Parole and Probation. Appellant failed to provide specific facts in support of this claim demonstrating that he was entitled to relief.[18] Therefore, the district court did not err in denying this claim.

For the reasons discussed above, we dismiss this appeal in part and affirm the orders of the district court.

Docket No. 39597

On February 13, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On March 26, 2002, appellant filed a motion for default judgment related to the January 24, 2002 habeas corpus petition. The State opposed the petition. On April 15, 2002, the district court denied appellant's motion for default judgment. On April 24, 2002, the district court denied appellant's habeas corpus petition. This appeal followed.[19]

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[17]Miranda v. Arizona, 384 U.S. 436 (1966).

[18]See Hargrove, 100 Nev. 498, 686 P.2d 222.

[19]To the extent that appellant appealed from the order denying his motion for default judgment, we conclude that we lack jurisdiction to consider that portion of the appeal because no statute or court rule provides for an independent appeal from the denial of a motion for default judgment. See Castillo v. State, 106 Nev. 349, 792 P.2d 1133 (1990). Accordingly, we dismiss that portion of the appeal. We, however, elect to construe appellant's appeal to be from the April 24, 2002 order denying his February 13, 2002 habeas corpus petition.

Appellant filed his petition almost eighteen years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.[20] Appellant's petition was procedurally barred absent a demonstration of good cause.[21] Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.[22]

In an attempt to excuse his procedural defects, appellant argued that DNA testing was not available at the time of his trial and would reveal that he was innocent of the crimes. 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 good cause or overcome the presumption of prejudice to the State. Even assuming that the unavailability of DNA testing at the time of appellant's trial would constitute adequate cause to excuse the procedural defects, appellant failed to demonstrate adequate cause for the entire length of his delay. Appellant failed to offer any specific facts in support of his good cause argument. Further, appellant failed to demonstrate that failure to consider his petition would result in a fundamental miscarriage of justice.[23] Therefore, we affirm the order of the district court.

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[20]NRS 34.726(1).

[21]Id.

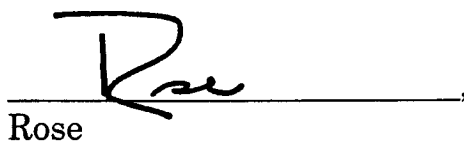
[22]NRS 34.800(2).

[23]See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

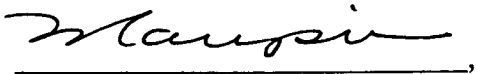
Conclusion

Having reviewed the records 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.[24] Accordingly, we

ORDER these appeals DISMISSED in part and the judgments of the district court AFFIRMED in part.[25]



_____, J.
Rose



_____, J.
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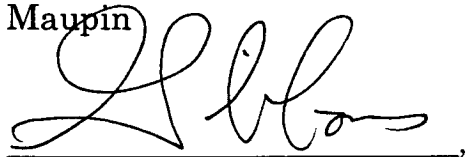

_____, J.
Gibbons

cc: Hon. Lee A. Gates, District Judge
William C. Frankell
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

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

[25]We have considered all proper person documents filed or received in these matters, and we conclude that the relief requested is not warranted.