

IN THE SUPREME COURT OF THE STATE OF NEVADA

MIGUEL ANGEL QUISPE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40428

FILED

AUG 22 2003

J. Powell
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 December 13, 1999, the district court convicted appellant, pursuant to a jury verdict, of one count of second degree kidnapping of a victim over the age of sixty-five. The district court sentenced appellant to serve two consecutive terms of twenty-four to eighty-four months in the Nevada State Prison. The district court suspended the sentences and placed appellant on probation for an indeterminate period not to exceed five years. On December 15, 2000, the district court entered an order revoking appellant's probation and executing the original sentences. The district court amended the judgment of conviction to reflect one hundred and eighty-one days of credit for time served. This court dismissed appellant's untimely notice of appeal from the original judgment of conviction for lack of jurisdiction.¹

On June 11, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

¹Quispe v. State, Docket No. 39575 (Order Dismissing Appeal, June 5, 2002).

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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 21, 2002, the district court denied appellant's petition.² This appeal followed.

Appellant filed his petition approximately two and one-half years after entry of the judgment of conviction.³ Thus, appellant's petition was untimely filed.⁴ Appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice.⁵

Appellant claimed that he had cause for the delay because of "counsel's failure to file an appeal on his behalf, after being informed that

²The record on appeal contains an affidavit from one of appellant's attorneys refuting his claim of ineffective assistance of counsel. This court recently held that a petitioner's statutory rights are violated when the district court improperly expands the record with an affidavit presented by the State refuting the claims in the petition in lieu of conducting an evidentiary hearing when an evidentiary hearing is required. Mann v. State, 118 Nev. ___, 46 P.3d 1228 (2002). Although we conclude that the district court erred to the extent that it considered the affidavit submitted by appellant's former trial counsel, appellant was not prejudiced by the error because appellant was not entitled to an evidentiary hearing on the claims that he raised in the petition.

³Appellant challenged the validity of the original judgment of conviction in his petition. To the extent that appellant may have intended to challenge the order revoking probation and amending the judgment of conviction, appellant's petition was filed one and one-half years after entry of the order revoking appellant's probation. However, appellant failed to set forth any arguments relating to the revocation of his probation.

⁴See NRS 34.726(1); see also Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-1134 (1998) (holding that the one year period for filing a post-conviction habeas corpus petition begins to run from the issuance of the remittitur from a timely direct appeal or from entry of the judgment of conviction if no direct appeal is taken.).

⁵See id.

counsel would continue working on his case.” Appellant further claimed that he was led to believe that counsel was still working on his case. The district court applied this court’s holding in Harris v. Warden⁶ and determined that appellant failed to demonstrate adequate cause to excuse his delay.

This court recently clarified its holding in Harris and held that “an appeal deprivation claim is not good cause if that claim was reasonably available to the petitioner during the statutory time period.”⁷ A petitioner may, however, establish good cause for the delay “if the petitioner establishes that the petitioner reasonably believed that counsel had filed an appeal and that the petitioner filed a habeas corpus petition within a reasonable time after learning that a direct appeal had not been filed.”⁸

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 his delay. Appellant failed to support his good cause claim with specific facts, which if true, would have entitled him to relief, and thus, appellant was not entitled to an evidentiary hearing in the instant case.⁹ Appellant failed to indicate what facts led him to believe that an appeal was being pursued by his attorney and when he learned that an appeal was not being pursued. Appellant was represented by several attorneys and failed to indicate which attorney

⁶114 Nev. 956, 964 P.2d 785 (1998).

⁷Hathaway v. State, 119 Nev. ___, 71 P.3d 503, 507 (2003).

⁸Id. at ___, 71 P.3d at 503.

⁹See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

allegedly misled him that an appeal was being pursued. Thus, appellant failed to demonstrate adequate cause to excuse his delay.


Moreover, appellant failed to demonstrate with the few facts that he did provide that he reasonably believed that an appeal had been filed from the original judgment of conviction. To the extent that appellant claimed that he believed that Mr. Joseph Scalia, his attorney at sentencing, had filed an appeal, the record belies appellant's claim. The record does not support any inference that appellant reasonably believed that Mr. Scalia was pursuing a direct appeal on his behalf. Mr. Scalia withdrew from representation one week after sentencing.¹⁰ Further, when appellant appeared in the district court on the notice of the State's intent to seek probation revocation, appellant informed the district court that he could not afford to hire another attorney—indicating that he was not represented by an attorney at the time. This court appearance occurred within the one-year time period for filing a timely habeas corpus petition challenging the validity of the original judgment of conviction; thus, appellant's appeal deprivation claim would have been reasonably available during the one-year statutory time period. Mr. Donn Ianuzi was retained approximately one week later to represent appellant in the probation revocation proceedings. To the extent that appellant claimed that he believed Mr. Ianuzi was pursuing an appeal from his original judgment of conviction, appellant's belief was not reasonable. Any appeal filed by Mr. Ianuzi from the original judgment of conviction would have been


¹⁰The notice of withdrawal from representation was filed in the district court and the district attorney acknowledged receipt of the notice. The notice indicates that it was sent to appellant's last known address.

dismissed for lack of jurisdiction because the notice of appeal would have been untimely from the original judgment of conviction.¹¹

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.¹² Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Gibbons

cc: Hon. Donald M. Mosley, District Judge
Miguel Angel Quispe
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹¹Appellant did not indicate that he desired or believed an appeal was being pursued from the order revoking his probation and amending the judgment of conviction to include jail-time credits. Any appeal filed from the order revoking probation would have been limited to the revocation of probation and the issue of credits.

¹²See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).