

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD CHARLES MCCRAY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40584

FILED

OCT 28 2003

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant Richard McCray's post-conviction petition for a writ of habeas corpus.

On November 24, 1997, the district court convicted McCray, pursuant to a jury verdict, of attempted murder with the use of a deadly weapon. The district court sentenced McCray to serve two consecutive terms of 192 months in the Nevada State Prison with the possibility of parole in 43 months. McCray filed a motion for a new trial that was denied by the district court. McCray filed a direct appeal to this court from his judgment of conviction and then voluntarily withdrew the appeal.<sup>1</sup>

On April 3, 1998, McCray filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court

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<sup>1</sup>McCray v. State, Docket No. 31422 (Order Dismissing Appeal, March 25, 1998).

denied McCray's petition. On March 19, 2002, this court affirmed the district court's decision on appeal.<sup>2</sup>

On July 19, 2002, McCray filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent McCray or to conduct an evidentiary hearing. On December 3, 2002, the district court dismissed McCray's petition as being both untimely and successive. This appeal followed.<sup>3</sup>

McCray's petition was untimely because it was filed more than four years after he voluntarily withdrew his direct appeal from this court.<sup>4</sup> McCray's petition was also successive because he had previously filed a proper person post-conviction petition for a writ of habeas corpus.<sup>5</sup> Therefore, McCray's petition was procedurally barred absent a showing of

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<sup>2</sup>McCray v. State, Docket No. 32759 (Order of Affirmance, March 19, 2002).

<sup>3</sup>McCray also appealed to this court from the district court's denial of his motion for a default judgment against the State for not timely filing a response to his current petition. We conclude that the district court did not abuse its discretion in denying this motion.

<sup>4</sup>The one-year period for filing a post-conviction habeas corpus petition under NRS 34.726(1) commences to run from the date of this court's order dismissing McCray's direct appeal. See NRS 34.726(1); NRAP 42(b); Gonzales v. State, 118 Nev. \_\_\_, \_\_\_, 53 P.3d 901, 904 n.18 (2002).

<sup>5</sup>See NRS 34.810(2).

good cause and actual prejudice,<sup>6</sup> unless denying the claims would otherwise result in a fundamental miscarriage of justice.<sup>7</sup>

In an attempt to excuse the procedural defects in his petition, McCray contended that the issues raised in his petition involve errors committed by the district court during his trial. These issues, however, should have been raised by McCray on direct appeal and fall outside the scope of permissible issues that may be raised in a post-conviction petition for a writ of habeas corpus.<sup>8</sup> It is noteworthy that McCray's direct appeal was dismissed only after this court received requests from both McCray and his appellate counsel to dismiss his appeal. McCray's failure to pursue these issues on direct appeal does not now warrant consideration of these issues in an untimely and successive petition for a writ of habeas corpus.

Even assuming that McCray could properly raise these issues in a habeas corpus petition, he offered no explanation as to why these issues were not raised in his first petition.<sup>9</sup> Therefore, we conclude that

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<sup>6</sup>See NRS 34.726(1); NRS 34.810(3).

<sup>7</sup>See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).


<sup>8</sup>See NRS 34.810(1)(b)(2).

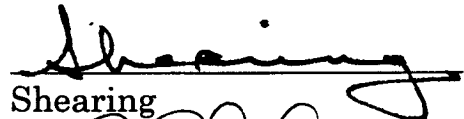
<sup>9</sup>We note that McCray did assert that an issue was overlooked by this court in reviewing the district court's denial of his first petition. Yet, our review of the record reveals that this issue was not raised by McCray in his first petition, and McCray conceded that the issue was raised for the first time in a supplemental document filed in this court on appeal. Therefore, this issue was not properly before this court on appeal. See McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998). McCray failed to otherwise explain why this issue was not timely raised in his first petition.


McCray failed to establish good cause and prejudice to excuse his untimely and successive petition,<sup>10</sup> and that the district court properly determined that his petition was procedurally barred.<sup>11</sup>

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.<sup>12</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>13</sup>

  
\_\_\_\_\_, J.  
Becker

  
\_\_\_\_\_, J.  
Shearing

  
\_\_\_\_\_, J.  
Gibbons

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<sup>10</sup>See Harris v. Warden, 114 Nev. 956, 958, 964 P.2d 785, 787 (1998) (stating that good cause is demonstrated by showing that an "impediment external to the defense" prevented the petition from being timely filed) (clarified by Hathaway v. State, 119 Nev. \_\_\_, 71 P.3d 503 (2003)).

<sup>11</sup>To the extent that McCray challenged the district court's criminal jurisdiction, our review of the record reveals that the district court had proper jurisdiction over McCray's trial. See Nev. Const. art. 6, § 6; NRS 171.010.

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

<sup>13</sup>We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

cc: Hon. Donald M. Mosley, District Judge  
Richard Charles McCray  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk