

IN THE SUPREME COURT OF THE STATE OF NEVADA

SCOTT THOMAS SCHLINGHEYDE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41449

FILED

FEB 25 2004

ORDER OF AFFIRMANCE

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

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

On February 10, 2000, the district court convicted Schlingheyde, pursuant to a guilty plea, of one count of unlawful manufacture of and/or possession of ingredients to manufacture a controlled substance (methamphetamine) in violation of NRS 453.322.¹ The district court sentenced Schlingheyde to serve a term of 180 months in the Nevada State Prison with the possibility of parole in 72 months to run consecutively to the term of imprisonment Schlingheyde received in district court case CR99-0966. No direct appeal was taken.

On March 19, 2003, Schlingheyde filed a 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 Schlingheyde or to conduct an evidentiary hearing.

¹We note that at the time of Schlingheyde's conviction, NRS 453.322 was newly enacted by the Nevada State Legislature and was cited as 1999 Nev. Stat., ch. 517, § 1, at 2636.

On April 15, 2003, the district court issued an order denying Schlingheyde's petition as being untimely. This appeal followed.

Schlingheyde's petition was untimely because it was filed more than three years after the district court entered the judgment of conviction.² Thus, Schlingheyde's petition was procedurally barred absent a showing of good cause and undue prejudice.³

In an attempt to excuse the procedural defects in his petition, Schlingheyde contended that his trial and appellate counsel were ineffective for failing to challenge the constitutional validity of NRS 453.322, which was the statute he was convicted of violating. Specifically, Schlingheyde contended that he filed his petition soon after learning about this court's opinion in Sheriff v. Burdg, which was published by this court on December 20, 2002.⁴ This court held in Burdg that NRS 453.322(1)(b) was unconstitutionally vague.⁵ Pursuant to Burdg, Schlingheyde contended that he is now entitled to relief.

Even assuming, without deciding, that in light of Burdg, Schlingheyde could explain his delay, he failed to demonstrate prejudice because this court's opinion in Burdg was not wholly applicable to his plea.

²See NRS 34.726(1); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998) (holding that the one-year period for filing a post-conviction habeas corpus petition begins to run from the entry of the judgment of conviction if no direct appeal is taken).

³See NRS 34.726(1).

⁴118 Nev. ___, 59 P.3d 484 (2002).

⁵Id. at ___, 59 P.3d at 488.

The record reveals that Schlingheyde pleaded guilty to "Unlawful Manufacture of and/or Possession of Ingredients to Manufacture a Controlled Substance." This plea involved criminal offenses under NRS 453.322(1)(a) and NRS 453.322(1)(b) respectively.⁶ This court's decision in Burdg, however, only concerned NRS 453.322(1)(b)—that portion of the statute making it a crime to possess a majority of the ingredients necessary to manufacture a controlled substance.⁷ Burdg did not invalidate the other portions of the statute, namely NRS 453.322(1)(a), which made it unlawful to manufacture a controlled substance.⁸

Although Schlingheyde's plea to the additional, or alternative, crime of possessing a majority of the ingredients necessary to manufacture a controlled substance pursuant to NRS 453.322(1)(b) may have been impacted by Burdg, Schlingheyde's plea to the unlawful manufacture of a controlled substance pursuant to NRS 453.322(1)(a) nonetheless remained valid. As such, Schlingheyde has failed to demonstrate any prejudice to excuse his untimely petition, or show how the district court's denial of his petition on procedural grounds constituted a fundamental miscarriage of justice.⁹ Therefore, we conclude that the district court properly denied Schlingheyde's petition as being untimely.

⁶We note that NRS 453.322 has since been amended. See 2003 Nev. Stat., ch. 261, § 29, at 1396-97.

⁷Burdg, 118 Nev. at ___, 59 P.3d at 488.

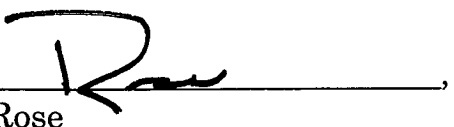
⁸Id.

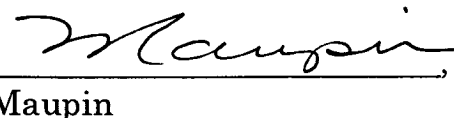
⁹See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Schlingheyde is not entitled to relief and that briefing and oral argument are unwarranted.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹¹

 C.J.
Shearing

 J.
Rose

 J.
Maupin

cc: Hon. Janet J. Berry, District Judge
Scott Thomas Schlingheyde
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹¹We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.