

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY DEAN DILLMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41622

FILED

JUN 02 2004

ORDER OF REVERSAL AND REMAND

J. Smith
CLERK OF SUPREME COURT
DEPUTY CLERK

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

On December 23, 1999, the district court convicted Dillman, pursuant to a guilty plea, of driving and/or being in actual physical control while under the influence of intoxicating liquor. The district court sentenced Dillman to serve a term of 96 to 240 months in the Nevada State Prison. Dillman voluntarily dismissed his direct appeal.¹

On December 11, 2000, Dillman filed a timely post-conviction petition for a writ of habeas corpus in the district court. On December 26, 2000, Dillman filed a motion for leave to file an amended habeas corpus petition. The district court granted Dillman's motion on January 11, 2001, and gave him until January 29, 2001 to file an amended habeas petition.

On January 30, 2001, Dillman filed a motion for extension of time to file an amended habeas corpus petition. On March 16, 2001, the district court granted Dillman's motion. Pursuant to the district court's

¹Dillman v. State, Docket No. 35499 (Order Dismissing Appeal, April 26, 2000).

extension, Dillman's amended habeas corpus petition was to be filed in the district court by July 9, 2001.

On June 22, 2001, Dillman filed a second motion for extension of time to file an amended habeas corpus petition. The State opposed the motion, and Dillman filed a reply. Dillman also filed a motion for the production of his case files from his former attorney. The August 8, 2001 district court minutes state, "Court noted the Defendant has not received the files from his lawyer and ORDERED, motions GRANTED." The district court further ordered a status check on August 15, 2001 regarding the production of files. On August 15, 2001, the district court was advised that a copy of the file was received and would be forwarded that day. The district court then ordered the matter off calendar. Dillman contended that he was not notified that his second motion for extension of time was granted.

Dillman took no further action in this matter until April 4, 2002. At that time, Dillman wrote a letter to the district court inquiring about the motions and a letter to the clerk of the district court requesting copies of the minutes. Upon receiving the minutes, Dillman alleged that he discovered that his second motion for extension of time to file an amended habeas corpus petition had been granted in August of 2001.

On May 9, 2002, Dillman filed a motion to place the matter back on the court's calendar. On June 20, 2002, the district court denied Dillman's motion to place the matter back on calendar. Dillman appealed, and this court dismissed the appeal for lack of jurisdiction.² Dillman filed

²Dillman v. State, Docket No. 39877 (Order Dismissing Appeal, August 21, 2002).

a motion for reconsideration, and the district court denied the motion. Dillman subsequently filed a proper person petition for a writ of mandamus in this court. Dillman sought, among other things, an order granting his motion to place the matter back on calendar and the opportunity to prepare an amended habeas corpus petition. On December 18, 2002, this court denied Dillman's petition, concluding that "[w]e are confident that the district court will resolve [Dillman's] December 11, 2002 habeas corpus petition as the court's calendar permits."³

On November 13, 2002, Dillman filed an amended proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss. Dillman filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Dillman or to conduct an evidentiary hearing. On June 11, 2003, the district court denied Dillman's amended petition, specifically finding that it was untimely.⁴

Our preliminary review of the record on appeal indicated that the district court never resolved Dillman's first timely petition. Nor did it appear that the district court ever specifically denied Dillman permission to file an amended petition. We concluded that under these circumstances, the district court may have erred in determining that the amended petition was procedurally barred without first resolving the timely petition Dillman filed on December 11, 2000.

³Dillman v. District Court, Docket No. 40405 (Order Denying Petition, December 18, 2002).

⁴See NRS 34.726(1).

On April 9, 2004, we ordered the State to show cause why the district court's order denying Dillman's amended petition should not be reversed and why this matter should not be remanded to the district court for consideration and resolution of the merits of Dillman's original petition. The State filed a timely response in which the State conceded that the matter should be remanded to the district court. The State argued, however, that the district court should only consider the amended petition as permission was sought to amend the deficiencies in the December 11, 2000 petition. We decline to limit the district court's consideration of Dillman's original petition. We therefore reverse the district court's order denying Dillman's amended petition and remand the matter to the district court for consideration and resolution of the merits of the petition Dillman filed on December 11, 2000, and the amended petition he filed on November 13, 2002. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Lee A. Gates, District Judge
Gary Dean Dillman
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk