

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCISCO CANA FERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42261

FILED

JUN 2 2004

JANE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Gross*
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 October 27, 1999, the district court convicted appellant, pursuant to a guilty plea, of first degree murder. The district court sentenced appellant to serve a term of life in the Nevada State Prison without the possibility of parole. This court dismissed appellant's direct appeal.¹ The remittitur issued on June 6, 2000.

On August 7, 2003, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent

¹See Fernandez v. State, Docket No. 35196 (Order Dismissing Appeal, May 10, 2000).

appellant or to conduct an evidentiary hearing. On October 22, 2003, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than three years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.² Appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice.³

In an attempt to demonstrate cause for the delay, appellant asserted that his former counsel failed to inform him that his direct appeal had been resolved. Appellant claimed that his former counsel sent a letter informing him of the resolution of his direct appeal, but that the letter was sent to the wrong address. Appellant asserted that he had informed his former counsel of the correct address. Appellant claimed that he learned in September 2002 that his direct appeal had been resolved. He further claimed that he had difficulties receiving copies of his files from his former counsel.

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 the delay in filing his petition. Even assuming, without deciding, that former counsel's failure to inform appellant of the resolution of his direct appeal would constitute good cause, appellant failed to explain the entire length of his delay. Appellant

²See NRS 34.726(1).

³See id.

waited approximately eleven months from the time that he allegedly learned that his direct appeal had been resolved to file his habeas corpus petition. This delay is not reasonable.⁴ Counsel's failure to send appellant his files did not prevent appellant from filing a timely habeas corpus petition.⁵ Appellant further failed to demonstrate that he would be unduly prejudiced by the dismissal of his petition as untimely because his claims lacked merit.⁶ Therefore, we affirm the order of the district court denying appellant's petition as procedurally time barred.


⁴See generally Hathaway v. State, 119 Nev. ___, 71 P.3d 503 (2003) (requiring a petitioner to raise an appeal deprivation claim within a reasonable time of learning that the petitioner had been deprived of a direct appeal).

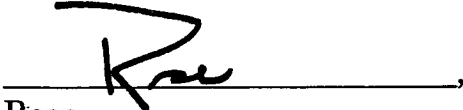
⁵See Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995) (holding that counsel's failure to send a petitioner his files did not prevent the petitioner from filing a timely petition).

⁶See NRS 34.726(1)(b) (providing that in order to demonstrate good cause a petitioner must demonstrate that the dismissal of the petition as untimely would result in undue prejudice); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993) (providing that a petitioner must present claims of error that worked to his actual and substantial disadvantage in order to demonstrate prejudice); see also Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996) (holding that a petitioner must demonstrate that his trial counsel's performance was deficient and that there is a reasonable probability that he would not have entered a guilty plea absent trial counsel's alleged deficiencies); Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986) (holding that a guilty plea is presumptively valid and it is the burden of the petitioner to demonstrate otherwise).

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.⁷ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 C.J.
Shearing

 J.
Rose

 J.
Maupin

cc: Hon. Kathy A. Hardcastle, District Judge
Francisco Cana Fernandez
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁷See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).