

IN THE SUPREME COURT OF THE STATE OF NEVADA

DELBERT M. GREENE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52584

FILED

AUG 25 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE AND REMAND
TO CORRECT JUDGMENT OF CONVICTION

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant was convicted, pursuant to jury trial, of burglary while in possession of a deadly weapon (count I), conspiracy to commit robbery (count II), and robbery with the use of a deadly weapon (count III). The district court orally sentenced appellant, on September 9, 2003, to serve a prison term of 36 to 156 months for count I, a consecutive prison term of 18 to 60 months for count II, and a prison term of 48 to 180 months plus an equal and consecutive term for the deadly weapon enhancement for count III; the district court ordered count III "to run concurrently with count I and consecutively to count II." Appellant was also ordered to pay \$996.00 in restitution jointly and severally with his accomplice. The judgment of conviction was entered on October 3, 2003, and the judgment of conviction stated the sentence imposed for count III was to run concurrently with count I and consecutively to count II. The

judgment of conviction failed to reference the equal and consecutive sentence imposed for the deadly weapon enhancement.

In appellant's direct appeal, we concluded that the district court erred in sentencing appellant in two ways: (1) the sentence for count III cannot run concurrently with count I and consecutively to count II when the sentence imposed for count II was ordered to run consecutively to count I; and (2) as noted, there is no mention of the deadly weapon enhancement imposed for count III. Greene v. State, Docket No. 42110 (Order Affirming in Part and Remanding, May 18, 2004). Therefore, we affirmed the judgment of conviction and rejected appellant's contentions, but remanded the case back to the district court for a new sentencing hearing. Id. The remittitur issued on June 15, 2004. After conducting a new sentencing hearing, the district court entered an amended judgment of conviction on July 15, 2004. The district court sentenced appellant to serve a prison term of 36 to 156 months for count I, a consecutive prison term of 18 to 60 months for count II, and two consecutive prison terms of 48 to 180 months for count III. Count II to run consecutive to Count I and Count III to run consecutive to Counts II and III. On appeal, this court affirmed the amended judgment of conviction and sentence. Greene v. State, Docket No. 43628 (Order of Affirmance, August 24, 2005). The remittitur issued on September 20, 2005.

On February 4, 2005, and February 7, 2005, appellant filed proper person post-conviction petitions for writs of habeas corpus in the district court. The State opposed the petitions. 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 April 20, 2005, the district court denied the petitions. On appeal, this court affirmed the

order of the district court. Greene v. State, Docket No. 45127 (Order of Affirmance, September 16, 2005).

On July 11, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The 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 30, 2008, the district court denied the petition. This appeal followed.

In his petition, appellant claimed as follows: (1) his trial counsel was ineffective for failing to object to the imposition of the deadly weapon enhancement; (2) his trial counsel was ineffective because stand-in-counsel came to his sentencing hearing, rather than counsel appointed by the district court; (3) the stand-in-counsel at sentencing was not familiar with the case; (4) his sentence was increased by the amended judgment of conviction after he had already begun to serve time in the Nevada State Prison; (5) the trial information was defective because it used inaccurate statutes; (6) the amended judgment of conviction is defective because the charges listed do not exist.

Appellant filed his petition more than four years after the remittitur from the direct appeal from the original judgment of conviction and more than two years after this court issued the remittitur from his direct appeal from the amended judgment of conviction. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed several post-conviction petitions for writs of habeas corpus. See NRS 34.810(1)(b); NRS 34.810(2). Appellant's petition was procedurally barred absent a

demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(3).

To excuse his procedural defects, appellant claimed that he waited to file the instant petition because he had been proceeding in federal court, had not heard of the resolution of the federal proceedings, and did not know that he could file a petition in state court when he had a pending matter in federal court.

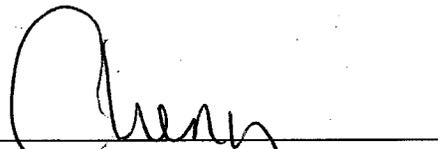
Based upon our review of the record on appeal, we conclude that the district court did not err in dismissing appellant's petition as procedurally barred. Appellant failed to demonstrate that an impediment external to the defense excused the procedural defects. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). Appellant's petition is subject to the procedural bars in NRS 34.726(1), NRS 34.810(1)(b), and NRS 34.810(2). That appellant was proceeding in federal court and did not know he could also proceed in state court is not good cause. See Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). Therefore, we affirm the order of the district court denying the petition as procedurally barred.

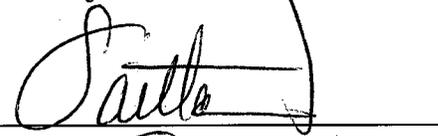
We note that in our review there appears to be an error on the face of the judgment of conviction. The amended judgment of conviction states that count III is to run consecutive to counts II and III. In reviewing the record on appeal, it appears that the district court intended to have count III run consecutive to counts I and II. Accordingly, we remand this matter for the district court to enter a corrected judgment of conviction to correct the clerical error. See NRS 176.565 (stating that “[c]lerical mistakes in judgments...may be corrected by the court at any

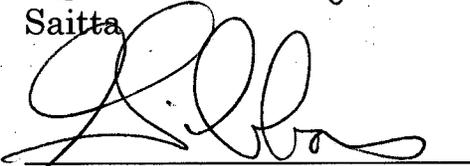
time.” Further, we direct the district court to transmit the corrected judgment of conviction to the Department of Corrections.

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

ORDER the judgment of the district court AFFIRMED.¹


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Valerie Adair, District Judge
Delbert M. Greene
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.