

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN THORPE TYLER,

No. 36582

Appellant,

vs.

E.K. MCDANIEL, BILL DONAT, JOE
E. NIEL, ROBERT BAYER AND
NEVADA DEPARTMENT OF PRISONS,

Respondents.

FILED

DEC 11 2001

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

ORDER OF AFFIRMANCE

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

On April 29, 1985, the district court convicted appellant, pursuant to a jury verdict, of one count of murder with the use of a deadly weapon and one count of being an ex-felon in possession of a concealable firearm. The district court sentenced appellant to serve two consecutive terms of life with the possibility of parole and a consecutive term of four years in the Nevada State Prison. This court dismissed appellant's direct appeal.¹ The remittitur issued on June 17, 1986.

On July 15, 1986, appellant filed a proper person petition for post-conviction relief in the district court. On April 8, 1987, the district court, after appointing counsel and conducting an evidentiary hearing, denied appellant's petition. This court dismissed the appeal from that order.²

On November 17, 1988, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On August 15, 1989, the district court, after

¹Tyler v. State, Docket No. 16536 (Order Dismissing Appeal, May 28, 1986).

²Tyler v. State, Docket No. 18225 (Order Dismissing Appeal, October 29, 1987).

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appointing counsel and without conducting an evidentiary hearing, denied appellant's petition. This court dismissed the appeal from that order.³

On July 2, 1992, appellant filed a post-conviction petition for a writ of habeas corpus in the district court. On October 6, 1992, the State filed a motion to dismiss appellant's petition. On October 9, 1992, the district court, without conducting an evidentiary hearing, granted the State's motion and dismissed appellant's petition. This court dismissed appellant's appeal.⁴

On May 6, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a response. 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 March 21, 2000, the district court dismissed appellant's petition. This appeal followed.

Appellant filed his petition nearly thirteen years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.⁵ Moreover, appellant's petition was successive because he had previously filed post-conviction petitions.⁶ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁷

In an attempt to excuse his procedural defects, appellant argued that his defects should be excused because he was pursuing relief in the federal courts, and the federal courts had indicated that he had not exhausted state court remedies. Further, appellant asserted that he had received ineffective assistance of counsel. Finally, appellant claimed that he was actually innocent. Our review of the record reveals that appellant

³Tyler v. State, Docket No. 20419 (Order Dismissing Appeal, October 24, 1990).

⁴Tyler v. Warden, Docket No. 23823 (Order Dismissing Appeal, May 24, 1994).

⁵See NRS 34.726(1).


⁶See NRS 34.810(1)(b)(2); NRS 34.810(2).

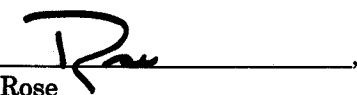
⁷See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

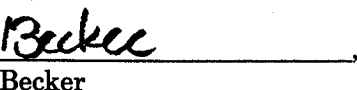
failed to overcome the procedural defects.⁸ Moreover, we conclude that appellant did not demonstrate that failure to consider his petition would result in a fundamental miscarriage of justice.⁹ Accordingly, we conclude that the district court properly dismissed appellant's petition.

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.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Shearing

 J.
Rose

 J.
Becker

cc: Steve L. Dobrescu, District Judge
Attorney General/Carson City
White Pine County District Attorney
John Thorpe Tyler
White Pine County Clerk

⁸See Lozada v. State, 110 Nev. 349, 871 P. 2d 944 (1994) (holding that good cause must be an impediment external to the defense); Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989) (stating that a prisoner's pursuit of federal habeas relief did not constitute good cause for his failure to file a post-conviction petition within the one- year time period required by statute).

⁹See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996) (stating that a petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice).

¹⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).