

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK JOHN KESNER,
Appellant,
vs.
WARDEN, STEWART CONSERVATION
CAMP, DAVID MELIGAN,
Respondent.

No. 39701

FILED

AUG 21 2002

ORDER OF AFFIRMANCE

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

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

We have reviewed the record on appeal, and for the reasons set forth in the attached order of the district court, conclude that the district court properly dismissed Kesner's petition.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Young _____, J.
Young

Agosti _____, J.
Agosti

Leavitt _____, J.
Leavitt

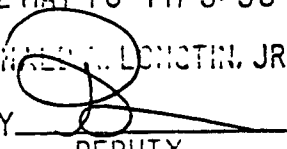
cc: Hon. Connie J. Steinheimer, District Judge
Glynn B. Cartledge
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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FILED

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RONALD L. LONGTIN, JR.

BY  DEPUTY

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
7 IN AND FOR THE COUNTY OF WASHOE

8 * * *

9 MARK JOHN KESNER,

10 Petitioner,

11 v.

Case No. CR95P2250

12 THE STATE OF NEVADA,

Dept. No. 4

13 Respondent.

14 _____ /
15 ORDER DISMISSING PETITION FOR WRIT OF
16 HABEAS CORPUS (POST-CONVICTION)

17 On December 8, 1995, pursuant to petitioner's guilty
18 pleas, this Court sentenced petitioner to consecutive sentences
19 of 84 to 240 months in the Nevada State Prison for causing the
20 death of two people by driving while intoxicated. On December 6,
21 2000, petitioner filed a petition for writ of habeas corpus
22 (post-conviction). On May 31, 2001, the State moved to dismiss
23 the petition. On or about August 31, 2001, petitioner filed an
24 opposition, and the State filed a reply to the opposition on
25 September 12, 2001. Pursuant to this Court's order, petitioner
26 and the State filed supplemental briefs on December 24, 2001, and

1 January 4, 2002, respectively.

2 The court grants the State's motion to dismiss. Unless
3 good cause is shown, a post-conviction habeas petition must be
4 filed within one year after entry of judgment of conviction or
5 after the Supreme Court issues its remittitur. See NRS
6 34.726(1). Good cause "to overcome a procedural bar must be some
7 impediment external to the defense." Harris v. Warden, 114 Nev.
8 956, 959, 964 P.2d 785, 787 (1998). Here, petitioner alleges he
9 did not file his petition within one year of his conviction
10 because he was unaware of his post-conviction remedies and
11 believed he could not appeal his conviction. However, "an
12 allegation that trial counsel was ineffective in failing to
13 inform a claimant of the right to appeal from the judgment of
14 conviction, or any other allegation that a claimant was deprived
15 of a direct appeal without his or her consent, does not con-
16 stitute good cause to excuse the untimely filing of a petition
17 pursuant to NRS 34.726." Id. Petitioner's ignorance of the law
18 is not good cause either. See Phelps v. Director, Prisons, 104
19 Nev. 656, 660, 764 P.2d 1303, 1306 (1988).

20 Petitioner also alleges that a failure to consider his
21 petition would amount to a "fundamental miscarriage of justice"
22 which would excuse his failure to file a timely petition. See
23 Pelligrini v. State, 117 Nev. Adv. Op. No. 71, 34 P.2d 519
24 (2001) (the court "may excuse the failure to show cause where the
25 prejudice from a failure to consider the claim amounts to a
26 'fundamental miscarriage of justice.'). The United States

1 Supreme Court has held that a "fundamental miscarriage of
2 justice" can only be met where a petitioner makes a colorable
3 showing he is actually innocent of the crime he challenges. See
4 Calderon v. Thompson, 523 U.S. 538, 559 (1998) (miscarriage of
5 justice standard is consistent "with AEDPA's central concern that
6 the merits of concluded criminal proceedings not be revisited in
7 the absence of a strong showing of actual innocence."); Schlup v.
8 Delo, 513 U.S. 298, 316 (1995) ("Without any new evidence of
9 innocence, even the existence of a concededly meritorious
10 constitutional violation is not in itself sufficient to establish
11 a miscarriage of justice that would allow a habeas court to reach
12 the merits of a barred claim."); Sawyer v. Whitley, 505 U.S. 333,
13 339 (1992) ("the miscarriage of justice exception is concerned
14 with actual as compared to legal innocence."); McCleskey v. Zant,
15 499 U.S. 467, 495 (1991) (describing the "fundamental miscarriage
16 of justice" exception as a "'safeguard against compelling an
17 innocent man to suffer an unconstitutional loss of liberty'"
18 (quoting Stone v. Powell, 428 U.S. 465, 491-92, n.31 (1976));
19 Murray v. Carrier, 477 U.S. 478, 496 (1986) ("in an extraordinary
20 case, where a constitutional violation has probably resulted in
21 the conviction of one who is actually innocent, a federal habeas
22 court may grant the writ even in the absence of a showing of
23 cause for the procedural default"); Smith v. Murray, 477 U.S.
24 527, 537 (1986) (the miscarriage of justice exception is
25 concerned with actual as compared to legal innocence); Kuhlman v.
26 Wilson, 477 U.S. 436, 454 (1986) (holding that the miscarriage of

1 justice exception would allow successive claims to be heard if
2 the petitioner "establish[es] that under the probative evidence
3 he has a colorable claim of factual innocence.").

4 The federal courts are in accord, including the Ninth
5 Circuit. See Manning v. Foster, 224 F.3d 1129, 1133 (9th Cir.
6 2000) ("A fundamental miscarriage of justice occurs where a
7 'constitutional violation has probably resulted in the conviction
8 of one who is actually innocent.'") (quoting Carrier, supra);
9 Johnson v. Alabama, 256 F.3d 1156, 1171 (11th Cir. 2001); Johnson
10 v. Gibson, 254 F.3d 1155, 1160 (10th Cir. 2001); Nims v. Ault,
11 251 F.3d 698, 701 (8th Cir. 2001); Spreitzer v. Schomig, 219 F.3d
12 639, 647-48 (7th Cir. 2000); Gall v. Parker, 231 F.3d 265, 319-
13 320 (6th Cir. 2000) Finley v. Johnson, 243 F.3d 215, 220 (5th
14 Cir. 2001); Royal v. Taylor, 188 F.3d 239, 243 (4th Cir. 1999);
15 Keller v. Larkins, 251 F.3d 408, 415 (3d Cir. 2001) Simpson v.
16 Matesanz, 175 F.3d 200, 210 (1st Cir. 1999).

17 Petitioner concedes he cannot demonstrate he is
18 actually innocent. Accordingly, because petitioner has not shown
19 good cause for proceeding with his tardy petition, and because he
20 cannot show he is actually innocent, the court dismisses the
21 petition for writ of habeas corpus (post-conviction).

22 DATED this 13 day of May, 2002.

23
24 Connie J. Steinheimer
25 DISTRICT JUDGE
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