

IN THE SUPREME COURT OF THE STATE OF NEVADA

NATHANIEL LEE MORRIS,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K.
MCDANIEL,
Respondent.

No. 42963

FILED

AUG 27 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

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; Michelle Leavitt, Judge.

On May 3, 1994, the district court convicted appellant, pursuant to a jury trial, of one count of burglary, two counts of robbery of a victim over the age of sixty-five years, and one count of robbery. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole. The remaining terms were imposed to run concurrently. This court dismissed appellant's appeal from his judgment of conviction.¹ The remittitur issued on April 18, 1995.

On June 23, 1995, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

¹Morris v. State, Docket No. 26014 (Order Dismissing Appeal, March 30, 1995).

State opposed the petition. On August 17, 1995, the district court denied the petition. This court dismissed the subsequent appeal.²

On November 12, 1997, appellant filed a second post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On April 28, 1998, the district court denied the petition. This court dismissed appellant's subsequent appeal.³

On November 14, 2003, appellant filed a third proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition arguing that the petition was untimely and successive. Moreover, the State specifically pleaded laches. 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 January 26, 2004, the district court denied appellant's petition. This appeal followed.

In the instant petition, appellant raised three claims: (1) his appellate counsel was ineffective for failing to argue that he was improperly adjudicated a habitual criminal; (2) his trial counsel was ineffective for failing to object at sentencing to the trial court's improper adjudication of appellant as a habitual criminal; and (3) his sentencing as a habitual criminal denied him his due process rights.

Appellant filed his petition more than eight years after this court issued the remittitur from his direct appeal. Thus, appellant's

²Morris v. State, Docket No. 27608 (Order Dismissing Appeal, June 3, 1998).

³Morris v. State, Docket Nos. 32409, 32464 (Order Dismissing Appeal and Administratively Closing Appeal, August 17, 2000).

petition was untimely filed.⁴ Moreover, appellant's petition was successive because he had previously filed two post-conviction habeas corpus petitions.⁵ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁶ Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.⁷

In an attempt to excuse his procedural defects, appellant argued his 1995 petition was improperly denied. Specifically, appellant claimed that the district court erroneously allowed the record to be expanded with an affidavit from trial counsel refuting appellant's claims.⁸ Appellant claimed that this error is good cause for any successive petition. Appellant also appeared to claim that he had good cause because the federal district court determined that he needed to exhaust state remedies.

Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's petition. The grounds raised in the instant petition do not relate to the alleged affidavit error, and the alleged affidavit error in 1995 does not explain appellant's

⁴See NRS 34.726(1).

⁵See NRS 34.810(1)(b)(2), (2).

⁶See NRS 34.726(1); NRS 34.810(1)(b), (3).

⁷See NRS 34.800(2).

⁸See Mann v. State, 118 Nev. 351, 46 P.3d 1228 (2002) (holding that the habeas rules do not contemplate the district court resolving factual disputes by affidavits without conducting an evidentiary hearing).

delay in raising the claims in the instant petition.⁹ The claims in the instant petition could have been raised within one year from the issuance of the remittitur from the direct appeal, and appellant failed to offer any explanation for his failure to do so.¹⁰ Lozada v. State¹¹ does not stand for the proposition that any alleged error made by the district court or this court constitutes good cause to raise new claims for relief at any time; rather, Lozada stands for the proposition that an error made by the district court and this court in resolving a claim in a prior post-conviction petition constitutes good cause to raise the same claim in a successive petition.¹² Raising claims for the purpose of exhaustion does not constitute good cause. Finally, appellant failed to overcome the presumption of prejudice to the State. Therefore, we affirm the order of the district court denying appellant's petition.

⁹See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003).

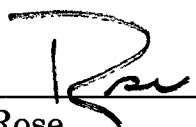
¹⁰The affidavit submitted by trial counsel in 1995 addressed appellant's three claims of ineffective assistance of trial counsel: (1) his trial counsel was ineffective for failing to investigate an alibi witness; (2) his trial counsel was ineffective for failing to challenge the in-court identification; and (3) his trial counsel was ineffective for failing to request eyewitness identification jury instructions. Although appellant raised an additional claim that the trial court abused its discretion in adjudicating him a habitual criminal, trial counsel's affidavit does not address this claim. On appeal, this court determined that appellant waived this claim by failing to raise it on direct appeal.

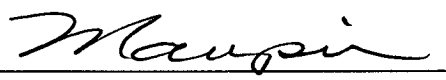
¹¹110 Nev. 349, 871 P.2d 944 (1994).

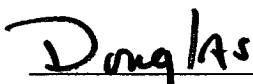
¹²Id. at 353, 871 P.2d at 946. Because appellant did not raise any claims relating to the claims of ineffective assistance of trial counsel in his 1995 petition, we conclude that appellant has waived any further challenges to these claims.

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.¹³ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. Michelle Leavitt, District Judge
Nathaniel Lee Morris
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹³See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).