

IN THE SUPREME COURT OF THE STATE OF NEVADA

GENE ANTHONY ALLEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43599

FILED

DEC 06 2004

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

ORDER OF AFFIRMANCE AND DISMISSING APPEAL IN PART

This is a proper person appeal from an order of the district court denying appellant Gene Allen's motion to vacate judgment, amended post-conviction petition for a writ of habeas corpus, motion for an evidentiary hearing, and motions to suppress. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

On April 7, 2003, the district court convicted Allen, pursuant to a guilty plea, of one count each of sexual assault on a minor under the age of sixteen and lewdness on a minor under the age of fourteen. The district court sentenced Allen to serve a term of life in the Nevada State Prison with the possibility of parole after ten years for the lewdness conviction, and a concurrent term of five to twenty years for the sexual assault conviction. This court affirmed Allen's judgment of conviction and sentence on direct appeal.¹ The remittitur issued on April 6, 2004.

On June 11, 2003, Allen filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Allen filed

¹Allen v. State, Docket No. 41274 (Order of Affirmance, March 11, 2004).

supplemental proper person post-conviction petitions for writs of habeas corpus on July 8, 2003, and December 26, 2003. The State filed an opposition. On February 23, 2004, the district court denied Allen's petition. On appeal, this court affirmed the order of the district court.²

On February 24, 2004, Allen filed a proper person motion to vacate judgment of conviction.³ On March 11, 2004, Allen filed a proper person amended post-conviction petition for a writ of habeas corpus. On May 11, 2004, Allen filed a motion titled "motion to suppress Petrocelli," and on May 24, 2004, Allen filed a motion titled "motion to suppress preliminary hearing." Allen additionally filed several motions for an evidentiary hearing. The State opposed Allen's petitions and motions. The district court declined to appoint counsel to represent Allen or conduct an evidentiary hearing. On June 25, 2004, the district court denied Allen's petitions and motions. This appeal followed.⁴

²Allen v. State, Docket No. 42969 (Order of Affirmance, September 17, 2004).

³In his motion, Allen appeared to challenge his judgment of conviction; we therefore elect to construe his motion to vacate judgment as a post-conviction petition for a writ of habeas corpus. See NRS 34.724(2)(b) (stating that a post-conviction petition for a writ of habeas corpus "[c]omprehends and takes the place of all other common-law, statutory or other remedies which have been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them").

⁴For the reasons discussed below, the district court did not err in failing to conduct an evidentiary hearing.

Allen's February 24, 2004, and March 11, 2004 petitions for writs of habeas corpus were successive because he had previously filed a post-conviction petition for a writ of habeas corpus.⁵ Therefore, Allen's habeas petitions were procedurally barred absent a demonstration of good cause and actual prejudice.⁶

Allen did not attempt to excuse his successive petitions. Further, he did not establish that he would be prejudiced by the dismissal of his post-conviction habeas petitions because he failed to include intelligible claims supported by specific facts.⁷ Consequently, the district court did not err in denying Allen's February 24, 2004, and March 11, 2004 petitions.

Next, with respect to Allen's appeal from the denial of his two motions to suppress, we note that Allen failed to file a timely notice of appeal. The district court entered its order denying these motions on June 25, 2004, but Allen did not file the notice of appeal until August 31, 2004—well after the expiration of the thirty-day appeal period prescribed by NRAP 4(b). An untimely notice of appeal fails to vest jurisdiction in this court.⁸ Thus, we lack jurisdiction to consider these appeals.

⁵See NRS 34.810(2).

⁶See NRS 34.810(3).


⁷See *Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

⁸See *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994).

Having reviewed the record on appeal and for the reasons set forth above, we conclude that Allen is not entitled to relief and that briefing and oral argument are unwarranted.⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED and DISMISS this appeal in part.¹⁰


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. John S. McGroarty, District Judge
Gene Anthony Allen
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁰We have reviewed all documents that Allen 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 Allen has attempted to present claims or facts in those submissions that were not previously presented in the proceedings below, we have declined to consider them in the first instance.