

IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK JAMES CAVANAUGH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43698

FILED

APR 05 2005

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

Appellant Patrick Cavanaugh was convicted after a jury found him guilty of one count of first-degree murder with the use of a deadly weapon in 1984 and sentenced him to death. This court affirmed his conviction and sentence on direct appeal.<sup>1</sup> Cavanaugh subsequently filed two post-conviction petitions for writs of habeas corpus in the district court, and this court affirmed the district court's denial of those petitions.<sup>2</sup>

The instant appeal involves Cavanaugh's third post-conviction petition, which was filed in the district court on October 29, 2001. The district court granted an evidentiary hearing on this petition, resulting in the State filing an original petition for a writ of prohibition or mandamus in this court. While the State pursued this extraordinary relief, the

---

<sup>1</sup>See Cavanaugh v. State, 102 Nev. 478, 729 P.2d 481 (1986).

<sup>2</sup>See Cavanaugh v. State, Docket No. 19158 (Order Dismissing Appeal, March 30, 1989); Cavanaugh v. Warden, Docket No. 31072 (Order Dismissing Appeal, June 23, 1998).

district court continued the date of the proceedings on Cavanaugh's habeas corpus petition until the State's writ petition was resolved.

On April 28, 2004, this court issued an order granting the State's writ petition and directed the district court to dismiss Cavanaugh's habeas corpus petition without an evidentiary hearing because it was procedurally barred under the relevant provisions of NRS Chapter 34.<sup>3</sup> Cavanaugh's petition for rehearing was summarily denied by this court on June 14, 2004.

About two weeks later on June 29, 2004, as directed by this court, the district court issued an order dismissing Cavanaugh's petition without an evidentiary hearing. On July 9, 2004, this court issued a notice in lieu of remittitur. Cavanaugh now appeals, raising several arguments attacking the validity of the district court's June 29 order.

Cavanaugh first contends that the order was invalid because the district court was without jurisdiction to enter it. He cites to the fact that the June 29 order by the district court was issued before this court issued its notice in lieu of remittitur on July 9.

A district court is divested of jurisdiction over a criminal case when an appeal is pending before this court.<sup>4</sup> Not until this court issues the remittitur in any such appeal does the jurisdiction of the district court over the criminal case return.<sup>5</sup>

---

<sup>3</sup>See State v. Cavanaugh, Docket No. 41993 (Order Granting Petition, April 28, 2004).

<sup>4</sup>See Buffington v. State, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994); see also NRS 177.155; NRS 177.305; NRAP 41(a).

<sup>5</sup>See Buffington, 110 Nev. at 126, 868 P.2d at 644.

Here, although the substance of the State's writ petition before this court concerned claims raised by Cavanaugh in the habeas corpus petition pending before the district court, the two petitions involved jurisdictionally distinct proceedings. Cavanaugh originally filed his habeas corpus petition in the district court, and the State did not take an appeal from a district court decision in regard to that petition. Rather, the State filed a writ petition before this court in the first instance over which this court maintained original jurisdiction.<sup>6</sup> Jurisdiction over the State's writ petition was therefore never within the district court, and no court existed to which this court could return, or remit, jurisdiction. This is the reason why only a notice in lieu of remittitur, and not an actual remittitur, was issued by this court regarding that proceeding.

Conversely, because the State did not file an appeal within this court, the district court was never divested of jurisdiction over Cavanaugh's habeas corpus proceedings. And our issuance of a notice in lieu of remittitur regarding the State's writ petition had no bearing upon that jurisdiction. To this end, the district court's decision to continue the date of Cavanaugh's habeas corpus proceedings while the State pursued its writ petition was merely an exercise of its judicial discretion. We conclude that the district court had jurisdiction to enter its June 29 order, and Cavanaugh's argument on this issue is misplaced.

Cavanaugh also contends that the district court's June 29 order was defective because it was prepared by the State and he was not given any notice before the district court signed it. He maintains that his due process rights were violated. This argument is equally misplaced.

---

<sup>6</sup>See Nev. Const. art. 6, § 4.

The local rules of the Eighth Judicial Circuit Court contemplate that a prevailing party may prepare an order for the district court to sign.<sup>7</sup> That the State prepared the June 29 order denying Cavanaugh's petition is therefore not in itself a ground for relief.

Additionally, even if Cavanaugh was not given actual notice of the June 29 order before it was signed by the district court, he was given constructive notice of the impending order and was served with that order after it was issued. More specifically, this court's April 28 order granting the State's writ petition and this court's June 14 order denying Cavanaugh's petition for rehearing placed him on notice that the issuance of an order from the district court complying with this court's directives and dismissing his petition on procedural grounds was imminent. The record on appeal also reveals that a copy of the district court's June 29 order was immediately placed in the mail to Cavanaugh, and he timely appealed. Cavanaugh has failed to cite any binding authority to support his claim that his due process rights were violated or to otherwise show how he was prejudiced by any failure of the State to give him actual notice of the June 29 order before the district court signed it. We conclude that Cavanaugh is not entitled to relief on this issue.

Cavanaugh next contends that the district court failed to expressly find in its June 29 order whether the dismissal of his habeas petition on procedural grounds would result in a fundamental miscarriage of justice. Cavanaugh contends that he is "very likely 'actually innocent'" of the death penalty and cites to the following factors to support this

---

<sup>7</sup>See EDCR 7.21; EDCR 7.23; see also EDCR 7.14. See generally DCR 21 ("The counsel obtaining any order, judgment or decree shall furnish the form of the same to the clerk or judge in charge of the court.").

contention: his trial counsel was ineffective in conducting jury voir dire and in failing to investigate and present mitigating evidence during his penalty hearing; the jury received improper instruction regarding the scope of his possible sentences; his two death-penalty aggravators were invalid; and an affidavit by jury foreperson Laurel Duffy, who years after Cavanaugh's trial impeached her own verdict. He therefore maintains that he is entitled to relief.

This court has recognized an exception to the application of provisions in NRS Chapter 34 that would generally bar review of a post-conviction habeas corpus petition where the denial of those claims on procedural grounds would result in a fundamental miscarriage of justice.<sup>8</sup>

Although the district court did not make an express factual finding as to whether the denial of Cavanaugh's habeas corpus petition on procedural grounds would result in a fundamental miscarriage of justice, this finding is implicit in its order. The district court recognized in its conclusions of law that a fundamental miscarriage of justice is a possible exception to the procedural bars. And the factors that Cavanaugh cites, listed above, do not demonstrate that, but for constitutional error, no reasonable juror would have sentenced him to death.<sup>9</sup>

---

<sup>8</sup>See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

<sup>9</sup>See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001) ("Where the petitioner has argued that the procedural default should be ignored because he is actually ineligible for the death penalty, he must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible.").

Moreover, this court previously reviewed these claims in Cavanaugh's petition and concluded in this court's April 28 order granting the State's petition that he failed to show that applying the procedural bars to those claims would result in a fundamental miscarriage of justice. Our prior determination constitutes the law of the case, and Cavanaugh has failed to present any reasons why this court should depart from it.<sup>10</sup>

Cavanaugh further faults the district court for not making any factual findings as to whether he was responsible for the delay in filing his untimely and successive habeas corpus petition and why he would not be prejudiced by the denial of his petition on procedural grounds.

Cavanaugh, however, confuses the burdens of proof on this issue. It was not the responsibility of the district court to make factual findings that disprove his claims. Rather, the burden of proof was upon Cavanaugh to prove his claims by affirmatively showing good cause to excuse his delay and that he would be prejudiced by the denial of his petition on procedural grounds.<sup>11</sup> And because the State pleaded laches, Cavanaugh's burden of proof was heightened because his delay created a rebuttable presumption of prejudice to the State.<sup>12</sup>

Here, the district court found that Cavanaugh simply failed to meet his burden of proof. Contrary to the instant allegation on appeal, the district court specifically found in the June 29 order that Cavanaugh failed to plead sufficient facts to demonstrate good cause and to rebut the presumption of prejudice resulting from laches to the State. Moreover,

---

<sup>10</sup>See Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

<sup>11</sup>See NRS 34.726(1); NRS 34.810(3).

<sup>12</sup>See NRS 34.800(2).

this court has previously concluded that Cavanaugh has failed to demonstrate good cause to explain the delay in filing this—his third—habeas corpus petition. This prior determination is the law of the case.<sup>13</sup> We conclude that this claim is without merit.

Finally, Cavanaugh contends that Nevada's one-year limitation period for filing a timely habeas corpus petition set forth in NRS 34.726 is unconstitutional because it constitutes an absolute procedural bar and does not mirror the tolled one-year limitation period that governs post-conviction habeas corpus petitions filed in federal court under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>14</sup> Inconsistency between Nevada's and the federal one-year limitations provisions, Cavanaugh maintains, renders NRS 34.726 unconstitutional because its application divests the federal courts of jurisdiction over claims raised in a post-conviction habeas corpus petition.

We initially note that the AEDPA is a federal statute and does not govern habeas corpus proceedings before this court—a state supreme court. Moreover, that the one-year limitation period of NRS 34.726 may differ from the AEDPA—a federal statute—does not provide a basis to hold NRS 34.726 unconstitutional. Cavanaugh provides no on-point authority to support this novel proposition. Rather, this court has previously reviewed the one-year statutory bar set forth in NRS 34.726 and has concluded that it is a reasonable limitation on post-conviction

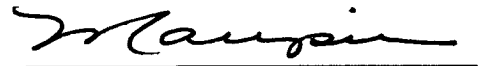
---


<sup>13</sup>See Hall, 91 Nev. at 315-16, 535 P.2d at 798-99.


<sup>14</sup>See 28 U.S.C. § 2244(d)(2) (tolling the one-year limitation period for filing a federal post-conviction habeas corpus petition while a petition is pending in state court).

habeas corpus relief and that there is "no constitutional infirmity in it."<sup>15</sup> Cavanaugh has failed to persuade us to depart from our prior holding. Therefore, we conclude that this claim, like the others Cavanaugh raises on appeal, is without merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Maupin

 J.  
Douglas

 J.  
Parraguirre

cc: Hon. Michael A. Cherry, District Judge  
Lionel Sawyer & Collins/Las Vegas  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

---

<sup>15</sup>See Pellegrini, 117 Nev. at 878, 34 P.3d at 531; see also Passanisi v. Director, Dep't Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989) (providing that the Nevada State Legislature "may . . . impose a reasonable regulation on the writ of habeas corpus, so long as the traditional efficacy of the writ is not impaired").