

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN DAVID SPENCE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44521

FILED

FEB 02 2006

ORDER OF AFFIRMANCE

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

This is an 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; Lee A. Gates, Judge.

In 1993 appellant John David Spence was convicted, pursuant to a jury verdict, of one count of sexual assault, five counts of sexual assault on a minor, and multiple counts of lewdness with a minor. Spence's own daughter was the victim of the offenses. He was sentenced to life in prison. This court affirmed his conviction and issued its remittitur on September 19, 1996.

Almost seven years later, on September 5, 2003, Spence filed a post-conviction petition for a writ of habeas corpus. The State opposed the petition, arguing that it was untimely and that the delay had prejudiced the State. After hearing oral argument, the district court denied the petition, finding that Spence had not shown good cause for the delay in filing the petition, under NRS 34.726(1),¹ and had not rebutted the

¹NRS 34.726(1) provides that a habeas petition challenging a judgment of conviction or sentence must be filed within one year after entry of the judgment or after issuance of this court's remittitur, unless the petitioner demonstrates good cause, *i.e.*, that the delay was not his fault and that dismissal of the petition will unduly prejudice him.

presumption of prejudice to the State due to the delay, under NRS 34.800(2).²

Spence claims that he was not charged with the offenses in this case within the period prescribed by the statute of limitations.³ As good cause for not raising this claim earlier, he cites this court's decision in State v. Quinn,⁴ which followed the resolution of his appeal by five years. We conclude that even assuming that the delay in this case preceding Quinn was not Spence's fault under NRS 34.726(1), that statute required Spence to file his petition at the very least within a year of Quinn's issuance. But Spence did not file his habeas petition until almost two years after Quinn was issued on September 17, 2001. He provides no explanation for this further delay to show that it was not his fault.

Moreover, Spence does not show that he was unduly prejudiced by the dismissal of his claim because Quinn would not provide him with any relief even if his claim were timely. Spence quotes our caselaw for the proposition that "constitutional due process requires the availability of habeas relief when a state's highest court interprets for the first time and clarifies the provisions of a state criminal statute to exclude a defendant's acts from the statute's reach at the time the defendant's

²NRS 34.800(2) provides in part that a period longer than five years between the filing of a judgment of conviction, an order imposing sentence, or a decision on direct appeal and the filing of a habeas petition challenging the judgment creates a rebuttable presumption of prejudice to the State.

³See NRS 171.085; NRS 171.095; see also 1985 Nev. Stat., ch. 658, §§ 10, 12, at 2167 (providing the earlier versions of these statutes effective at the time of Spence's offenses).

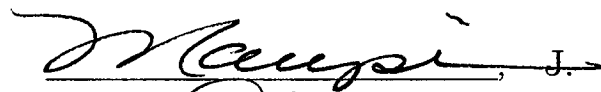
⁴117 Nev. 709, 30 P.3d 1117 (2001).

conviction became final."⁵ However, he does not explain how Quinn would exclude his acts from the reach of any relevant statute. In Quinn, this court interpreted NRS 171.095 and the meaning of "discovery" of an offense committed in a secret manner; such discovery ends the tolling of the statute of limitations.⁶ We concluded that "a crime can remain undiscovered even if multiple persons know about it so long as the silence is induced by the wrongdoer's threats."⁷ The record before us demonstrates that Spence's threats induced the silence of the victim and the friends to whom she originally disclosed Spence's crimes.


Finally, Spence has made no attempt to rebut the presumption that the seven-year delay in this case prejudiced the State.

The district court therefore did not err in denying Spence's petition as untimely. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

⁵Clem v. State, 119 Nev. 615, 623, 81 P.3d 521, 527 (2003).

⁶117 Nev. at 715-16, 30 P.3d at 1121-22.

⁷Id., 30 P.3d at 1122.

cc: Hon. Lee A. Gates, District Judge
Goodman Brown & Premsrirut
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk