

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 44991

FILED

JUN 14 2005

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

ORDER OF AFFIRMANCE AND DISMISSING APPEAL IN PART

This is a proper person appeal from orders of the district court dismissing appellant Gene Allen's post-conviction petition for a writ of habeas corpus and denying his "motion for sentencing transcripts," and "motion for downward departure." 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 of a minor under the age of sixteen and lewdness with 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.

¹Allen v. State, Docket No. 41274 (Order of Affirmance, March 11, 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 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 the judgment of conviction.³ On March 11, 2004, Allen filed a proper person amended post-conviction petition for a writ of habeas corpus. Allen additionally filed two motions to suppress. The State opposed Allen's petitions and motions. On June 25, 2004, the district court denied Allen's petitions and motions. On appeal, this court affirmed the order of the district court denying Allen's post-conviction petitions for writs of habeas corpus, but dismissed Allen's untimely appeal from the denial of his motions.⁴

On August 10, 2004, Allen filed a post-conviction petition for a writ of habeas corpus. On August 17, 2004, and August 23, 2004, Allen

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

³Because this motion appeared to challenge the judgment of conviction, it was construed as a post-conviction petition for a writ of habeas corpus. See NRS 34.724(2)(b).

⁴Allen v. State, Docket No. 43599 (Order of Affirmance and Dismissing Appeal in Part, December 6, 2004).

filed additional post-conviction petitions for writs of habeas corpus. The State filed an opposition. On October 11, 2004, the district court denied Allen's petitions. On appeal, this court affirmed the order of the district court.⁵

On November 19, 2004, Allen filed a post-conviction petition for a writ of habeas corpus. On January 25, 2005, and again on March 11, 2005, Allen filed a "motion for sentencing transcripts." On March 3, 2005, Allen filed a document titled "motion for downward departure." The State opposed Allen's petition and motions. On March 2, 2005, the district court dismissed Allen's petition for a writ of habeas corpus. On March 29, 2005, the district court denied Allen's "motion for sentencing transcripts" and "motion for downward departure." This appeal followed.⁶

Allen's post-conviction petition for a writ of habeas corpus was successive because he had previously filed several post-conviction habeas

⁵Allen v. State, Docket No. 44180 (Order of Affirmance, March 4, 2005).

⁶To the extent that Allen is also attempting to appeal from a June 25, 2003, order of the district court denying his motion for leave to proceed in forma pauperis, motion to withdraw/revoke guilty plea, motion in limine, and motion for change of venue, we note that Allen did not file a timely notice of appeal. See NRAP 4(b). An untimely notice of appeal fails to vest jurisdiction in this court. See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

corpus petitions.⁷ Therefore, Allen's petition was procedurally barred absent a demonstration of good cause and actual prejudice.⁸

In an attempt to excuse his procedural defect, Allen appeared to argue that he has not been provided with transcripts or a complete record. We conclude that Allen did not establish good cause to excuse his successive petition.⁹ Further, Allen failed to demonstrate that he would be unduly prejudiced by the dismissal of his petition because he did not include intelligible claims supported by specific facts.¹⁰ Consequently, the district court did not err in dismissing Allen's post-conviction petition for a writ of habeas corpus.¹¹

With respect to Allen's appeal from the denial of his "motion for sentencing transcripts" and "motion for downward departure," we note the existence of a jurisdictional defect. Specifically, the right to appeal is statutory; where no statute or court rule provides for an appeal, no right to appeal exists.¹² No statute or court rules provides for an appeal from a

⁷See NRS 34.810(2).

⁸See NRS 34.810(3).

⁹See generally Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

¹⁰See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).


¹¹Further, the district court did not err in denying any proper person motions filed in connection with this proceeding.

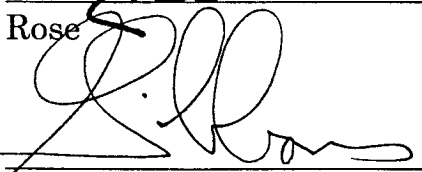
¹²Castillo v. State, 106 Nev. 349, 792 P.2d 1133 (1990).

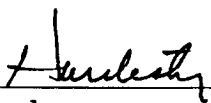
decision denying the aforementioned motions. Thus, we lack jurisdiction to consider these appeals.

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.¹³ Accordingly, we

ORDER the judgment of the district court AFFIRMED and DISMISS this appeal in part.¹⁴


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

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

¹⁴We caution Allen that a prisoner may forfeit all deductions of statutory good time earned by the prisoner if the court finds that the prisoner has filed a document in a civil action for an "improper purpose." A "civil action" includes a petition for a writ of habeas corpus. See NRS 209.451(1)(d)(1), (5). We 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.

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