

IN THE SUPREME COURT OF THE STATE OF NEVADA


EUGENE ALBERT MAUWEE, SR.,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
MICHAEL BUDGE,
Respondent.

No. 46134

FILED

FEB 17 2006

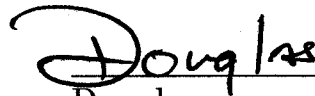
ORDER OF AFFIRMANCE


JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY  CHIEF DEPUTY CLERK

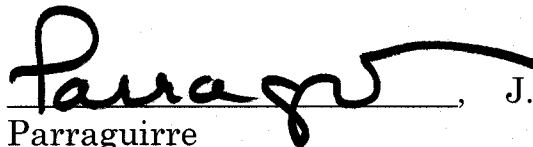
This is a proper person appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

We have reviewed the record on appeal, and we conclude that the district court did not err in dismissing appellant's petition for the reasons stated in the attached order. Therefore, briefing and oral argument are not warranted in this case.¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.²

 _____, J.
Douglas

 _____, J.
Becker

 _____, J.
Parraguirre

¹See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²We have reviewed all documents that appellant 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 appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Connie J. Steinheimer, District Judge
Eugene Albert Mauwee Sr.
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

ORIGINAL

FILED

SEP 20 2005

RONALD A. LONGIN, JR., CLERK
By: [Signature]
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE

EUGENE A. MAUWEE, SR.,

Petitioner,

v.

Case No. CR89P810

MICHAEL BUDGE, WARDEN,

Dept. No. 4

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT

This matter came before the court on Mauwee's Petition for Writ of Habeas Corpus (Post-Conviction) and Respondent's motion to dismiss the petition. For the reasons to follow, the court hereby grants Respondent's motion.

It is undisputed that Mauwee's petition is his third state court habeas petition. Since Mauwee's present petition raises claims that were raised earlier and rejected by the Nevada Supreme Court on the merits, and also raises claims that were not, but could have been raised earlier, the court finds that Mauwee is attempting to abuse the writ. Accord NRS 34.810(2). In addition, the court finds that the present petition is untimely. Accord NRS 34.726; see also Pellegrini, 117 Nev. 860, 869-70, 34 P.3d 519 (2001). Consequently, this petition must be dismissed, unless Mauwee pleaded specific facts demonstrating both good cause and prejudice to avoid these procedural bars. NRS 34.810(3); NRS

1 34.726(1); see also *State v. District Court (Riker)*, 121 Nev. ___, 112 P.3d 1070 (2005)(The statutory
2 rules respecting default are mandatory and cannot be ignored when properly raised by the State.).

3 A careful review of Mauwee's petition and supporting memorandum of points and
4 authorities fails to reveal any allegation of specific facts which, if true, would demonstrate good cause
5 and prejudice. On the other hand, Mauwee, in his opposition to the State's motion to dismiss contends
6 good cause and prejudice do exist.

7 First, Mauwee contends that, pursuant to *Phelps v. Director*, 104 Nev. 656, 764 P.2d
8 1303 (1988), he is not required to plead cause and prejudice on the face of his present petition. 104 Nev.
9 at p. 659. If Mauwee had filed his petition under the statutory scheme that existed in 1988 when *Phelps*
10 was decided, then the *Phelps* decision would be persuasive. The present statutory scheme, unlike that in
11 existence in 1988, does contemplate such allegations of cause and prejudice be specified on the face of
12 the petition. Accordingly, Mauwee's first attempt to demonstrate cause and prejudice lacks merit.

13 Mauwee also claims cause and prejudice exist "based on a new application of law" not
14 available when he filed his first two state court habeas petitions. While our Supreme Court has held that
15 a factual legal basis for a claim which was not reasonably available earlier may excuse the procedural
16 bars at issue, *Pellegrini v. State*, 117 Nev. at p. 887, Mauwee's reliance on that theory is misplaced here.

17 According to Mauwee, the recent Supreme Court decision in *Moore v. State*, 117 Nev.
18 659, 27 P.3d 447 (2001), created a new factual or legal basis for a claim. This court disagrees.

19 First, *Moore* has little or nothing to do with Mauwee's case, in that, *Moore* addressed the
20 application of the deadly weapon enhancement to those convicted of a charged conspiracy offense, such
21 as conspiracy to commit robbery with the use of a deadly weapon. Mauwee was not charged nor
22 convicted as a co-conspirator. Indeed, Mauwee has never denied being the triggerman in this case.
23 Instead, Mauwee has conceded the act of shooting the victim, and then interposed various mens rea
24 defenses, such as voluntary intoxication, the simple non existence of malice aforethought, and
25 justifications like self defense. Accordingly, Mauwee's reliance on *Moore* is completely misplaced.

26 Second, even if *Moore* provided a new factual or legal basis for any of his claims,

1 Mauwee failed to file this petition within one year after *Moore* was decided. Accordingly, since this
2 theory of cause and prejudice was itself not pursued in a timely fashion, the present petition must
3 nevertheless be dismissed as untimely. *Accord Hathaway v. State*, 119 Nev. ___, 71 P.3d 503 (2003);
4 *see also State v. District Court (Riker)*, 112 P.3d at p. 1077.

5 In sum, it is the judgment and order of the court that Mauwee's petition shall be
6 dismissed. The present petition both abuses the writ and is untimely, and Mauwee has failed to allege
7 any facts which, if true, demonstrate good cause and prejudice to avoid the application of the statutory
8 rules regarding default.

9 DATED this 27 day of September, 2005.

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11 Connie J. Steinheimer
12 DISTRICT JUDGE
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