

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN CHARLES FRITZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46643

FILED

MAY 26 2006

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is a proper person appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On March 10, 2000, the district court convicted appellant, pursuant to a guilty plea, of one count of lewdness with a child under the age of fourteen. The district court sentenced appellant to serve a term of twenty-four to ninety-six months in the Nevada State Prison. The district court suspended this sentence and placed appellant on probation for a period not to exceed five years. The district court further imposed the special sentence of lifetime supervision. No direct appeal was taken.

On March 7, 2005, the district court revoked appellant's probation. The district court modified appellant's sentence to a term of imprisonment of nineteen to seventy-two months. The district court

entered an amended judgment of conviction to that effect on March 7, 2005. No appeal was taken from the order revoking probation.

On November 15, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss the petition, arguing the petition was not verified, was not in the proper form, and was untimely filed. The State further specifically pleaded laches pursuant to NRS 34.800(2). Appellant filed a response. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On February 7, 2006, the district court dismissed appellant's petition. This appeal followed.

Preliminarily, this court notes that the district court cited appellant's lack of verification as one of the reasons it was dismissing appellant's petition. However, our review of the record on appeal reveals that appellant submitted an affidavit setting forth the facts supporting his petition. In signing the affidavit, appellant indicated that his signature was under the penalty of perjury. This was in substantial compliance with the requirements set forth in NRS 34.735.¹ Further, lack of verification is not a proper reason to dismiss a petition; this court has held that lack of

¹See NRS 208.165 ("A prisoner may execute any instrument by signing his name immediately following a declaration 'under penalty of perjury' with the same legal effect as if he had acknowledged it or sworn to its truth before a person authorized to administer oaths.").

verification is not a jurisdictional defect and the district court should allow the error to be corrected.²

The district court further dismissed the petition on the grounds that it was not in substantial compliance with NRS 34.735. Although appellant's petition was deficient, there is no authority in Nevada supporting the district court's decision to dismiss the petition with prejudice on this ground. Rather, the district court should have provided appellant with an opportunity to cure any defects that prevented the district court from adequately reviewing the petition.

In his petition, appellant claimed that his counsel at the probation revocation proceeding was ineffective for failing to file an appeal from the order revoking probation and that revocation of probation for viewing adult pornography violated the First Amendment. Appellant further claimed that lifetime supervision violated various constitutional rights.

The district court dismissed the entire petition on the ground that it was procedurally time barred and barred by laches. However, the petition was not procedurally barred or barred by laches to the extent the petition challenged the effectiveness of counsel in the probation revocation proceeding or the revocation of probation. A challenge to the probation revocation proceeding is not a challenge to the judgment of conviction, but

²See Miles v. State, 120 Nev. 383, 91 P.3d 588 (2004).

rather, is more in the nature of true habeas corpus relief.³ Thus, we affirm the order of the district court in part because appellant's challenge to lifetime supervision, a challenge to the validity of the judgment of conviction, was correctly procedurally barred as appellant failed to demonstrate good cause for the delay in raising the claim or rebut the presumption of laches.⁴

The district court did not reach the merits of appellant's claims that his probation revocation counsel failed to file an appeal after being requested to do so or that his probation was revoked in violation of his constitutional rights. Because these claims challenging the probation revocation proceedings are not subject to NRS 34.726 or NRS 34.800, we reverse the district court's order in part, and we remand this matter to the district court to consider these claims on the merits.

³See NRS 34.360 (permitting a petitioner to challenge the legality of his continued confinement); NRS 34.726(1) (providing that the procedural time bar applies to a petition challenging the validity of a judgment of conviction and sentence); NRS 34.800(2) (providing that the rebuttable presumption of laches applies to a petition challenging the validity of the judgment of conviction).

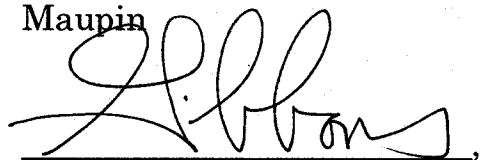
⁴See NRS 34.800(2); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994);

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.⁵ Accordingly, we

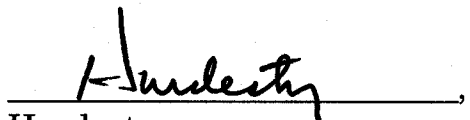
ORDER the judgment of the district court AFFIRMED in part, reversed in part and remanded to the district court for proceedings consistent with this order.⁶

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

⁵See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁶This order constitutes our final disposition of this appeal. Any future appeal shall be docketed as a new matter.

cc: Hon. Joseph T. Bonaventure, District Judge
Kevin Charles Fritz
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk