

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEPHEN WENDELL SMYTHE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46829

FILED

JUL 10 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
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. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

On November 25, 2002, the district court convicted appellant, pursuant to a guilty plea, of second degree murder. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole. No direct appeal was taken.

On September 25, 2003, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant filed three supplements to his petition. On January 8, 2004, the district court denied the petition. This court affirmed the order of the district court on appeal.¹

¹Smythe v. State, Docket No. 42726 (Order of Affirmance, July 23, 2004).

On October 6, 2005, appellant filed a second proper person post-conviction petition for a writ of habeas corpus in the district court, and on November 1, 2005, appellant filed an amended petition. The State filed a motion to dismiss the petition. 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 January 11, 2006, the district court dismissed appellant's petition. This appeal followed.

Appellant filed his petition almost three years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.² Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.³ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁴

In an attempt to excuse his procedural defects, appellant indicated that he was filing his petition to exhaust state remedies. Appellant indicated that four claims were being raised that had not previously been presented in the first post-conviction proceeding because he did not have transcripts of the proceedings from his trial counsel at the

²See NRS 34.726(1).

³See NRS 34.810(2).

⁴See NRS 34.726(1); NRS 34.810(3).

time he filed his first petition.⁵ Appellant claimed that he was re-raising several claims because he had failed to present them adequately in the prior post-conviction proceeding. Finally, appellant claimed that he was actually innocent.

Based upon our review of the record on appeal, we conclude that the district court did not err in dismissing the petition. Appellant failed to demonstrate that an impediment external to the defense excused his procedural defects.⁶ Filing a petition for exhaustion purposes is not good cause. Further, appellant failed to demonstrate that trial counsel's failure to send him transcripts excused his procedural defects.⁷ The doctrine of the law of the case prevents appellant from relitigating claims previously considered and rejected on the merits.⁸ Finally, appellant failed to demonstrate that failure to consider his petition would result in a fundamental miscarriage of justice because appellant failed to demonstrate that he was actually innocent of the offense.⁹ Therefore, we

⁵Appellant specifically identified grounds 2, 6, 8, and 11 as not having been previously presented. However, it appears that the remainder of appellant's grounds also contain many allegations and facts not previously presented in the first post-conviction proceeding.

⁶See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

⁷See Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

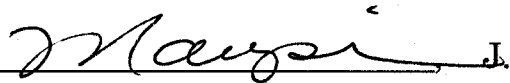
⁸See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

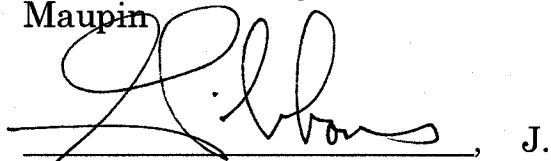
⁹See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).


affirm the order of the district court dismissing the petition as procedurally barred.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹¹


Maupin


Gibbons


Hardesty

¹⁰See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹¹We 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. Michelle Leavitt, District Judge
Stephen Wendell Smythe
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk