

IN THE SUPREME COURT OF THE STATE OF NEVADA

MALCOLM GRAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46862

FILED

JUL 05 2006

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

On December 14, 1995, the district court convicted appellant, pursuant to a jury verdict, of one count of second-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole. This court dismissed appellant's appeal from his judgment of conviction and sentence.¹ The remittitur issued on January 21, 1998.

On October 19, 1998, appellant, with the assistance of counsel, filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.770, the district court declined to conduct an evidentiary hearing. On December

¹Gray v. State, Docket No. 28156 (Order Dismissing Appeal, December 30, 1997).

16, 1998, the district court denied appellant's petition. This court affirmed the denial of the petition.²

On December 16, 2005, appellant filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant also filed a supplement to the petition. The State opposed the petition arguing that the petition was procedurally barred. Moreover, the State specifically pleaded laches. 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 March 13, 2006, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than seven years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.³ Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.⁴ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁵ Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.⁶

In an attempt to excuse his procedural defects, appellant argued that he was filing the petition for the purpose of exhausting his

²Gray v. State, Docket No. 39346 (Order of Affirmance, September 3, 2003).

³See NRS 34.726(1).

⁴See NRS 34.810(1)(b)(2); NRS 34.810(2).

⁵See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

⁶See NRS 34.800(2).

state remedies. He further argued that good cause existed for raising new claims because his appointed counsel refused to raise the claims in his first post-conviction petition for a writ of habeas corpus. Finally, appellant argued that the failure to review his petition on the merits would result in a fundamental miscarriage of justice.

Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant's petition was procedurally barred. Appellant failed to demonstrate that an impediment external to the defense prevented him from complying with the procedural rules.⁷ Filing a petition for the purpose of exhausting state remedies does not excuse an untimely and successive habeas corpus petition.⁸ Further, because appellant had no constitutional or statutory right to post-conviction counsel, appellant's claim that his post-conviction counsel was ineffective does not constitute good cause to excuse an untimely and successive habeas corpus petition.⁹ Appellant also failed to demonstrate that a failure to review his petition will result in a fundamental miscarriage of justice. Finally, appellant failed to overcome the presumption of prejudice to the State. Accordingly, we conclude the district court did not err in denying appellant's petition.

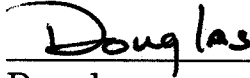
⁷See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).


⁸See id.; Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003).

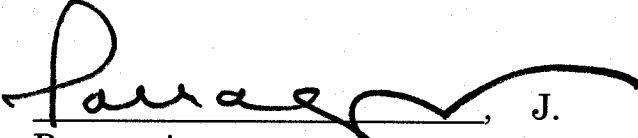
⁹See McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996).

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.


_____, J.
Douglas


_____, J.
Becker


_____, J.
Parraguirre

cc: Eighth Judicial District Court Dept. 16, District Judge
Malcolm Gray
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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