IN THE SUPREME COURT OF THE STATE OF NEVADA

NED BRUEN,
Appellant,
vs.
WARDEN, LOVELOCK CORRECTIONAL CENTER, LENARD VARE AND DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS, GLEN WHORTON,
Respondents.

No. 47333

FILED

JUL 17 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district order dismissing a postconviction petition for a writ of habeas corpus. Ninth Judicial District Court, Douglas County; David R. Gamble, Judge.

Appellant Ned Bruen was convicted, pursuant to a bench trial, of five counts of sexual assault, one count of attempted sexual assault, five counts of lewdness with a minor child under fourteen years, seven counts of possession of child pornography, and one count of use of a minor in child pornography. The district court sentenced Bruen to five concurrent life terms in prison for the sexual assaults and multiple concurrent and consecutive definite terms for the remaining counts. We upheld Bruen's convictions on appeal.[1] Bruen then filed a postconviction petition for a writ of habeas corpus, which the district court denied after conducting an evidentiary hearing. This court affirmed the district court's order on

[1]Bruen v. State, Docket No. 19675 (Order Dismissing Appeal, April 24, 1990).

appeal.[2] On January 25, 2006, Bruen filed a second postconviction petition for a writ of habeas corpus, which the district court summarily dismissed.[3] This appeal followed.

Bruen contends that the district court erred in denying his petition as procedurally barred. Because Bruen's petition was untimely filed and successive, he was required to demonstrate good cause for failing to present his claims earlier and prejudice.[4]

Bruen first argues that the district court erred in dismissing his claim that his convictions were secured in violation of the statute of limitations contained in NRS 171.095(1)(a), which tolls the statute of limitations on certain offenses committed in a secret manner until such offenses are "discovered." Bruen asserts that he demonstrated good cause to overcome applicable procedural default rules because this court issued two decisions not reasonably available prior to the time he filed the instant petition. Bruen argued in his petition that this court's decisions in Houtz v. State[5] and State v. Quinn[6] rendered the charged offenses time-barred under NRS 171.095(1)(a).

We first observe that Houtz and Quinn were decided several years before Bruen filed the instant petition, and he failed to explain his

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[2]Bruen v. Warden, Docket No. 29991 (Order Dismissing Appeal, March 29, 2000).

[3]Bruen also sought postconviction relief in federal court.

[4]See NRS 34.726(1); NRS 34.810(2), (3).

[5]111 Nev. 457, 893 P.2d 355 (1995).

[6]117 Nev. 709, 30 P.3d 1117 (2001).

delay in filing his petition. However, even assuming Houtz and Quinn applied retroactively to his case, as Bruen suggests, their holdings did not alter the statute of limitations in Bruen's favor. In Houtz, we concluded that the tolling of the statute of limitations for "secret offenses" should not extend beyond the time when the minor victim reaches 18 years of age.[7] Here, the victim revealed the abuse when he was 19 years old and an information was filed thereafter within the relevant statute of limitations period.[8] In Quinn, we held that for purposes of tolling the statute of limitations under NRS 171.095(1)(a), discovery occurs when any person other than the wrongdoer has knowledge of the alleged act and its criminal nature, unless the person with knowledge fails to report for the reasons set forth in Walstrom v. State.[9] This court expressly applied Walstrom in rejecting Bruen's direct appeal argument that his crimes were not committed in a secret manner. Consequently, Quinn did not change the analysis in Bruen's case. Therefore, we conclude that the district court did not err in dismissing this claim.

Bruen next asserts that the district court erred in dismissing his claim that his appellate counsel was ineffective for failing to challenge the sufficiency of the evidence supporting the sexual assault and attempted sexual assault offenses because the evidence failed to establish that any penetration occurred and that the relevant sexual acts were

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[7]111 Nev. at 462, 893 P.2d at 358.

[8]See NRS 171.085; NRS 171.095.

[9]117 Nev. at 715-16, 30 P.3d at 1121-22 (citing Walstrom v. State, 104 Nev. 51, 55-57, 752 P.2d 225, 228-29 (1988), overruled on other grounds by Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994)).

committed against the victim's will.[10] Bruen did not explain his delay in failing to raise this claim previously or demonstrate prejudice. In particular, we note that the evidence establishing Bruen's guilt respecting these offenses was overwhelming. A challenge to the sufficiency of the evidence in this case had no reasonable probability of success on appeal.[11] Accordingly, we conclude that the district court did not err in dismissing this claim.[12]

Finally, Bruen contends that the district court erred in dismissing his claim that his appellate counsel was ineffective due to a financial conflict of interest. However, Bruen raised this issue in his first postconviction petition, and the district court denied it after thoroughly vetting the matter in an evidentiary hearing. Because we rejected this claim on appeal, further consideration of it is barred by the law of the

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[10]See NRS 200.366.

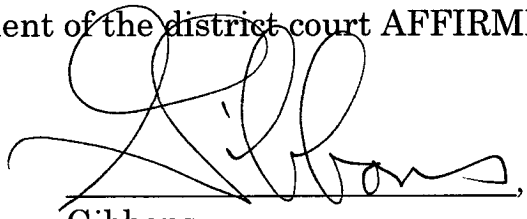
[11]See Thomas v. State, 120 Nev. 37, 44, 83 P.3d 818, 823 (2004) (stating that to establish ineffective assistance of appellate counsel, appellant must establish deficient performance and prejudice by showing that the omitted issue would have had a reasonable probability of success on appeal).

[12]To the extent Bruen argues that the district court erred in dismissing his claim that the evidence was insufficient to support his convictions for sexual assault and attempted sexual assault, this claim was appropriate for direct appeal. See NRS 34.810(1)(b)(2). Bruen asserted that he overcame applicable procedural bars because he is actually innocent of these offenses. We disagree and conclude that the district court did not err in dismissing this claim.

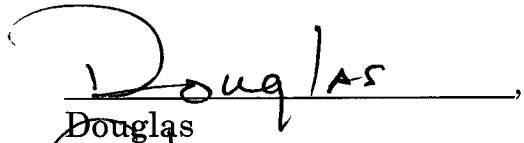
case.[13] Consequently, we conclude that the district court did not err in dismissing this claim.

Having considered Bruen's arguments and concluded that the district court did not err in dismissing his habeas petition, we

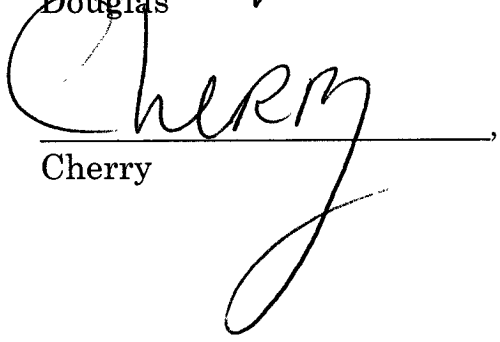
ORDER the judgment of the district court AFFIRMED.



_____, J.
Gibbons



_____, J.
Douglas



_____, J.
Cherry

cc: Hon. David R. Gamble, District Judge
Richard F. Cornell
Attorney General Catherine Cortez Masto/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk

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