

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEREK A. COSTANTINO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47986

FILED

JAN 08 2007

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

ORDER OF AFFIRMANCE

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; Donald M. Mosley, Judge.

On August 27, 1996, the district court convicted appellant, pursuant to a guilty plea, 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 twenty-five years in the Nevada State Prison and pay \$3,830.95 in restitution, joint and several liability with any other responsible party. This court dismissed appellant's subsequent appeal from his judgment of conviction.¹ The remittitur issued on March 18, 1997.

On April 7, 1997, appellant filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. After conducting an evidentiary hearing, the district court denied the petition. On September 11, 1997, appellant filed a second post-

¹Costantino v. State, Docket No. 28854 (Order Dismissing Appeal, February 26, 1997).

conviction petition for a writ of habeas corpus in the district court. The district court denied the petition. Appellant filed timely appeals from the orders denying his petitions, and this court dismissed the appeals.²

On September 10, 2003, appellant filed a third proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court denied the petition, and this court affirmed the order of the district court on appeal.³

On May 20, 2005, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. The district court denied the motion, and this court affirmed the order of the district court on appeal.⁴

On April 26, 2006, appellant filed a proper person motion to modify his sentence in the district court. The State opposed the motion. The district court denied the motion, and this court affirmed the order of the district court on appeal.⁵

On June 2, 2006, appellant filed a fourth proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant filed a motion for the appointment of counsel. The State

²Costantino v. State, Docket Nos. 30734, 31276 (Order Dismissing Appeals, December 10, 1999).

³Costantino v. State, Docket No. 42609 (Order of Affirmance, August 23, 2004).

⁴Costantino v. State, Docket No. 45635 (Order of Affirmance, September 26, 2005).

⁵Costantino v. State, Docket No. 47414 (Order of Affirmance, September 20, 2006).

opposed the petition arguing that the petition was untimely and successive. 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 August 28, 2006, the district court dismissed appellant's petition. This appeal followed.⁶

Appellant filed his petition more than nine years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.⁷ Moreover, appellant's petition was successive because he had previously filed several post-conviction petitions for writs of habeas corpus.⁸ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁹ Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.¹⁰

In an attempt to excuse his procedural defects, appellant argued that he had good cause to relitigate his claims because he was not

⁶We conclude that the district court did not abuse its discretion in denying appellant's motion for the appointment of counsel. See NRS 34.750.

⁷See NRS 34.726(1).

⁸See NRS 34.810(2). Appellant asserted that all of the claims raised in his fourth petition had been raised in previous actions, including the first post-conviction petition for a writ of habeas corpus that was decided on the merits.

⁹See NRS 34.726(1); NRS 34.810(3).

¹⁰See NRS 34.800(2).

appointed counsel in the first post-conviction proceeding, he was not properly notified of the evidentiary hearing in the first post-conviction proceeding and the evidentiary hearing should have been continued, he was a layman at law without sufficient knowledge and expertise to properly litigate the claims raised in the prior proceedings without counsel, he was not allowed to go to the law library based upon his housing assignment, he did not have adequate access to inmate law clerks, and some legal pleadings were lost in 2003 by prison administrators.

Based upon our review of the record on appeal, we conclude that the district court did not err in dismissing appellant's petition as procedurally defective. Appellant failed to demonstrate that an impediment external to the defense excused the procedural defects.¹¹ Appellant failed to demonstrate that any alleged defects with the 1997 proceedings on his first post-conviction petition for a writ of habeas corpus excused his nine year delay.¹² Appellant's lack of legal knowledge and expertise does not constitute good cause.¹³ Appellant failed to demonstrate that he was not provided with adequate access to legal materials or assistance in the prison. Appellant failed to demonstrate how

¹¹See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

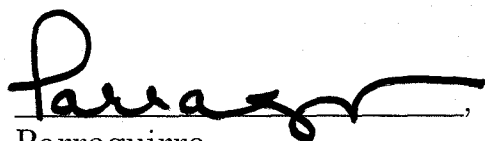
¹²We note that appellant litigated the issue of notice of the evidentiary hearing and his claim that his trial counsel was ineffective in failing to disclose exculpatory evidence in a federal habeas corpus petition. Attached to appellant's 2006 petition is a copy of an order issued by the federal district court denying relief in his federal habeas corpus petition.

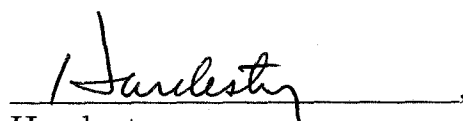
¹³See Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988).

the loss of some pleadings in 2003 excused his nine-year delay and the successive nature of his petition. Finally, appellant failed to overcome the presumption of prejudice to the State. Therefore, we affirm the order of the district court dismissing the petition as procedurally barred and barred by laches.

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.¹⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Parraguire, J.


Hardesty, J.


Saitta, J.

cc: Hon. Donald M. Mosley, District Judge
Derek A. Costantino
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁴See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).