

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT COSTANZO A/K/A ROBERT F.
COSTANZO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48749

FILED

AUG 14 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *C. Alvarado*
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; Stewart L. Bell, Judge.

On August 12, 1985, the district court convicted appellant, pursuant to a guilty plea, of two counts of sexual assault. The district court sentenced appellant to serve two terms of life in the Nevada State Prison. No direct appeal was taken.

On March 4, 1988, appellant filed a proper person post-conviction petition for writ of habeas corpus in the district court. On May 6, 1988, the district court denied appellant's petition. This court dismissed appellant's subsequent appeal.¹

On March 6, 1995, appellant filed a proper person post-conviction petition for writ of habeas corpus in the district court. On July

¹Costanzo v. State, Docket No. 19149 (Order Dismissing Appeal, dated August 25, 1988).

10, 1995, the district court denied appellant's petition as untimely. Appellant did not appeal the district court's denial of his petition.

On October 16, 2006, 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 on the ground that the petition was untimely and successive. The State further 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 December 27, 2006, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than 21 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 in which there was a prior determination on the merits.³ To the extent that appellant raised new claims in his petition, these claims constituted an abuse of the writ.⁴ Appellant's petition was procedurally barred absent a

²See NRS 34.726(1).

³See NRS 34.810(2). In the instant petition, appellant repeated his claim that he was denied conflict-free counsel.

⁴See *id.* The claims that constituted an abuse of the writ include: (1) counsel was ineffective for not advising appellant that he was not eligible for release; (2) counsel was ineffective for not advising appellant that his sentences would not run concurrently; (3) counsel was ineffective for coercing his guilty plea; (4) counsel was ineffective for failing to object to his presentence investigation report; (5) the record did not accurately reflect the guilty plea canvass; (6) appellant was denied a speedy trial; (7)

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demonstration of good cause and prejudice.⁵ A petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.⁶ In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence of the crime or ineligibility for the death penalty.⁷ In addition, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.⁸

In an attempt to excuse his procedural defects, appellant argued that his petition was based on newly discovered evidence and legal innocence. However, appellant did not support his assertions with any facts.⁹ Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to

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the judge was biased; (8) appellant was denied the right to a jury trial; and (9) appellant's supervised release violated the Fifth Amendment.

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

⁶Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

⁷Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).


⁸See NRS 34.800(2).

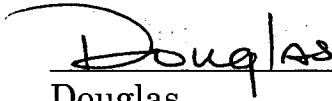
⁹Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (holding that a petitioner is not entitled to relief based on claims that are "unsupported by any specific factual allegations").

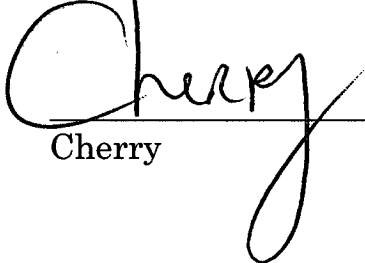
demonstrate good cause.¹⁰ Appellant failed to demonstrate that the claims he raised in the petition could not have been raised in the prior petition or discovered earlier in the proceedings. Moreover, appellant did not demonstrate that failure to consider his petition would result in a fundamental miscarriage of justice. Finally, appellant did not raise any argument in response to the State's plea of laches and thus, did not meet his burden of rebutting the presumption of prejudice to the State. Accordingly, the district court did not err in denying his petition.

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.¹¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

¹⁰Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994) (holding that good cause must be an impediment external to the defense).

¹¹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Stewart L. Bell, District Judge
Robert F. Costanzo
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk