

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROY D. MORAGA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49049

FILED

AUG 16 2007

JANE T. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

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; Lee A. Gates, Judge.

On July 7, 1990, the district court convicted appellant, pursuant to a jury verdict, of two counts of burglary and two counts of sexual assault. The district court sentenced appellant to serve a single term of life without the possibility of parole in the Nevada State Prison. On direct appeal, this court upheld appellant's conviction but remanded to the district court for resentencing on the ground that the district court failed to sentence appellant for each of the four primary offenses.¹

After resentencing, the district court entered an amended judgment of conviction.² The district court sentenced appellant to serve two consecutive terms of ten years for the burglary counts and a

¹Moraga v. State, Docket No. 21488 (Order of Remand, August 27, 1991).

²On September 29, 2003, the district court entered a second amended judgment of conviction granting appellant with 180 days of credit for time served.

consecutive term of life with the possibility of parole after five years for one of the sexual assault counts. The district court also sentenced appellant as a habitual criminal to a term of life without the possibility of parole for the remaining sexual assault count. This court dismissed appellant's appeal from the amended judgment of conviction.³ The remittitur issued on October 24, 1995.

On February 20, 1996, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant, with the assistance of counsel, subsequently filed a supplement to the petition. The State opposed the petition and supplement. On September 6, 1996, the district court denied appellant's petition. This court affirmed the district court's order on appeal.⁴

On January 10, 2006, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition arguing that the petition was procedurally time barred 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 February 8, 2007, the district court dismissed appellant's petition. This appeal followed.

In his petition, appellant claimed that his constitutional due process rights were violated because his sentence after resentencing

³Moraga v. State, Docket No. 22901 (Order Dismissing Appeal, October 4, 1995).

⁴Moraga v. State, Docket Nos. 29321, 32542 (Order Dismissing Appeals, April 20, 1999).

exceeded his original sentence. Specifically, appellant alleged that the increased sentence was a result of vindictive punishment for challenging his convictions.

Appellant filed his petition more than ten years after this court issued the remittitur from his appeal from the amended judgment of conviction. Thus, appellant's petition was untimely filed.⁵ Moreover, appellant's petition constituted an abuse of the writ because appellant could have raised his claim in his prior petition.⁶ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁷ Good cause must be an impediment external to the defense.⁸ In the event that good cause is not shown, a petitioner may be entitled to a review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.⁹ A petitioner may meet this standard upon a colorable showing that he is actually innocent of the crime.¹⁰ Finally, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.¹¹

⁵See NRS 34.726(1).

⁶See NRS 34.810(2).

⁷See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

⁸See Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994).

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

¹⁰See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

¹¹See NRS 34.800(2).

In an attempt to excuse his procedural defects, appellant first argued that he filed the untimely petition in an effort to exhaust his claim in state court. Exhausting state remedies does not constitute good cause to support the filing of an untimely petition.

Second, appellant argued that his appellate counsel's failure to raise his claim on appeal from the amended judgment of conviction constituted an impediment external to the defense. Appellant failed to demonstrate that an impediment external to the defense prevented him from raising his claim within the statutory time period. Appellant's claim was reasonably available to him when he filed his first post-conviction petition for a writ of habeas corpus, and appellant failed to demonstrate that interference by officials prevented him from raising the claim in his first petition.¹²

Third, appellant asserted that failure to consider his claim would result in a fundamental miscarriage of justice. Appellant's claim that his new sentence violated his due process rights lacked merit. In North Carolina v. Pearce, the United States Supreme Court held that "[d]ue process of law, . . . , requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial."¹³ Unless the reason for increasing a sentence affirmatively appears on the record, a presumption arises that a greater sentence has been imposed for a vindictive purpose.¹⁴

¹²See Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

¹³395 U.S. 711, 725 (1969) overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794 (1989).

¹⁴Id. at 726.

However, the presumption of vindictiveness does not apply where there is no reasonable likelihood of actual vindictiveness on the part of the sentencing authority, and in such a case the defendant must prove actual vindictiveness.¹⁵ Here, there is no basis for a presumption of vindictiveness. Appellant did not successfully challenge his convictions, rather appellant's case was remanded because the district court erroneously sentenced appellant to a single sentence although appellant was convicted of four separate offenses. As this court noted in the order of remand, Nevada laws anticipate that a corresponding sentence be imposed for each offense a defendant is convicted of.¹⁶ Appellant failed to demonstrate that the district court was acting vindictively when it imposed the new sentence on remand. Therefore, appellant failed to demonstrate that his due process rights were violated. Because appellant's claim lacked merit, appellant failed to demonstrate that a fundamental miscarriage of justice would result by failing to consider his claim.

Finally, in response to the State's plea of laches, appellant claimed that the State would not be unduly prejudiced by the delay in filing his petition because the State cannot demonstrate that any transcripts, witnesses, evidence or records necessary for reviewing his claim are unavailable. Appellant further argued that the delay in filing his petition was not unreasonable because he was not responsible for the

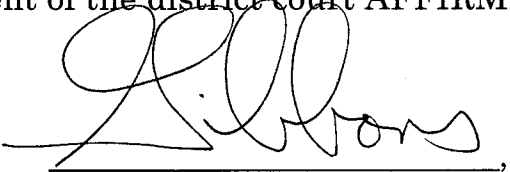
¹⁵Smith, 490 U.S. at 799-800.

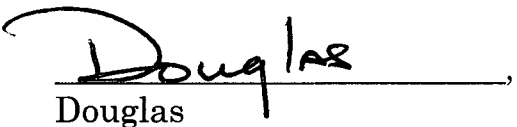
¹⁶Moraga v. State, Docket No. 21488 (Order of Remand, August 27, 1991).

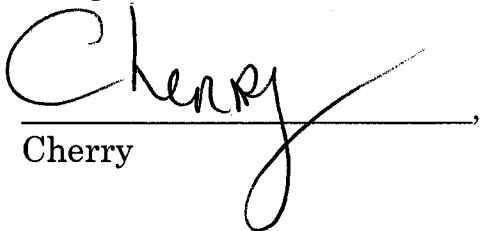
delay. We conclude that this falls short of overcoming the presumption of prejudice to the State.

Based upon our review of the record on appeal, we conclude that the district court did not err by dismissing appellant's petition, and we affirm the order of the district court. 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.¹⁷ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁸


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. Lee A. Gates, District Judge
Roy D. Moraga
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹⁷See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁸We have reviewed the document that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon that submission is warranted.