

IN THE SUPREME COURT OF THE STATE OF NEVADA

GENE ANTHONY ALLEN,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

GENE ANTHONY ALLEN,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

No. 49167

FILED

SEP 12 2007

No. 49612

JANETTE M. BLOOM
CLERK OF SUPREME COURT
S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE IN DOCKET NO. 49167 AND ORDER

DISMISSING APPEAL IN DOCKET NO. 49612

Docket No. 49167 is a proper person appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Docket No. 49612 is a proper person appeal from an amended judgment of conviction. We elect to consolidate these appeals for disposition.¹ Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

On April 7, 2003, the district court convicted appellant, pursuant to a guilty plea, of one count each of sexual assault of a minor

¹See NRAP 3(b).

under the age of sixteen and lewdness with a minor under the age of fourteen. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after ten years for the lewdness conviction, and a concurrent term of five to twenty years for the sexual assault conviction. The district court further provided appellant with 634 days of credit for time served. This court affirmed appellant's judgment of conviction and sentence on direct appeal.² The remittitur issued on April 6, 2004.

On June 11, 2003, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant filed supplemental proper person post-conviction petitions for writs of habeas corpus on July 8, 2003, and December 26, 2003. The State filed an opposition. On February 23, 2004, the district court denied appellant's petitions. On appeal, this court affirmed the order of the district court.³

²Allen v. State, Docket No. 41274 (Order of Affirmance, March 11, 2004).

³Allen v. State, Docket No. 42969 (Order of Affirmance, September 17, 2004).

On February 24, 2004, appellant filed a proper person motion to vacate the judgment of conviction.⁴ On March 11, 2004, appellant filed a proper person amended post-conviction petition for a writ of habeas corpus. Appellant additionally filed two motions to suppress. The State opposed appellant's petitions and motions. On June 25, 2004, the district court denied appellant's petitions and motions. On appeal, this court affirmed the order of the district court denying appellant's post-conviction petitions for writs of habeas corpus, but dismissed appellant's untimely appeal from the denial of his motions.⁵

On August 10, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus. On August 17, 2004, and August 23, 2004, appellant filed additional post-conviction petitions for writs of habeas corpus. The State filed an opposition. On October 11, 2004, the district court denied appellant's petitions. On appeal, this court affirmed the order of the district court.⁶

⁴Because this motion appeared to challenge the judgment of conviction, it was construed as a post-conviction petition for a writ of habeas corpus. See NRS 34.724(2)(b).

⁵Allen v. State, Docket No. 43599 (Order of Affirmance and Dismissing Appeal in Part, December 6, 2004).

⁶Allen v. State, Docket No. 44180 (Order of Affirmance, March 4, 2005).

On November 19, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus. On January 24, 2005, and again on March 11, 2005, appellant filed a "motion for sentencing transcripts." On March 3, 2005, appellant filed a document titled "motion for downward departure." The State opposed appellant's petition and motions. On March 2, 2005, the district court dismissed appellant's petition for a writ of habeas corpus. On March 29, 2005, the district court denied appellant's "motion for sentencing transcripts" and "motion for downward departure." This court affirmed the order of the district court denying appellant's petition and dismissed the appeal from the denial of the motions.⁷

On August 19, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On December 6, 2005, the district court denied the petition. No appeal was taken from the December 6, 2005 order.

On December 22, 2005, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the

⁷Allen v. State, Docket No. 44991 (Order of Affirmance and Dismissing Appeal in Part, June 14, 2005).

motion. On January 24, 2006, the district court denied the motion. This court affirmed the order of the district court on appeal.⁸

On April 24, 2006, appellant filed an eleventh post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On May 24, 2006, appellant filed a proper person document requesting another district court judge, and the State opposed appellant's request. On August 1, 2006, the district court dismissed appellant's petition and request for a different district court judge. This court affirmed the order of the district court on appeal.⁹

In addition to the actions set forth above, appellant filed numerous proper person motions and documents in the district court and in this court.

On February 5, 2007, appellant filed what is arguably his twelfth post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss arguing that the petition was untimely and successive. Appellant filed a response. 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 April 3,

⁸Allen v. State, Docket No. 46666 (Order of Affirmance, July 25, 2006).

⁹Allen v. State, Docket No. 47501 (Order of Affirmance, January 10, 2007).

2007, the district court entered an order dismissing the petition and directing the Director of the Department of Corrections to forfeit 310 days of statutory good time credits for the filing of a frivolous petition. On May 11, 2007, the district court amended its order to reflect that the district court was not directing the forfeiture of credits, but recommending that the credits be forfeited by the Director. On May 15, 2007, the district court entered an amended judgment of conviction deducting 310 days of credit for time served. On that same date, the district court entered a second amended judgment of conviction rescinding the first amended judgment of conviction and reinstating the full amount of credit for time served—634 days of credit for time served. These appeals followed.

Docket No. 49167—Post-Conviction Petition for a Writ of Habeas Corpus

Appellant filed an unintelligible petition for relief. The petition was filed almost three years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.¹⁰ Moreover, appellant's petition was successive because he raised claims that he indicated had previously been litigated and an abuse of the writ because he raised claims that he had not previously litigated.¹¹

¹⁰See NRS 34.726(1).

¹¹See NRS 34.810(2). Notably, appellant did not specifically identify the claims that had been previously litigated and where those claims were litigated. Appellant further did not specifically identify which claims had
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Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.¹² A petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.¹³ In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence.¹⁴

In an attempt to excuse his procedural defects, appellant appeared to argue that he should have his petition considered on the merits because his case had been transferred to a new district court judge, and he did not have transcripts. Appellant further claimed that he was actually innocent.

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

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not been raised in the previous proceedings. See NRS 34.735 (setting forth the form of the petition).

¹²See NRS 34.726(1); NRS 34.810(3).

¹³Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

¹⁴Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

impediment external to the defense excused his procedural defects.¹⁵ This court previously considered and rejected appellant's argument that Judge Bell should not have presided over the eleventh habeas corpus proceedings. The doctrine of the law of the case prevents further litigation of this issue.¹⁶ Even assuming that Judge Bell erroneously presided over the eleventh habeas corpus proceedings, appellant failed to demonstrate that the claims raised in the eleventh and twelfth petitions were not reasonably available within the one-year deadline to file a timely petition.¹⁷ Appellant further failed to demonstrate how the lack of transcripts prevented him from filing all of his claims in his first timely petition that was considered on the merits. Finally, appellant failed to support his claim of actual innocence with any facts, and thus, his claim of actual innocence did not overcome his procedural defects.

Although the district court's April 3, 2007 order contained an error in that it ordered the Director of the Department of Corrections to forfeit credits when NRS 209.451 permits only the Director to forfeit statutory good time credits in accordance with prison regulations, the district court corrected this error in its amended order entered on May 5,

¹⁵See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

¹⁶See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

¹⁷See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003).

2007. Therefore, we affirm the district court's May 5, 2007 dismissal of the petition and recommendation that the Director of the Department of Corrections forfeit statutory good time credits for appellant's abusive and wasteful filings.

Docket No. 49612—Amendment to Judgment of Conviction

As noted earlier, the district court entered two amended judgments of conviction on May 15, 2007. The first amended judgment of conviction deducted 310 days of credit of time served from the original judgment of conviction. The second amended judgment of conviction rescinded that deduction and restored the full amount of credit for time served.

From the documents before this court, it appears that the district court properly determined that there was not any authority permitting the deduction of credit for time served as a sanction for the filing of a frivolous habeas corpus petition.¹⁸ Any errors relating to the first amended judgment of conviction were corrected in the second

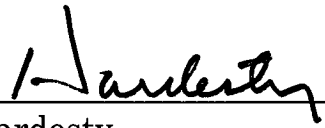
¹⁸See NRS 176.055(1) (providing that the district court may provide credit for time served for the amount of time the defendant actually spent in confinement pursuant to the judgment of conviction); Kuykendall v. State, 112 Nev. 1285, 926 P.2d 781 (1996) (determining that the purpose of NRS 176.055 was to ensure that all time served is credited towards a defendant's ultimate sentence, and thus, reading the language in NRS 176.055 as mandatory).

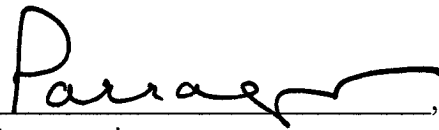
amended judgment of conviction, and thus, appellant has not been aggrieved in this matter. Therefore, we dismiss this appeal.

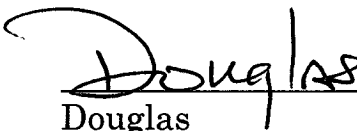
Conclusion

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.¹⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED in Docket No 49167 and we DISMISS the appeal in Docket No. 49612.²⁰


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

¹⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²⁰We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in these matters, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. James M. Bixler, District Judge
Gene Anthony Allen
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk