


IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE A. GALLIMORT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49438

FILED

OCT 11 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY: 
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 May 26, 1998, the district court convicted appellant, pursuant to a bench trial, of one count of first degree kidnapping with the use of a deadly weapon and one count of battery with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole for the kidnapping count and two consecutive terms of 24 to 96 months for the battery count, the latter to be served consecutively to the former. This court affirmed the judgment of conviction on appeal.¹ The remittitur issued on April 5, 2000.

On September 30, 1998, while his direct appeal was pending, appellant filed a proper person post-conviction petition for a writ of habeas corpus. On October 14, 1998, the district court denied the petition. On

¹Gallimort v. State, 116 Nev. 315, 997 P.2d 796 (2000).

June 15, 2000, appellant filed a second proper person post-conviction petition for a writ of habeas corpus. On September 14, 2000, the district court denied the petition. Appellant filed timely appeals from both decisions, and this court affirmed the orders of the district court on appeal.²

On January 18, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus, motion for the appointment of counsel and/or interpreter fluent in "Cuban Spanish," and motion for transportation in the district court. The State filed a motion to dismiss the petition arguing that the petition was untimely filed 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. The district court denied the motions, and on April 19, 2007, the district court dismissed appellant's petition. This appeal followed.³

²Gallimort v. State, Docket Nos. 33289 and 36826 (Order of Affirmance, August 7, 2001).

³To the extent that appellant appealed the decisions to deny his motion for the appointment of counsel and/or interpreter and motion for transport, we conclude that the district court did not abuse its discretion in denying these motions. See NRS 34.750.

We note that appellant filed a reply to the State's motion to dismiss the petition. However, the reply to the motion to dismiss appears to have been untimely as it was filed two days after the fifteen-day deadline set forth in NRS 34.750(4). Even assuming that the reply was timely filed, the arguments lacked merit for the reasons discussed herein.

In his petition, appellant claimed that he should be permitted to relitigate four claims raised in his 2000 petition because an evidentiary hearing was conducted on the 2000 petition outside his presence. Specifically, appellant raised the following four claims for relief: (1) his trial counsel was ineffective for failing to call witnesses; (2) his trial counsel was ineffective for failing to represent appellant to the best of his abilities; (3) his trial counsel was ineffective in regards to an interpreter; (4) his trial counsel was ineffective for failing to file a motion to dismiss the deadly weapon enhancements.

Appellant filed his petition almost seven years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.⁴ Moreover, appellant's petition was successive because he had previously raised two of his specific claims for relief in the post-conviction proceedings relating to the 1998 petition and those claims were decided on the merits.⁵ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁶ Further, because the State specifically pleaded laches, appellant was required to overcome

⁴See NRS 34.726(1).

⁵See NRS 34.810(1)(b)(2); NRS 34.810(2). The first and second claims for relief were raised in the post-conviction proceedings relating to the 1998 petition and decided on the merits. The third and fourth claims for relief, as well as the first and second claims for relief, were raised in the 2000 petition. However, the 2000 petition was procedurally defective in violation of NRS 34.810.

⁶See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

the presumption of prejudice to the State.⁷ A petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.⁸ In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence.⁹

Appellant argued that his petition should not be subject to any procedural bars as the procedural bars would be a suspension of his privilege to seek habeas corpus relief, and he should be discharged pursuant to NRS 34.500. In an attempt to excuse his procedural defects, appellant also argued he had good cause because an evidentiary hearing on the merits of the claims raised in the second petition was conducted outside his presence. Appellant relied upon this court's holding in Gebers v. State¹⁰ that the procedures set forth in NRS chapter 34 require the presence of a petitioner during an evidentiary hearing. Appellant further claimed good cause existed because an interpreter during the trial was not fluent in "Cuban Spanish," which resulted in a lack of communication. Finally, appellant claimed a fundamental miscarriage of justice based upon the arguments set forth above.

Based upon our review of the record on appeal, we conclude that the district court did not err in dismissing the petition as

⁷See NRS 34.800(2).

⁸Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

⁹Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

¹⁰118 Nev. 500, 50 P.3d 1092 (2002).

procedurally barred. Because appellant's petition challenged the validity of his judgment of conviction and sentence, the procedural bar rules set forth in NRS 34.726, 34.800, and 34.810 were applicable to the instant petition and application of these rules did not suspend any privilege to seek habeas corpus relief.¹¹ Any error in not having appellant present for the evidentiary hearing on the second petition was harmless in the instant case as the second petition was procedurally barred pursuant to NRS 34.810 and this court did not affirm the decision to reach the merits of the claims raised in the second petition, but affirmed the denial of the petition on procedural grounds. Thus, Gebers is distinguishable from the instant case, and appellant was not entitled to a new evidentiary hearing on the procedurally defective claims raised in the 2000 petition. We note that the first and second claims were in fact litigated in the 1998 petition and decided on the merits, without an evidentiary hearing being conducted or required. The doctrine of the law of the case prevents further litigation of these claims.¹² Appellant's good cause argument regarding the lack of a qualified interpreter during trial did not constitute good cause as this court previously considered and rejected an argument on direct appeal relating to the interpreters during the trial. The doctrine of the law of the case prevents further litigation of the interpreter issue as well and cannot be avoided by a more specific and precisely focused argument.¹³

¹¹See NRS 34.724(2)(b).

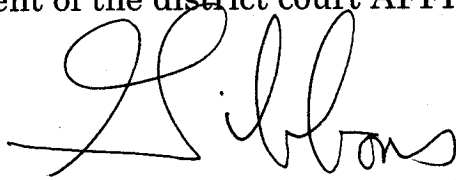
¹²See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

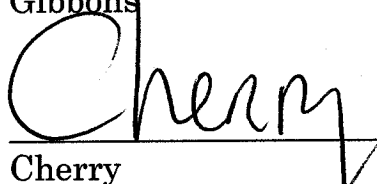
¹³See id.


Additionally, appellant failed to overcome the presumption of prejudice to the State. Finally, appellant failed to demonstrate a fundamental miscarriage of justice in the instant case as he failed to demonstrate that he was actually innocent.

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.¹⁵


_____ J.

Gibbons

_____ J.

Cherry

_____ J.

Saitta

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

¹⁵We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, 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. Donald M. Mosley, District Judge
Jose A. Gallimort
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk