

IN THE SUPREME COURT OF THE STATE OF NEVADA

TONY HEWITT,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49520

**FILED**

DEC 10 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY S. Young  
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 and an order of the district court denying appellant's motion to withdraw a guilty plea. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On April 6, 2004, the district court convicted appellant, pursuant to a guilty plea, of attempted sexual assault with a minor under the age of 14. The district court sentenced appellant to serve a term of 6 to 15 years in the Nevada State Prison. Appellant did not file a direct appeal.

Petition for a Writ of Habeas Corpus

On January 17, 2007, appellant filed a post-conviction proper person petition for a writ of habeas corpus in the district court. The State opposed the petition. 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 May 8, 2007, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than 2 years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.<sup>1</sup> Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.<sup>2</sup> Good cause must be an impediment external to the defense.<sup>3</sup>

In an attempt to demonstrate cause for the delay, appellant argued that his petition was filed untimely due to the ineffectiveness of his trial counsel and trial counsel's alleged concealment of evidence. Based upon our review of the record on appeal, we conclude that appellant has failed to demonstrate good cause for his delay in filing the instant petition. Appellant failed to demonstrate that the factual and legal bases for his claims were not reasonably available to him during the statutory time period for filing a post-conviction petition for a writ of habeas corpus.<sup>4</sup> Therefore, the district court did not err in denying appellant's petition.

#### Motion to Withdraw a Guilty Plea

On July 24, 2006, appellant filed a post-conviction proper person motion to withdraw a guilty plea. The State opposed the motion. On November 15, 2007, the district court entered a written order denying the motion. This appeal followed.

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<sup>1</sup>See NRS 34.726(1).

<sup>2</sup>See id.

<sup>3</sup>See Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994).

<sup>4</sup>See Hathaway v. State, 119 Nev. 248, 253, 71 P.3d 503, 506 (2003).

This court has held that a motion to withdraw a guilty plea is subject to the equitable doctrine of laches.<sup>5</sup> Application of the doctrine requires consideration of various factors, including: "(1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State."<sup>6</sup> Failure to identify all grounds for relief in a prior proceeding seeking relief from a judgment of conviction should weigh against consideration of a successive motion.<sup>7</sup>

Based upon our review of the record on appeal, we conclude that appellant's motion is subject to the equitable doctrine of laches. Appellant filed his motion more than two years after the judgment of conviction was entered. Appellant failed to provide any explanation for the delay. Appellant failed to indicate why he was not able to present his claims prior to the filing of the instant motion. Finally, it appears that the State would suffer prejudice if it were forced to proceed to trial after such an extensive delay. Accordingly, we conclude that the doctrine of laches precludes consideration of appellant's motion on the merits.

Moreover, as a separate and independent ground to deny relief, appellant's claims lacked merit. A guilty plea is presumptively valid, and a defendant carries the burden of establishing that the plea was

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<sup>5</sup>See Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000).

<sup>6</sup>Id. at 563-64, 1 P.3d at 972.

<sup>7</sup>Id. at 564, 1 P.3d at 972.

not entered knowingly and intelligently.<sup>8</sup> Further, this court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion.<sup>9</sup> In determining the validity of a guilty plea, this court looks to the totality of the circumstances.<sup>10</sup>

First, appellant claimed that his plea was invalid because the record did not affirmatively show that he made his guilty plea voluntarily, understanding of the nature of the charge and the consequences of the plea.<sup>11</sup> This claim lacked merit. The written guilty plea memorandum thoroughly informed appellant of the rights he waived by entry of his guilty plea as well as the potential punishment for the crime. During the plea canvass, appellant acknowledged reading and understanding the written guilty plea agreement. Appellant further indicated that he did not have any questions about the written guilty plea agreement. Appellant then indicated that he was entering his plea freely and voluntarily. Appellant also made factual admissions to the crime of attempted sexual assault with a minor, indicating that he understood the nature of the charge. Thus, under the totality of the circumstances, appellant failed to carry his burden on this claim.<sup>12</sup>

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<sup>8</sup>Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986); see also Hubbard v. State, 110 Nev. 671, 877 P.2d 519 (1994).

<sup>9</sup>Hubbard, 110 Nev. at 675, 877 P.2d at 521.

<sup>10</sup>State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant, 102 Nev. 268, 721 P.2d 364.

<sup>11</sup>Hubbard, 110 Nev. at 675, 877 P.2d at 521.

<sup>12</sup>See Bryant, 102 Nev. 268, 721 P.2d 364.

Second, appellant claimed that his plea was invalid because he was incompetent and therefore unable to understand the nature of the charges against him or to assist his counsel. Appellant also claimed that his plea was invalid because the district court did not conduct a hearing regarding his competence. This court has held that the test for determining competency is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."<sup>13</sup> Appellant must demonstrate incompetence by a preponderance of the evidence.<sup>14</sup> In support of this claim, appellant pointed out that, at the proceedings on January 22, 2004, when he waived his right to a preliminary hearing, he was having difficulty following the proceedings. Appellant also asserted that he was sent from a psychiatric unit to the hearing, but failed to provide any support for this assertion.<sup>15</sup> These facts are insufficient to demonstrate incompetence by a preponderance of the evidence. Thus, the district court did not err in failing to conduct a competency hearing and appellant failed to demonstrate that his plea was invalid in this regard.

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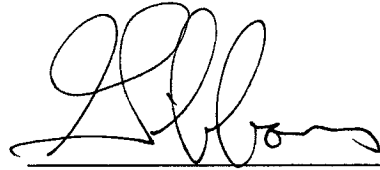
<sup>13</sup>Melchor-Gloria v. State, 99 Nev. 174, 179-180, 660 P.2d 109, 113 (1983) (quoting Dusky v. United States, 362 U.S. 402 (1960)).

<sup>14</sup>Cooper v. Oklahoma, 517 U.S. 348, 355-56 (1996).


<sup>15</sup>In his petition for a writ of habeas corpus, appellant also stated that he was housed in the psychiatric unit at the time of his preliminary hearing because he was depressed and that he was prescribed different drugs to treat his depression. Depression and drug treatment are not sufficient to prove incompetence.

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.<sup>16</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 \_\_\_\_\_, J.

Gibbons

 \_\_\_\_\_, J.

Cherry

 \_\_\_\_\_, J.

Saitta

cc: Hon. Donald M. Mosley, District Judge  
Tony Hewitt  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>16</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).