

IN THE SUPREME COURT OF THE STATE OF NEVADA

CEDRIC O'NEAL HOWARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49548

FILED

APR 25 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

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; Kenneth C. Cory, Judge.

On July 19, 1990, the district court convicted appellant, pursuant to a guilty plea, of burglary. The district court adjudicated appellant an habitual criminal and sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole. Appellant did not file a direct appeal.

On August 23, 1991, appellant filed a proper person petition for post-conviction relief pursuant to former NRS chapter 177. On October 24, 1991, the district court denied appellant's petition. This court dismissed appellant's appeal of the district court's denial of his petition.¹

¹Howard v. State, Docket No. 23529 (Order Dismissing Appeal, October 22, 1992).

On April 12, 1993, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On May 24, 1993, the district court denied appellant's petition. This court dismissed appellant's appeal of the district court's denial of his petition.²

On January 31, 2007, 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 untimely 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 May 8, 2007, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than 16 years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.³ Moreover, appellant's petition was an abuse of the writ because he raised new claims not raised and litigated in his prior post-conviction petitions for a writ of habeas corpus.⁴ Appellant's petition was procedurally barred

²Howard v. State, Docket Nos. 25968 and 25971 (Order Dismissing Appeals, September 29, 1994). This court elected to consolidate appellant's proper person appeal from the district court's denial of his petition for a writ of habeas corpus with appellant's proper person appeal from the district court's denial of appellant's petition for a writ of habeas corpus in another case.

³See NRS 34.726(1). Appellant's petition was also filed more than 14 years after amendments to NRS chapter 34. See 1991 Nev. Stat., ch. 44, § 5, at 75-76.

⁴See NRS 34.810(2). Appellant raised an appeal deprivation claim for the first time in the instant petition.

absent a demonstration of good cause and prejudice.⁵ Claims that were reasonably available during the statutory period for filing a petition do not constitute good cause to excuse an untimely petition.⁶ Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.⁷

In an attempt to excuse his procedural defects, appellant first argued that his counsel's failure to file a requested direct appeal excused his untimely filing. However, appellant did not assert that his counsel's failure to file an appeal was unknown to him within the statutory period.⁸ Therefore, the district court did not err in finding that this claim did not establish cause for untimely filing.

Second, appellant argued that his claims were not procedurally barred because the district court improperly sentenced appellant under the habitual criminal statute. Appellant failed to

⁵See NRS 34.726(1); NRS 34.810(1)(b).

⁶Hathaway v. State, 119 Nev. 248, 253, 71 P.3d 503, 506 (2003).

⁷See NRS 34.800(2).

⁸See Hathaway, 119 Nev. at 254, 71 P.3d at 507 (holding that good cause was shown where petitioner "requested that his attorney file an appeal, his attorney had affirmatively indicated that he would file an appeal, he believed that his attorney had filed an appeal on his behalf, and he filed his habeas corpus petition within a reasonable time after learning that his attorney had not filed an appeal."); Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 792 (1998) (holding that "the mere allegation that a claimant was deprived of a direct appeal without his or her consent does not alone constitute good cause and prejudice").

demonstrate adequate cause for the entire length of the delay. Appellant raised similar claims that challenged his habitual criminal adjudication in both his prior petitions for writs of habeas corpus which were filed over 13 years before the filing of the instant petition. While appellant may have relied upon authority not previously cited in his prior petitions, appellant did not support his claims with any authority that had been decided within the nine years prior to the filing of the instant petition. Therefore, the district court did not err in finding that this claim did not establish cause for untimely filing.

Third, appellant argued that his claims were not procedurally barred because he was not represented by counsel throughout “these proceedings.” To the extent that appellant claimed that he was not represented by counsel during his plea canvass and sentencing hearing, appellant’s claim is belied by the record.⁹ To the extent appellant claimed that he was not represented by counsel throughout his post-conviction proceedings, appellant was not entitled to the appointment of post-conviction counsel, thus, lack of post-conviction counsel is not good cause.¹⁰ Therefore, the district court did not err in finding that this claim did not establish cause for untimely filing.

Fourth, appellant claimed that he could not have raised his claims sooner because his sentence had not yet exceeded the 10-year

⁹See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

¹⁰See McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996); see also Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997).

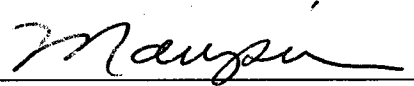
statutory maximum sentence for burglary. Appellant failed to demonstrate adequate cause for the entire length of the delay.¹¹ The judgment of conviction in the instant case sentenced appellant as an habitual criminal to a term of life in the Nevada State prison with the possibility of parole. Thus, appellant knew from the time of the sentencing hearing and the filing of the judgment of conviction that he was sentenced to a maximum sentence in excess of what appellant considered the maximum sentence. Further, appellant's prior petitions, which he filed over 13 years prior to the instant petition, also challenged appellant's sentence, including the procedure used in adjudicating appellant an habitual criminal. Moreover, as appellant filed the instant petition over 16 years after the entry of his judgment of conviction, appellant failed to file his petition within a reasonable time after the expiration of what he considered the legal maximum sentence. Therefore, the district court did not err in finding that this claim did not establish cause for untimely filing.

Finally, appellant did not raise any argument in response to the State's plea of laches; and thus, appellant did not meet his burden of rebutting the presumption of prejudice to the State. Therefore, the district court did not err in denying his petition.

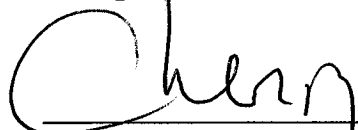
¹¹While NRS 34.726(1) does not apply to petitions challenging the continued legality of a petitioner's confinement, appellant's claims relate to his judgment of conviction and his adjudication as an habitual criminal.

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.¹² Accordingly, we


ORDER the judgment of the district court AFFIRMED.

 J.

Maupin

 J.

Cherry

 J.

Saitta

cc: Hon. Kenneth C. Cory, District Judge
Cedric O'Neal Howard
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

¹²See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).