

IN THE SUPREME COURT OF THE STATE OF NEVADA

RANDALL TODD BREWER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50226

RANDALL TODD BREWER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50695

FILED

JUL 11 2008

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

ORDER OF AFFIRMANCE

Docket No. 50226 is a proper person appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Docket No. 50695 is a proper person appeal from an order of the district court denying appellant's motion to correct an illegal sentence. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge. We elect to consolidate these appeals for disposition.¹

On October 17, 2000, the district court convicted appellant, pursuant to a guilty plea, of three counts of burglary. The district court

¹See NRAP 3(b).

sentenced appellant to serve three consecutive terms of 48 to 120 months in the Nevada State Prison. This court affirmed the judgment of conviction on appeal.² The remittitur issued on May 1, 2001.

On May 2, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel and counsel filed a supplemental petition. On October 4, 2004, the district court denied the petition. This court affirmed the district court's order on appeal.³

On June 7, 2006, appellant filed a proper person motion for sentence modification. On August 9, 2006, the district court denied the motion. This court affirmed the district court's order on appeal.⁴

Docket No. 50226

On August 8, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. 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 September 12, 2007, the district court dismissed appellant's petition. This appeal followed.

²Brewer v. State, Docket No. 37046 (Order of Affirmance, March 15, 2001).

³Brewer v. State, Docket No. 44233 (Order of Affirmance, April 22, 2005).

⁴Brewer v. State, Docket No. 47926 (Order of Affirmance, December 6, 2006).

Appellant filed his petition more than six years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.⁵ Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus in which there was a prior determination on the merits.⁶ To the extent that appellant raised new claims in his petition, these claims constituted an abuse of the writ.⁷ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁸ A petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice—the conviction of one who is actually innocent.⁹ To demonstrate actual innocence a petitioner must demonstrate in light of all the evidence, it is more likely than not that no reasonable juror would have convicted petitioner absent a constitutional violation.¹⁰ The United States Supreme Court has held that

⁵See NRS 34.726(1).

⁶See NRS 34.810(2). In the instant petition, appellant repeated his claims that he was sentenced based on impalpable and suspect evidence and that his appellate counsel was ineffective.

⁷See *id.* Appellant's claim that his convictions violated double jeopardy because they were transactionally related was an abuse of the writ.

⁸See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

⁹Mazzan 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).

actual innocence means factual innocence and not mere legal insufficiency.¹¹

Appellant did not attempt to demonstrate good cause or prejudice to excuse the procedural defects; rather appellant argued that a failure to review his claims would result in a fundamental miscarriage of justice. Appellant asserted that he was actually innocent of the burglary charged in Count 2 of amended information because it was part of a larger criminal transaction and thus the conviction violated double jeopardy.

Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant's petition was procedurally barred as untimely, successive, and an abuse of the writ. Appellant failed to demonstrate that he was actually innocent in the instant case as his argument relating to double jeopardy involved mere legal insufficiency. Therefore, the district court did not err in dismissing the petition as procedurally barred.

Docket No. 50695

On October 4, 2007, appellant filed a proper person motion to correct an illegal sentence in the district court. On November 8, 2007, the district court denied appellant's motion. This appeal followed.

In his motion, appellant contended that his convictions for Counts 1 and 2 of the information, which charged appellant for the burglary of Eagle Motors on April 26, 2000, and April 27, 2007,

¹¹See Bousley v. United States, 523 U.S. 614, 623-24 (1998).

respectively, violated double jeopardy because both entries were part of the same criminal transaction.

A motion to correct an illegal sentence may only challenge the facial legality of the sentence: either the district court was without jurisdiction to impose a sentence or the sentence was imposed in excess of the statutory maximum.¹² “A motion to correct an illegal sentence ‘presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence.’”¹³

Our review of the record on appeal reveals that the district court did not err in denying appellant’s motion. Appellant’s sentences were facially legal, and there is no indication that the district court was without jurisdiction in this matter.¹⁴ Appellant’s double jeopardy challenge fell outside the narrow scope of claims permissible in a motion to correct an illegal sentence. Therefore, the district court did not err in denying appellant’s motion.

¹²Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

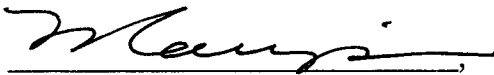
¹³Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

¹⁴See 1995 Nev. Stat., ch. 443, § 124, at 1215 (NRS 205.060).

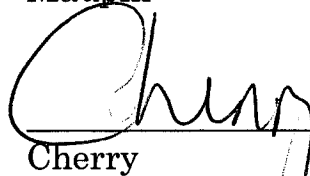
Conclusion

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.¹⁵ Accordingly, we

ORDER the judgments of the district court AFFIRMED.¹⁶

 J.

Maupin

 J.

Cherry

 J.

Saitta

cc: Hon. Steven P. Elliott, District Judge
Randall Todd Brewer
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹⁵See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁶We 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.