


IN THE SUPREME COURT OF THE STATE OF NEVADA

AUSTIN L. SANDS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52041

**FILED**

DEC 17 2008

TRACIE K. LINDEMAN  
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; Lee A. Gates, Judge.

On May 31, 2000, the district court convicted appellant, pursuant to a jury verdict, of two counts of attempted murder with the use of a deadly weapon and one count of resisting a public officer. The district court sentenced appellant to serve a total of two consecutive terms of 24 to 120 months in the Nevada State Prison. This court affirmed the judgment of conviction on appeal, but remanded for correction of a clerical error in the judgment of conviction.<sup>1</sup> The remittitur issued on May 29, 2002. The district court entered two amended judgments of conviction on October 10, 2000, and February 17, 2005.

On March 21, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

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<sup>1</sup>Sands v. State, Docket No. 36329 (Order Affirming in Part and Remanding for Correction of Judgment of Conviction, November 9, 2001).

State opposed the petition. On June 27, 2002, the district court denied the petition. This court affirmed the order of the district court on appeal.<sup>2</sup>

On March 24, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition, arguing the petition was untimely and successive. Moreover, the State specifically pleaded laches. 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 June 26, 2008, the district court dismissed appellant's petition. This appeal followed.

Appellant filed his petition almost six years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.<sup>3</sup> Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus raising similar claims and an abuse of the writ to the extent that he raised new and different claims.<sup>4</sup> Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>5</sup> Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.<sup>6</sup> A petitioner may be entitled to review of defaulted claims if failure to review the claims would

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<sup>2</sup>Sands v. State, Docket No. 39918 (Order of Affirmance, January 9, 2004).

<sup>3</sup>See NRS 34.726(1).

<sup>4</sup>See NRS 34.810(1)(b)(2); NRS 34.810(2).

<sup>5</sup>See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

<sup>6</sup>See NRS 34.800(2).

result in a fundamental miscarriage of justice.<sup>7</sup> In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence of the crime or ineligibility for the death penalty.<sup>8</sup>

Appellant first argued that his petition was not six years late. Appellant claimed that his petition was filed within three years from the second amended judgment of conviction and within approximately four years from the issuance of the remittitur in the post-conviction appeal. Appellant further appeared to claim that the time for filing should be tolled while he pursued litigation in the federal courts. Appellant's argument was patently without merit. NRS 34.726 requires a post-conviction petition be filed within one year from issuance of the entry of the judgment of conviction or the remittitur from a timely direct appeal.<sup>9</sup> Laches may be applied to a petition challenging a judgment of conviction that is filed more than five years after entry of the judgment of conviction or decision on direct appeal. No tolling provisions apply to a post-conviction petition for a writ of habeas corpus. An amendment to a judgment of conviction may in certain circumstances provide good cause for delay in filing a petition after the statutory time period; however, because the amended judgments of conviction did nothing more than correct clerical errors they would not provide good cause in the instant case.<sup>10</sup>

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<sup>7</sup>Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

<sup>8</sup>Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

<sup>9</sup>See Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132 (1998).

<sup>10</sup>Sullivan v. State, 120 Nev. 537, 96 P.3d 761 (2004).

Next, in an attempt to excuse his procedural defects, appellant claimed that he had recently received newly discovered evidence demonstrating that the police officers who testified against him committed perjury and that state and court actors had committed malfeasance. Appellant asserted that crime scene investigation photographs called into question the testimony of the police officers. Appellant further claimed that his trial counsel had not released all documents in his possession to appellant. Appellant claimed that new landmark decisions would excuse his procedural defects. Finally, appellant claimed that he was actually innocent because of his alleged proof of perjured testimony and the malfeasance of the state and court actors.

Based upon our review of the record on appeal, we conclude that the district court did not err in dismissing the petition as procedurally barred. Appellant failed to demonstrate that an impediment external to the defense prevented him from filing his claims in a timely post-conviction petition for a writ of habeas corpus.<sup>11</sup> Appellant acknowledged that the alleged newly discovered evidence had been provided to his trial counsel, and thus, the evidence did not qualify as newly discovered evidence.<sup>12</sup> Trial counsel's failure to send a petitioner the complete case files is not good cause.<sup>13</sup> Appellant failed to provide any specific, cogent argument as to how any new decisions excused his

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<sup>11</sup>Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

<sup>12</sup>Callier v. Warden, 111 Nev. 976, 988, 901 P.2d 619, 626 (1995) (citing Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991)).

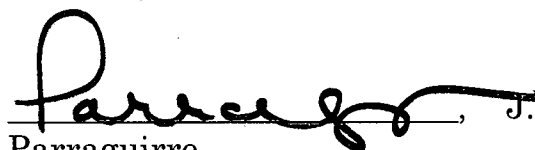
<sup>13</sup>Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

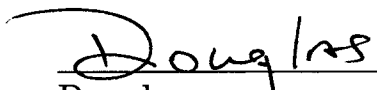
procedural defects in the instant case. Appellant failed to overcome the presumption of prejudice to the State. Finally, appellant failed to demonstrate that he was actually innocent.

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.<sup>14</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>15</sup>

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

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

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

cc: Hon. Lee A. Gates, District Judge  
Austin L. Sands  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>14</sup>Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>15</sup>We 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.