

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEREK A. COSTANTINO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51868

DEREK A. COSTANTINO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52048

**FILED**

JAN 08 2009

TRACEE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

Docket No. 51868 is a proper person appeal from an order of the district court denying a "motion for modification/correction/withdrawal of guilty plea." Docket No. 52048 is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. We elect to consolidate these appeals for disposition.<sup>1</sup>

On August 27, 1996, the district court convicted appellant, pursuant to a guilty plea, of one count of second-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve a

<sup>1</sup>See NRAP 3(b).

term of 25 years in the Nevada State Prison plus an equal and consecutive term for the deadly weapon enhancement. This court dismissed appellant's subsequent appeal from his judgment of conviction.<sup>2</sup> The remittitur issued March 18, 1997.

On April 7, 1997, appellant filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. After conducting an evidentiary hearing, the district court denied the petition. On September 11, 1997, appellant filed a second post-conviction petition for a writ of habeas corpus in the district court. The district court denied the petition. Appellant filed timely appeals from the orders denying his petitions, and this court dismissed the appeals.<sup>3</sup>

On September 10, 2003, appellant filed a third proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court denied the petition, and this court affirmed the order of the district court on appeal.<sup>4</sup>

On May 20, 2005, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the

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<sup>2</sup>Costantino v. State, Docket No. 28854 (Order Dismissing Appeal, February 26, 1997).

<sup>3</sup>Costantino v. State, Docket Nos. 30734, 31276 (Order Dismissing Appeals, December 10, 1999).

<sup>4</sup>Costantino v. State, Docket No. 42609 (Order of Affirmance, August 23, 2004).

motion. The district court denied the motion, and this court affirmed the order of the district court on appeal.<sup>5</sup>

On April 26, 2006, appellant filed a proper person motion to modify his sentence in the district court. The State opposed the motion. The district court denied the motion, and this court affirmed the order of the district court on appeal.<sup>6</sup>

On June 2, 2006, appellant filed a fourth proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant filed a motion for the appointment of counsel. The State opposed the petition. On August 28, 2006, the district court dismissed appellant's petition, and this court affirmed the order of the district court on appeal.<sup>7</sup>

Docket No. 51868

On May 2, 2008, appellant filed a "motion for modification/correction/withdrawal of guilty plea" in the district court. The State opposed the motion. On May 30, 2008, the district court denied appellant's motion. This appeal followed.

In his motion, appellant claimed that Assembly Bill 63, a proposed revision of NRS 193.165, should allow the district court to consider additional evidence which would lessen his sentence and the

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<sup>5</sup>Costantino v. State, Docket No. 45635 (Order of Affirmance, September 26, 2005).

<sup>6</sup>Costantino v. State, Docket No. 47414 (Order of Affirmance, September 20, 2006).

<sup>7</sup>Costantino v. State, Docket No. 47986 (Order of Affirmance, January 8, 2007).

district court should reconsider his sentence because a co-defendant received a much lighter sentence. Appellant further claimed that the district court should consider additional facts which would warrant the granting of a lesser sentence, such as an affidavit from his codefendant stating that appellant did not commit the murder.

“[A] motion to modify a sentence is limited in scope to sentences based on mistaken assumptions about a defendant's criminal record which work to the defendant's extreme detriment.”<sup>8</sup> 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.<sup>9</sup> “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.’”<sup>10</sup> A motion to modify or correct a sentence that raises issues outside the very narrow scope of issues permissible may be summarily denied.<sup>11</sup>

Our review of the record on appeal reveals that appellant's claims fell outside the narrow scope of claims permissible in a motion to modify sentence. Appellant failed to demonstrate that the district court relied upon a mistaken assumption about his criminal record that worked

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<sup>8</sup>Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

<sup>9</sup>Id.

<sup>10</sup>Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

<sup>11</sup>Id. at 708-09 n.2, 918 P.2d at 325 n.2.

to his extreme detriment. As a separate and independent ground for affirming the district court's denial of appellant's motion, we note that this court concluded that the 2007 amendments to NRS 193.165 did not apply retroactively, but rather applied based on the date the offense was committed.<sup>12</sup>

Further, appellant's claim concerning the amendment to NRS 193.165 fell outside of the scope of claims permissible in a motion to correct an illegal sentence. Appellant's sentence was facially legal, and appellant failed to demonstrate that the district court was not a competent court of jurisdiction.<sup>13</sup> Therefore, the district court did not err in denying appellant's motion.

In addition, this court has held that a motion to withdraw a guilty plea is subject to the equitable doctrine of laches.<sup>14</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>15</sup> Failure to identify all grounds for relief in a prior proceeding

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<sup>12</sup>State v. Dist. Ct. (Pullin), 124 Nev. \_\_\_, \_\_\_, 188 P.3d 1079, 1080 (2008).

<sup>13</sup>See NRS 200.030(2).

<sup>14</sup>Hart v. State, 116 Nev. 558, 563, 1 P.3d 969, 972 (2000).

<sup>15</sup>Id. at 563-64, 1 P.3d at 972.

seeking relief from a judgment of conviction should weigh against consideration of a successive motion.<sup>16</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 11 years after his judgment of conviction. 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. Therefore, the district court did not err in denying this motion.

Docket No. 52048

On April 21, 2008, appellant filed a fifth 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 August 15, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that Assembly Bill 63, a proposed revision of NRS 193.165, should allow the district court to consider additional evidence which would lessen his sentence and that the difference in sentences between appellant and a co-defendant violate equal protection and the "excessive punishment clause" of the U.S. and Nevada constitutions.

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<sup>16</sup>Id. at 564, 1 P.3d at 972.

Appellant filed his petition more than 11 years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.<sup>17</sup> Moreover, appellant's petition was successive because he had previously filed several post-conviction petitions for writs of habeas corpus.<sup>18</sup> Further, appellant's petition constituted an abuse of the writ as his claims were new and different from those claims raised in his previous post-conviction petition for writ of habeas corpus.<sup>19</sup> Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>20</sup> Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.<sup>21</sup>

In an attempt to excuse his procedural defects, appellant argued that he was unable to raise his claims in a previous petition because NRS 193.165 was amended in 2007 and this petition was his first opportunity to litigate his claims based upon the amended statute.

Based upon our review of the record on appeal, we conclude that the district court did not err in dismissing appellant's petition as procedurally defective. Appellant failed to demonstrate that an

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<sup>17</sup>See NRS 34.726(1).

<sup>18</sup>See NRS 34.810(2).

<sup>19</sup>See *id.*

<sup>20</sup>See NRS 34.726(1); NRS 34.810(3).

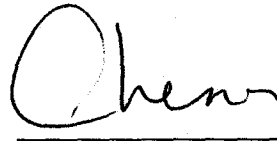
<sup>21</sup>See NRS 34.800(2).

impediment external to the defense excused the procedural defects.<sup>22</sup> The 2007 amendment to NRS 193.165 does not apply retroactively.<sup>23</sup> Finally, appellant failed to overcome the presumption of prejudice to the State. Therefore, we affirm the order of the district court dismissing the petition as procedurally barred and barred by laches.

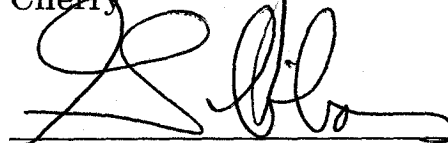
Conclusion

Having reviewed the records 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>24</sup> Accordingly, we

ORDER the judgments of the district court AFFIRMED.

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

Cherry

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

Gibbons

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

Saitta

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<sup>22</sup>See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994).

<sup>23</sup>See State v. Dist. Ct. (Pullin), 124 Nev. \_\_\_, \_\_\_, 188 P.3d 1079, 1080 (2008).

<sup>24</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).



cc: Hon. Stewart L. Bell, District Judge  
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Eighth District Court Clerk