IN THE SUPREME COURT OF THE STATE OF NEVADA

THEODORE R. BURKETT, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 32273
THEODORE R. BURKETT, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 34706
THEODORE R. BURKETT, Appellant, vs. WARDEN, NEVADA STATE PRISON, JOHN IGNACIO, Respondent.	No. 35637

FILED

AUG 16 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEALS

These are proper person appeals from orders of the district court denying appellant's post-conviction petitions for writs of habeas corpus. We elect to consolidate these appeals for disposition. See NRAP 3(b).

On December 2, 1981, the district court convicted appellant, pursuant to a guilty plea, of one count of first degree kidnapping and one count of sexual assault. The district court sentenced appellant to serve two concurrent terms of life

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in the Nevada State Prison with the possibility of parole. Appellant did not file a direct appeal.

In 1985, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court.[1] The district court denied appellant's petition, and this court dismissed appellant's subsequent appeal. Burkett v. Director, Docket No. 21850 (Order Dismissing Appeal, June 27, 1991).

On June 16, 1997, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On October 14, 1997, the district court denied appellant's petition. Appellant's appeal is docketed in this court as Docket No. 32273.

On July 2, 1999, appellant filed a proper person petition for a writ of habeas corpus in the district court. The State opposed the petition. On August 6, 1999, the district court denied appellant's petition. Appellant's appeal is docketed in this court as Docket No. 34706.

On September 15, 1999, appellant filed a proper person petition for a writ of habeas corpus in the district court.[2] The State opposed the petition. On February 7, 2000, the district court denied appellant's petition. Appellant's appeal is docketed in this court as Docket No. 35637.

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[1]Appellant claimed that he filed this petition in the First Judicial District Court on October 7, 1985. Appellant claimed that this petition was transferred to the Seventh Judicial District Court on August 27, 1990.

[2]Appellant filed his petition in the Eighth Judicial District Court. On November 16, 1999, the Eighth Judicial District Court transferred the matter to the First Judicial District Court.

Docket No. 32273

Appellant's June 16, 1997 petition, challenging the validity of his conviction and sentence, was filed more than sixteen and one-half years after entry of the judgment of conviction. Thus, appellant's petition was untimely. See NRS 34.726(1). Therefore, appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice. See NRS 34.726(1).

In an attempt to excuse his delay, appellant argued that he was never informed by his attorney or the district court of his right to appeal the conviction. Appellant argued that his attorney never informed him of post-conviction remedies. Finally, he noted that he was only recently notified of this court's decision dismissing his appeal from his first post-conviction petition. Based upon our review of the record, we conclude that the district court did not err in determining that appellant's petition was procedurally barred because appellant failed to demonstrate adequate cause to excuse the delay in filing his petition. See Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

Docket Nos. 34706 & 35637

In his July 2, 1999, and September 15, 1999 petitions, appellant first argued that his due process rights were violated because the parole board applied NRS 213.1214(2), a 1997 legislative enactment, which burdened his ability to become eligible for parole.[3] Appellant stated that he had been

[3]NRS 213.1214(2), effective October 1, 1997, provides that "[a] prisoner who has been certified . . . and who returns for any reason to the custody of the department of prisons may not be paroled unless a panel recertifies him."

certified as eligible for parole by a psychiatric panel in 1991 pursuant to former NRS 200.375.[4] Appellant stated that he had been paroled in 1991 and returned to prison in 1993 for parole violations. In 1994, appellant stated that he had been released on parole without any recertification. In 1996, appellant stated that he had been returned to prison for parole violations and released again without any recertification. Finally, appellant noted that he was returned to prison again in 1998 for parole violations. On April 16, 1999, the psychiatric panel refused recertification, and on May 18, 1999, the parole board denied appellant parole because the psychiatric panel refused his recertification. Appellant argued that the parole board improperly applied NRS 213.1214(2) to require him to be recertified by the psychiatric panel before he could be considered eligible for parole and that this amounted to an ex post facto violation. Appellant argued that at the time his crime was committed and at the time of his first certification,

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[4]NRS 200.375 was repealed effective October 1, 1997, see 1997 Nev. Stat., ch. 524, § 22, at 2513, and codified under NRS 213.1214. In 1991, at the time appellant was first certified, former NRS 200.375 provided:

> (1) No person convicted of sexual assault may be paroled unless a board consisting of:
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> (a) The administrator of the mental hygiene and mental retardation division of the department of human resources;
>
> (b) The director of the department of prisons; and
>
> (c) A physician authorized to practice medicine in Nevada who is also a qualified psychiatrist,
>
> certifies that the person so convicted was under observation while confined in an institution of the department of prisons and is not a menace to the health, safety or morals of others.

1983 Nev. Stat., ch. 55, § 1, at 205. Former NRS 200.375 was originally enacted in 1967. See 1967 Nev. Stat., ch. 21, § 58, at 470.

former NRS 200.375 did not explicitly provide for recertification. Rather, appellant believed that his certification should remain valid indefinitely, absent new information about the offender's mental or personal history and that the denial of recertification was not based upon new information.

Based upon our review of the record on appeal, we conclude that the district courts did not err in denying these claims. Parole is an act of grace; a prisoner has no constitutional right to parole. See NRS 213.10705; Niergarth v. Warden, 105 Nev. 26, 768 P.2d 882 (1989). The subject of parole is within the legislative authority. See Pinana v. State, 76 Nev. 274, 283, 352 P.2d 824, 829 (1960). NRS 213.1214(2) requires recertification of a prisoner who, after being certified, is returned to the custody of the department of prisons. Thus, the parole board did not err in applying NRS 213.1214(2) to appellant. Appellant has no right to certification or continued certification by the psychiatric panel. See NRS 213.1214(4). Appellant's belief that his certification was valid in perpetuity was in error. Further, there is no ex post facto violation when the law merely alters the method of imposing a penalty and does not change the quantum of punishment. See Land v. Lawrence, 815 F. Supp. 1351 (D. Nev. 1993).

Next, in his July 2, 1999, appellant argued that his counsel was ineffective for failing to advise him of the substantial consequences of his plea. He argued that his trial counsel failed to inform him that the certification requirement could be changed by the legislature. Appellant argued that if he had been informed of this possibility by his counsel or by the

district court or district attorney that he would not have entered his guilty plea. Appellant's challenge to the validity of his conviction and sentence was untimely. See NRS 34.726(1). Appellant failed to demonstrate cause to excuse his procedural defects. See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). Therefore, this claim was procedurally defaulted.

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. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976). Accordingly, we

ORDER these appeals dismissed.[5]

Maupin, J.

Shearing, J.

Becker, J.

cc: Hon. Michael L. Douglas, District Judge
Hon. Michael R. Griffin, District Judge
Attorney General
Clark County District Attorney
Theodore R. Burkett
Clark County Clerk
Carson City Clerk

[5]We have considered all proper person documents filed or received in these matters, and we conclude that the relief requested is not warranted.