

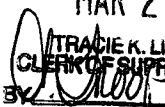
IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN ANTHONY STONE A/K/A
KEVIN ANTHONY ROBINSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52406

FILED

MAR 26 2009

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 denying a "first amendment petition or writ of habeas corpus." Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

On December 20, 2000, the district court convicted appellant, pursuant to a jury verdict, of one count of attempted murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of 96 to 240 months in the Nevada State Prison. This court affirmed the judgment of conviction on direct appeal. Stone v. State, Docket No. 37276 (Order of Affirmance, March 23, 2001). The remittitur issued on April 18, 2001.

On August 31, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court denied the petition. This court affirmed the district court's order on appeal. Stone v. State, Docket No. 38610 (Order of Affirmance, November 6, 2002).

On August 21, 2008, appellant filed a “first amendment petition or 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 August 25, 2008, the district court denied appellant’s petition. This appeal followed.

In his petition, appellant claimed: (1) his trial counsel was ineffective for failing to challenge the reasonable doubt jury instruction; (2) his trial counsel was ineffective for failing to object to the fact that “abandoned and malignant heart” was not defined in the jury instructions; (3) his trial counsel was ineffective for failing to object to a jury instruction requiring the jury to consider attempted murder before considering lesser included offenses; and (4) his appellate counsel was ineffective on direct appeal.

Because appellant challenged the validity of his judgment of conviction, appellant’s petition was properly construed as a post-conviction petition for a writ of habeas corpus. See NRS 34.724(2)(b). Appellant filed his petition more than seven years after this court issued the remittitur from his direct appeal. Thus, appellant’s petition was untimely filed. See NRS 34.726(1). Moreover, appellant’s petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus. See NRS 34.810(1)(b)(2). Appellant’s petition was also an abuse of the writ because he raised new and different claims for relief. NRS 34.810(2). Appellant’s petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). A petitioner may be entitled to review of defaulted claims if

failure to review the claims would result in a fundamental miscarriage of justice. Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence of the crime—"it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation." Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

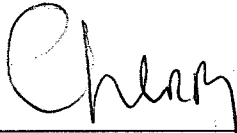
Appellant first claimed that procedural time bars are not consistently applied, and thus, they should not apply in the instant case. This claim is patently without merit. The procedural bars set forth in NRS chapter 34 apply to this petition. Appellant did not otherwise attempt to demonstrate good cause for the delay or the failure to raise the claims in the first petition.


Next, appellant claimed that he was actually innocent. Appellant provided no cogent argument as to why he was actually innocent. To the extent that he claimed that he was actually innocent for the grounds set forth earlier, appellant failed to demonstrate that it was more likely than not that no reasonable juror would have convicted him. Therefore, we affirm the order of the district court denying the petition as procedurally barred and without good cause.

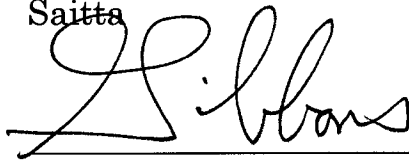
Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that

briefing and oral argument are unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Brent T. Adams, District Judge
Kevin Anthony Stone
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹We 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.