

IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL SCOTT KLEIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52546

FILED

AUG 25 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 post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

On April 4, 1990, the district court convicted appellant, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon. The district court sentenced appellant to a term in the Nevada State Prison of life without the possibility of parole for murder, plus an equal and consecutive sentence for the deadly weapon enhancement, and a term of 15 years for robbery, plus an equal and consecutive sentence for the deadly weapon enhancement, the latter terms for robbery to run concurrently with the terms imposed for murder. This court dismissed appellant's direct appeal. Klein v. State, Docket No. 21223 (Order Dismissing Appeal, October 24, 1991). The remittitur issued on December 3, 1991.

On November 3, 1992, appellant filed a proper person petition for post-conviction relief in the district court. The State opposed the petition. The district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On February 2, 1993, the district court denied the petition. This court dismissed appellant's subsequent appeal. Klein v. State, Docket No. 24410 (Order Dismissing Appeal, March 27, 1997).

On April 16, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. 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 21, 2001, the district court denied the petition. This court dismissed the appeal because appellant voluntarily withdrew his appeal of the district court's order denying the petition. Klein v. State, Docket No. 38478 (Order Dismissing Appeal and Vacating Prior Order Directing Transmission of Record on Appeal in Docket No. 38478, November 16, 2001).

On July 10, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition as procedurally barred and 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 September 25, 2008, the district court denied the petition. This appeal followed.

In his petition, appellant claimed: (1) that he was entitled to the benefit of the changes in NRS 193.165, altering the sentences

available for the deadly weapon enhancements; (2) the use of a deadly weapon was not found by a jury; and (3) the jury instruction concerning the deadly weapon enhancement violated the ruling in Milton v. State, 111 Nev. 1487, 908 P.2d 684 (1995).

Appellant filed his petition more than 16 years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed. See NRS 34.726(1).¹ Moreover, appellant's petition was successive because he had previously filed two post-conviction petitions for relief. See NRS 34.810(1)(b); NRS 34.810(2). Further, appellant's petition constituted an abuse of the writ because some of his claims were new and different from those claims raised in his previous post-conviction petitions. See 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). Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

To excuse the procedural defects, appellant claimed that the changes to NRS 193.165 provided good cause to seek an alteration of his sentences for the deadly weapon enhancements.² He further claimed that

¹We note that the petition was untimely from the effective date of NRS 34.726. See 1991 Nev. Stat., ch. 44, § 5, at 75-6.

²At the time of appellant's offense, NRS 193.165 (deadly weapon enhancement) provided for an equal and consecutive sentence. 1991 Nev. Stat., ch. 403, § 6, at 1059. In 2007, the legislature amended NRS
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good cause for the delay arose out of the fact that the jury did not determine the facts regarding the deadly weapon enhancement.

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 barred. Appellant failed to demonstrate that an impediment external to the defense excused the procedural defects. 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). Appellant's petition is subject to the procedural bars in NRS 34.726(1), NRS 34.810(1)(b), and NRS 34.810(2). 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. State v. Dist. Ct. (Pullin), 124 Nev. ___, 188, ___, ___, P.3d 1079, 1080, 1083-84 (2008). Thus, the 2007 amendments do not provide good cause in this case. In addition, appellant's claim that the jury did not determine the facts of the deadly weapon enhancement was belied by the record on appeal and appellant does not provide any information as to why he could not have raised this claim in a timely petition. Appellant's reliance on Cunningham v. California, 549 U.S. 270 (2007) is misplaced because the jury did determine the facts of the deadly weapon enhancement. Further, appellant failed to explain the thirteen

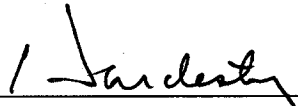
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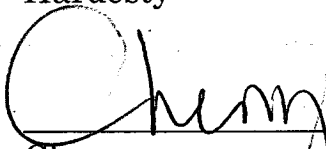
193.165, providing for a term of 1 to 20 years. 2007 Nev. Stat., ch. 525, § 13, at 3188-89.

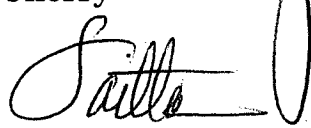
year delay in raising claims arising from the ruling in Milton v. State, 111 Nev. 1487, 908 P.2d 684 (1995). Finally, appellant failed to overcome the presumption of prejudice to the State. Therefore, we affirm the order of the district court denying the petition as procedurally barred.

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.³


_____, C.J.
Hardesty


_____, J.
Cherry


_____, J.
Saitta

³We 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.

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Paul Scott Klein
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk