


IN THE SUPREME COURT OF THE STATE OF NEVADA

CURTIS JEROME PETTES A/K/A
CURTIS EUGENE SHUFORD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52561

FILED

JUL 09 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; Donald M. Mosley, Judge.

On September 16, 1986, the district court convicted appellant, pursuant to a bench trial, of one count each of attempted robbery with the use of a deadly weapon and battery with the use of a deadly weapon. The district court sentenced appellant to serve a term in the Nevada State Prison of seven and one-half years for attempted robbery, plus an equal and consecutive term for the deadly weapon enhancement and a consecutive term of ten years for battery with the use of a deadly weapon. All terms were to run consecutive to the sentence imposed in district court case number C71647. This court dismissed appellant's appeal from his judgment of conviction and sentence. Shuford v. State, Docket No. 17709 (Order Dismissing Appeal, September 23, 1987). The remittitur issued on October 13, 1987. Appellant unsuccessfully sought post-conviction relief. Pettes v. State, Docket No. 21024 (Order Dismissing Appeal, June 29, 1990); Pettes v. State, Docket No. 47111 (Order of Affirmance, August 22, 2006).

On June 30, 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 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 September 26, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that the district court did not have jurisdiction to convict and sentence him because he was never arraigned on an amended indictment that was filed by the State. Appellant claimed that he was charged with attempted murder, but improperly convicted on the lesser included charge of battery with the use of a deadly weapon. Appellant claimed that battery with the use of a deadly weapon was not a proper lesser included offense of attempted murder with the use of a deadly weapon.

Appellant filed his petition more than 20 years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed. See NRS 34.726(1); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).¹ Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas. See NRS 34.810(2). 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 a writ of

¹We note that the petition was also untimely from the January 1, 1993 effective date of NRS 34.726. See 1991 Nev. Stat., ch. 44, § 5, at 75-6.

habeas corpus. See id. Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); 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).

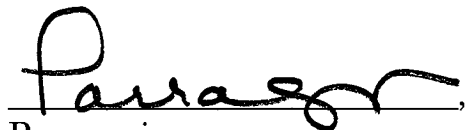
To excuse his procedural defects, appellant claimed that he only recently discovered that the State filed an amended information, thus he could not have raised this claim before. Appellant further claimed that his jurisdictional claim could be raised at any time. Appellant did not attempt to demonstrate good cause for his failure to raise the claim that battery with the use of a deadly weapon was not a lesser included offense of attempted murder with the use of a deadly weapon.

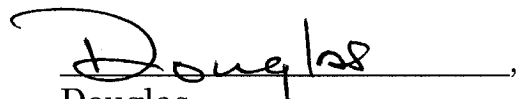
Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's petition as procedurally defective. Appellant failed to demonstrate that an impediment external to the defense excused the procedural defects. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). "An impediment external to the defense may be demonstrated by a showing 'that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable.'" Hathaway, 119 Nev. at 252, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986) (quotations and citations omitted)). As the amended information was filed in the district court on November 20, 1985, appellant failed to demonstrate that this claim was not reasonably available prior to the filing of the instant petition. Even assuming, without deciding, that a jurisdictional challenge can be raised in an untimely petition and this satisfies the good cause requirement, appellant

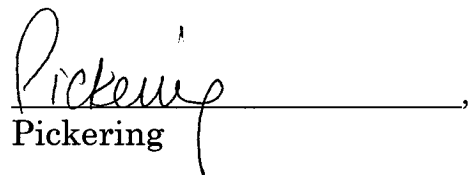
failed to demonstrate any prejudice by the dismissal of his petition. Appellant's claim that the district court was without jurisdiction to convict and sentence him because he was never arraigned on the amended indictment is patently without merit. Appellant was arraigned on November 25, 1985, five days after the filing of the amended indictment. Appellant previously pursued a post-conviction petition for a writ of habeas corpus and appellant failed to demonstrate that he could not have raised these claims in that petition. See Hathaway, 119 Nev. at 252-53, 71 P.3d at 506. 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 and barred by laches.

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.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Donald M. Mosley, District Judge
Curtis Jerome Pettes
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk