

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 52565

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

No. 52566

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

No. 52596

FILED

MAY 01 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Docket No. 52565 is a proper person appeal from an order of the district court denying a motion to modify sentence. Docket No. 52566 is a proper person appeal from an order of the district court denying a motion to amend the judgment of conviction. Docket No. 52596 is a proper person appeal from an order of the district court dismissing 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. See NRAP 3(b).

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 term of 25 years in the Nevada State Prison plus an equal and consecutive term for the deadly weapon enhancement. In addition, appellant was given credit for 94 days of time served. This court dismissed appellant's appeal from his judgment of conviction. Costantino v. State, Docket No. 28854 (Order Dismissing Appeal, February 26, 1997). 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 subsequent appeals. Costantino v. State, Docket Nos. 30734, 31276 (Order Dismissing Appeals, December 10, 1999).

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. Costantino v. State, Docket No. 42609 (Order of Affirmance, August 23, 2004).

On May 20, 2005, appellant filed a proper person motion to correct an illegal 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. Costantino v. State, Docket No. 45635 (Order of Affirmance, September 26, 2005).

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. Costantino v. State, Docket No. 47414 (Order of Affirmance, September 20, 2006).

On June 2, 2006, appellant filed a fourth proper person post-conviction petition for a writ of habeas corpus in the district court. 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. Costantino v. State, Docket No. 47986 (Order of Affirmance, January 8, 2007).

On May 2, 2008, appellant filed a "motion for modification/correction/withdrawal of guilty plea" in the district court. On April 21, 2008, appellant filed a fifth proper person post-conviction petition for a writ of habeas corpus in the district court. On May 30, 2008, the district court denied appellant's motion and on August 15, 2008 denied the petition. This court affirmed the orders of the district court on appeal. Costantino v. State, Docket Nos. 51868 and 52048 (Order of Affirmance, January 8, 2009).

Docket No. 52565

On August 22, 2008, appellant filed a motion to modify sentence in the district court. The State opposed the motion. On September 12, 2008, the district court denied the motion. This appeal followed.

In his motion, appellant claimed that he recently discovered an inaccuracy in the Presentence Investigation Report that caused him to be given an incorrect amount of credit for time served.

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.” Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). A motion to modify a sentence that raises issues outside the very narrow scope of issues permissible may be summarily denied. Id. at 708-09 n.2, 918 P.2d at 325 n.2.

Our review of the record on appeal reveals that appellant’s claim fell outside the narrow scope of claims permissible in a motion to modify a sentence. Appellant failed to demonstrate that the district court relied upon a mistaken assumption about his criminal record that worked to his extreme detriment. Therefore, the district court did not err in denying this motion.

Docket No. 52566

On August 19, 2008, appellant filed a motion for an amended judgment of conviction. The State opposed the motion. On September 10, 2008, the district court denied the motion. This appeal followed.

In his motion, appellant claimed that his credit for time served was incorrectly calculated because the district court relied solely on the representations made by the State, rather than documented evidence about his time served.

This court has held that a claim for credit for time served is a challenge to the validity of the judgment of conviction and sentence that must be raised on direct appeal or in a timely post-conviction petition for a writ of habeas corpus. See NRS 34.724(2)(c); Griffin v. State, 122 Nev. 737, 739, 137 P.3d 1165, 1166 (2006). Thus, appellant's motion should have been treated as a post-conviction petition for a writ of habeas corpus. Appellant filed his motion almost 12 years after entry of the original judgment of conviction, and almost two years after this court's decision in Griffin v. State. Thus, appellant's motion was untimely filed. See NRS 34.726(1). Appellant's motion was procedurally barred absent a demonstration of cause for the delay and undue prejudice. See id.

In an attempt to demonstrate cause for the delay, appellant argued that he only recently discovered the error in calculation of credits.

Based upon our review of the record on appeal, we conclude that the motion was procedurally barred and without good cause. Thus, the district court did not err in denying the motion. Appellant's claim that he recently discovered the error in calculation of credits is belied by the record as appellant raised this issue in a previous petition for a writ of habeas corpus. Thus, appellant failed to demonstrate that an impediment external to the defense prevented him from filing his claim for credit for time served within one year from the judgment of conviction setting forth

the credit for time served or within one year from the decision in Griffin v. State. 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). Therefore, the district court did not err in denying this motion.

Docket No. 52596

On August 6, 2008, appellant filed a sixth post-conviction petition for a writ of habeas corpus. 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 October 27, 2008, the district court dismissed the petition. This appeal followed.

In his petition, appellant claimed as follows: his trial counsel conspired with the State to convict him; he was a victim of vindictive prosecution; his trial counsel did not sufficiently explain sentencing to him and gave him misleading advice; the district court's rulings caused a conflict of interest between him and his trial counsel; his trial counsel failed to interview important witnesses; his codefendants received lesser sentences; his plea was invalid because he was hypoglycemic, confused about concurrent versus consecutive sentences, and the plea canvass was insufficient; his appellate counsel was ineffective for failing to file a brief raising meritorious issues, failing to file a motion to withdraw, and failing to notify appellant that he had a right to file a supplemental brief on his own behalf; the Nevada Supreme Court's order dismissing his direct appeal was vague and ambiguous; the State court's errors prejudiced him in his federal appeals; he was not given sufficient notice of an evidentiary

hearing for one of his previous post-conviction petitions; a hearing for his 1997 post-conviction petition for a writ of habeas corpus was held without his presence; his federal post-conviction counsel did not subpoena witnesses for an evidentiary hearing; the United States District Court erred by failing to address defective proceedings in the Nevada state courts; and he had been held without access to legal materials and the mail.

Appellant filed his petition almost 11 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 several post-conviction petitions for writs of habeas corpus. See NRS 34.810(1)(b); NRS 34.810(2). Further, appellant's petition constituted an abuse of the writ as some of his claims were new and different from those claims raised in his previous post-conviction petitions for a writ of habeas corpus. 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(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).

In an attempt to excuse his procedural defects, appellant claimed that he had not had the opportunity to review his court file in a timely manner, he was not an attorney, and he had a limited education.

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

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). As appellant has previously filed numerous petitions and motions, he failed to demonstrate that he did not have an opportunity to review his court file and litigate potential claims prior to the instant petition. A limited education is not good cause. See generally Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that petitioner's claim of organic brain damage, borderline mental retardation and reliance on assistance of inmate law clerk unschooled in the law did not constitute good cause for the filing of a successive post-conviction petition). Finally, appellant failed to overcome the presumption of prejudice to the State. In addition, a post-conviction petition for a writ of habeas corpus is not the proper vehicle to raise challenges to conditions of confinement. Bowen v. Warden, 100 Nev. 489, 686 P.2d 250 (1984). Therefore, we affirm the order of the district court dismissing the petition as procedurally barred and barred by laches.

Appellant is cautioned that an inmate may have statutory good time and work time credit forfeited if the inmate, in a civil action, submits a pleading or other document to the court that:

- (1) Contains a claim or defense that is included for an improper purpose, including, without limitation, for the purpose of harassing his opponent, causing unnecessary delay in the litigation or increasing the cost of the litigation;
- (2) Contains a claim, defense or other argument which is not warranted by existing law or by a reasonable argument for a change in

existing law or a change in the interpretation of existing law; or

(3) Contains allegations or information presented as fact for which evidentiary support is not available or is not likely to be discovered after further investigation.

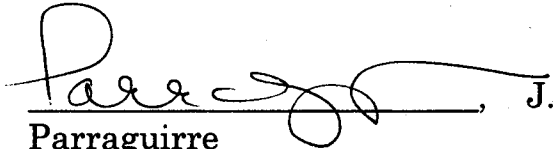
See NRS 209.451(1)(d).

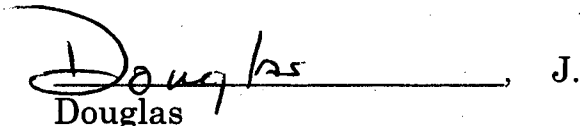
A post-conviction petition for a writ of habeas corpus is a civil action for the purposes of NRS 209.451. See NRS 209.451(5).

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 Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). Accordingly, we

ORDER the judgments of the district court AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Eighth Judicial District Court Dept. 7, District Judge
Derek A. Costantino
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk