

IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMY LENVILLE DUNCAN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52689

**FILED**

**AUG 25 2009**

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

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 February 2, 1996, the district court convicted appellant, pursuant to a guilty plea, of two counts of sexual assault and one count of first-degree kidnapping. The district court sentenced appellant to serve three consecutive terms of life in the Nevada State Prison with the possibility of parole.

On December 19, 1996, appellant filed a proper person motion in the district court entitled, "motion for relief from judgment under FRCP 60(b)(1)(3)." The district court clerk transmitted the motion to this court, and this court docketed the motion as a notice of appeal. Thereafter, this court dismissed the appeal concluding that, to the extent the document could be considered an appeal from the judgment of conviction, it was untimely. Duncan v. State, Docket No. 29753 (Order Dismissing Appeal, March 14, 1997).

On April 6, 1998, 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 NRS 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On July 17, 1998, the district court denied appellant's petition, ruling that it was procedurally barred. This court affirmed the order of the district court on appeal. Duncan v. State, Docket No. 32800 (Order of Affirmance, October 31, 2000).

On February 15, 2002, appellant filed a motion to withdraw his guilty plea. The State opposed the motion. On March 21, 2002, the district court denied appellant's motion to withdraw his guilty plea. This court affirmed the order of the district court on appeal. Duncan v. State, Docket No. 39714 (Order of Affirmance, March 5, 2003).

On July 1, 2005, appellant filed a second, untimely 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 October 4, 2005, the district court denied appellant's petition. On appeal, this court affirmed the order of the district court. Duncan v. State, Docket No. 46344 (Order of Affirmance, February 17, 2006).

On August 5, 2008, appellant filed a third, untimely 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 October 13, 2008, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that his trial counsel was ineffective for failing to file a direct appeal, that the State lied about the

results of a DNA test, that his trial counsel was ineffective for failing to investigate and object to the DNA test results, that his trial counsel was ineffective for failing to put on any defense to the charges, that his trial counsel was ineffective for refusing to aid him with a motion to withdraw guilty plea, and cumulative error.

Appellant filed his petition more than 12 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 relief. 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. 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 his procedural defects, appellant argued that his counsel's failure to file a direct appeal and the fact that there had not been an evidentiary hearing for his post-conviction claims provided good cause to consider his claims on the merits.

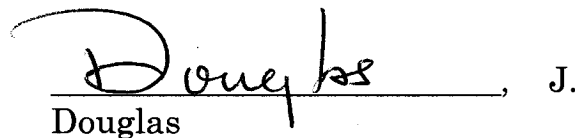
Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's petition as procedurally barred. Appellant failed to demonstrate that an impediment external to the defense excused the procedural defects. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). Appellant's petition is subject to

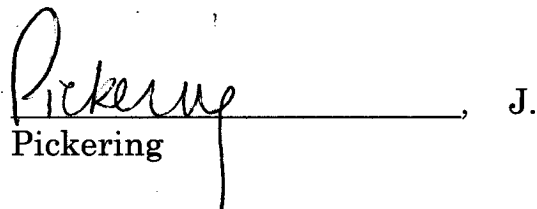
the procedural bars in NRS 34.726(1), NRS 34.810(1)(b), and NRS 34.810(2). Appellant argued in a previous untimely post-conviction petition for a writ of habeas corpus that the failure of his trial counsel to file a direct appeal should provide good cause to excuse the procedural defects and this court rejected that claim. The doctrine of the law of case prevents further litigation of this issue and cannot be avoided by a more detailed and precisely focused argument. See Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Further, appellant failed to demonstrate he was entitled to an evidentiary hearing. NRS 34.770; Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). 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.

 J.  
Parraguirre

 J.  
Douglas

 J.  
Pickering

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