

IN THE SUPREME COURT OF THE STATE OF NEVADA

ARMOND LEWIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53028

FILED

JUL 31 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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; Michelle Leavitt, Judge.

On December 12, 2003, the district court convicted appellant, pursuant to a guilty plea, of three counts of attempted murder with the use of a deadly weapon. The district court sentenced appellant to serve a total of two consecutive terms of 24 to 156 months in the Nevada State Prison. This court dismissed the direct appeal for lack of jurisdiction because the notice of appeal was untimely filed. Lewis v. State, Docket No. 43092 (Order Dismissing Appeal, April 26, 2004).

On October 12, 2004, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On March 14, 2005, the district court denied the petition. No appeal was taken from this order.

On August 21, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a response. 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 January 26, 2009, the district court denied appellant's petition. This appeal followed.

In his petition, appellant claimed that the sentences for the deadly weapon enhancements were illegal because the information set forth the deadly weapon enhancements in the same counts as the primary offenses. Appellant further argued that attempted murder could not be enhanced. Appellant claimed that his trial counsel was ineffective in his representation of appellant.

Appellant filed his petition more than four and one-half years after entry of the judgment of conviction. 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 challenging imposition of the deadly weapon enhancement and raised some of the same claims challenging the deadly weapon enhancement and some new claims challenging the deadly weapon enhancement. 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).

It appears that appellant claimed that the merits of his claim provided good cause for the delay and that this court's decision in Dolby v. State, 106 Nev. 63, 67, 787 P.2d 388, 390 (1990), recognizing that the elder victim enhancement could not apply to the offense of attempted murder, provided good cause for the delay.

Based upon our review of the record on appeal, we conclude that the district court did not err in denying the petition as procedurally

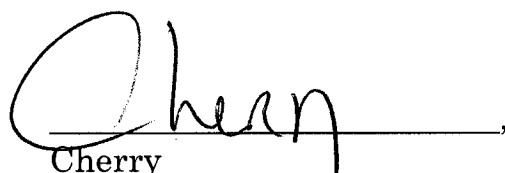
barred. Appellant's apparent argument that the merits of the claims provide good cause is circular in nature and patently without merit. Appellant was required to demonstrate why he should be permitted to raise these claims in an untimely, second habeas corpus petition. This appellant did not do. The claims raised in the 2008 petition were reasonably available at the time he filed his first petition. Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003). Although new case law may be good cause in certain circumstances, appellant did not demonstrate that any such circumstances existed here. Id. Dolby was not a new decision as it was decided eighteen years before appellant filed the 2008 petition.¹ Therefore, we affirm the order of the district court denying the petition as procedurally barred and without good cause.²

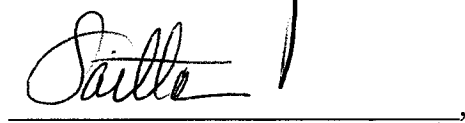
¹Further, appellant's reliance upon Dolby is misplaced as this court's recognition that the offense of attempted murder could not be enhanced pursuant to NRS 193.167 depended upon the version of NRS 193.167 in effect at the time Dolby committed his offense and that version did not specifically include the offense of attempted murder. Compare 1989 Nev. Stat., ch. 778, § 1 at 1850 (setting forth a list of specific offenses that do not include attempted murder) to 1999 Nev. Stat., ch. 18, § 1, at 42 (amending NRS 193.167 to include attempted murder). Notably, NRS 193.165, the deadly weapon enhancement, has never had any such limitation on the offense of attempted murder.

²To the extent that appellant claimed that his sentence was illegal, appellant failed to demonstrate that his sentence was facially illegal or that the district court was without jurisdiction. Edwards v. State, 112 Nev. 704, 918 P.2d 321 (1996); see also NRS 200.030; NRS 193.330; 1995 Nev. Stat., ch. 455, § 1, at 1431 (NRS 193.165).

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

ORDER the judgment of the district court AFFIRMED.

 _____, J.
Cherry

 _____, J.
Saitta

 _____, J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Armond Lewis
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk