

IN THE SUPREME COURT OF THE STATE OF NEVADA

LEWIS W. STEWART,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49360

LEWIS STEWART A/K/A LEWIS  
WILLIAM VELAZQUEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53215 ✓

**FILED**

FEB 03 2010

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

ORDER OF AFFIRMANCE

These are appeals from an order of the district court denying a motion to correct an illegal sentence and an order of the district court denying an untimely post-conviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, and Elizabeth Goff Gonzalez, Judges.

Docket No. 49360

Appellant provides no specific, cogent argument regarding the denial of the motion to correct an illegal sentence filed in the district court on March 21, 2007. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6

<sup>1</sup>Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in these appeals.

(1987). Therefore, we conclude appellant fails to demonstrate that the district court erred in denying his motion. Further, the claim raised in the motion—that he was actually innocent of first-degree kidnapping because he the lacked specific intent to commit the crime—fell outside the very narrow scope of claims permissible in a motion to correct an illegal sentence. Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). Appellant’s sentence was facially legal, see NRS 200.380, NRS 199.480, NRS 200.310, NRS 200.320, 1995 Nev. Stat., ch. 443, § 124, at 1215, 1995 Nev. Stat., ch. 455, § 1, at 1431, 1999 Nev. Stat., ch. 18, § 1, at 42-43, 1999 Nev. Stat., ch. 57, § 2, at 141-42, and appellant failed to demonstrate that the district court was not a court of competent jurisdiction. See Edwards, 112 Nev. at 708, 918 P.2d at 324. Therefore, we affirm the district court’s denial of the motion.

Docket No. 53215

Appellant filed his petition on October 30, 2008, approximately 8 years after this court issued the remittitur from his direct appeal on January 12, 2001. Thus, appellant’s petition was untimely filed. See NRS 34.726(1). Moreover, appellant’s petition was successive because he had previously filed a petition for a writ of habeas corpus which was decided on the merits and appellant’s claims are new and different from those previously raised and constitute an abuse of the writ.<sup>2</sup> See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant’s petition was procedurally barred absent a demonstration of good cause and actual prejudice. See

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<sup>2</sup>See Stewart v. State, Docket No. 39020 (Order of Affirmance, November 6, 2002); Stewart v. State, Docket No. 48275 (Order of Affirmance, March 8, 2007).

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). A petitioner may be entitled to review of defaulted claims if failure to review would result in a fundamental miscarriage of justice. Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

In an attempt to excuse his procedural defects, appellant argued that his claims were based on this court's decision in Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002), and Bolden v. State, 121 Nev. 908, 124 P.3d 191 (2005) overruled on other grounds by Cortinas v. State, 124 Nev. \_\_\_, 195 P.3d 315 (2008), cert. denied, \_\_\_ U.S. \_\_\_, 130 S. Ct. 416 (2009), both of which were decided after 2001, and could not have been filed within the statutory time period for the first petition.<sup>3</sup> These cases were decided in 2002 and 2005, respectively. Thus, even if the court were to conclude that these decisions provided good cause for a part of appellant's delay in filing, appellant failed to demonstrate good cause for the entire length of his delay. See NRS 34.726(1).

Appellant further claimed that it would be a fundamental miscarriage of justice if he is not given relief because he is actually innocent of first-degree kidnapping based on the holdings in Sharma and Bolden. Appellant failed to demonstrate that no reasonable juror would

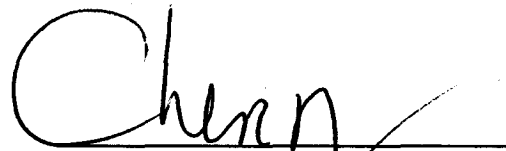
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<sup>3</sup>Appellant also argues that Mitchell v. State, 122 Nev. 1269, 149 P.3d 33 (2006), provides good cause for filing his untimely petition. However, this case does not provide good cause because it only applied Sharma, and did not create new law or clarify existing law. Further, Sharma would not provide good cause because it was only a clarification of the law, and therefore, this claim was always available.

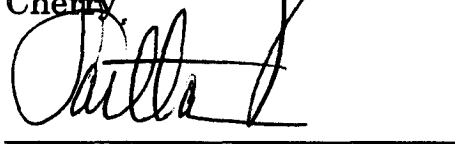
have convicted appellant had different jury instructions been given because of the substantial evidence presented at trial. See Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Therefore, the district court did not err in denying appellant's petition.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief. Accordingly, we


ORDER the judgment of the district court AFFIRMED.

 \_\_\_\_\_ J.

Cheryl

 \_\_\_\_\_ J.

Saitta

 \_\_\_\_\_ J.

Gibbons

cc: Eighth Judicial District Court Dept. 6, District Judge  
Hon. Elizabeth Goff Gonzalez, District Judge  
Terrence M. Jackson  
Law Office of John J. Momot  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk