

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY J. BURRIOLA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53395

FILED

FEB 04 2010

ORDER OF AFFIRMANCE

TRACEE 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.<sup>1</sup> Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Appellant filed his petition on October 24, 2008, more than nine years after the filing of the judgment of conviction on April 23, 1999.<sup>2</sup> Thus, appellant's petition was untimely filed. See NRS 34.726(1).

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<sup>1</sup>This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>2</sup>Appellant's direct appeal was dismissed for lack of jurisdiction because the notice of appeal was untimely filed. Burriola v. State, Docket No. 34282 (Order Dismissing Appeal, August 16, 1999). Thus, the proper date to measure timeliness is the entry of the judgment of conviction. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).

Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus on April 24, 2000.<sup>3</sup> See NRS 34.810(2). Further, appellant's petition constituted an abuse of the writ as he raised claims that were new and different from those claims raised in his previous post-conviction petition. 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).

Appellant first claimed that the procedural bars should be excused because he was not able to appeal the denial of his first post-conviction petition for a writ of habeas corpus because he was held in disciplinary segregation until the appeal period expired. Appellant failed to demonstrate an impediment external to the defense should excuse the eight-year delay since the district court's denial of his first petition. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (an impediment external to the defense may be demonstrated by showing "that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance

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<sup>3</sup>Appellant did not appeal the denial of his first petition.

impracticable.”); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994).

Second, appellant argued that he has good cause to raise his claim that the plea deal was breached because he had to wait until he had served six years before he realized he was not being considered for parole. Appellant’s claim was patently without merit. A parole hearing for appellant was conducted in 2006.

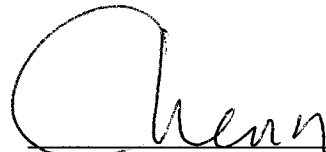
Third, appellant argued that he lacked the legal knowledge to timely raise his new claims. That appellant failed to realize the legal or factual support for these claims in a timely fashion did not excuse the delay. Hathaway, 119 Nev. at 252, 71 P.3d at 506; see generally Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that limited intelligence and lack of trained legal assistance did not constitute good cause for filing a successive post-conviction petition).


Fourth, appellant argued that there are no procedural bars for post-conviction petitions filed in Nevada. This claim was patently without merit. Appellant’s petition was subject to the procedural bars set forth in NRS 34.726(1), NRS 34.800(2), and NRS 34.810(2).

Finally, appellant failed to overcome the presumption of prejudice to the State. Therefore, the district court properly denied the petition as procedurally barred and barred by laches.

Having considered appellant's contentions and concluding that they are without merit, we

ORDER the judgment of the district court AFFIRMED.<sup>4</sup>

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

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

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<sup>4</sup>We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.