

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN DEVON SUTTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53466

FILED

JAN 12 2010

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 dismissing a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

On May 5, 1999, the district court convicted appellant, pursuant to a guilty plea, of one count of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to terms totaling life in the Nevada State Prison with the possibility of parole after 40 years. On appeal, this court affirmed the judgment of conviction and sentence. Sutton v. State, Docket No. 34165 (Order of Affirmance, June 11, 2001). The remittitur issued on July 9, 2001. Appellant unsuccessfully sought post-conviction relief by way of a timely petition for a writ of habeas corpus with the assistance of post-conviction counsel. Sutton v. State, Docket No. 40477 (Order of Affirmance, July 8, 2004).

On December 22, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition as untimely, successive and specifically pleaded laches. 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 April 2, 2009, the district court dismissed the petition. This appeal followed.

In his petition, appellant claimed: (1) he did not enter a knowing, voluntary, and intelligent guilty plea; (2) the district court failed to canvass him on all of the elements of first-degree murder; (3) the guilty plea agreement was unconstitutional; and (4) his trial and appellate counsel were ineffective for failing to argue that the State erroneously informed the district court that premeditation is the only element needed for first-degree murder.

Appellant filed his petition more than seven 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 which was decided on the merits. See NRS 34.810(2). Further, appellant's petition constituted an abuse of the writ as his claims were new and different from those claims raised in his previous post-conviction petition. See id. 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 the procedural defects, appellant first claimed that he did not raise the above claims earlier due to a lack of knowledge of the claims. Lack of legal knowledge did not demonstrate good cause and appellant failed to demonstrate that the claims were not reasonably available prior to the instant petition. 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); Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003).

Second, appellant claimed he had good cause because his post-conviction counsel had not raised the above claims. While appellant may have needed to be raise them for state exhaustion purposes, such a need did not demonstrate good cause. See generally Colley v. State, 105 Nev. 235, 235-36, 773 P.2d 1229, 1230 (1989). Further, appellant was not entitled to the effective assistance of counsel in the first post-conviction proceeding, therefore the failure of post-conviction counsel to raise the current claims did not explain or excuse the lapse of over six years from appellant's first petition for a writ of habeas corpus. Hathaway, 119 Nev. at 252, 71 P.3d at 506; McKague v. Warden, 112 Nev. 159, 165 n.5, 912 P.2d 255, 258 n.5 (1996).

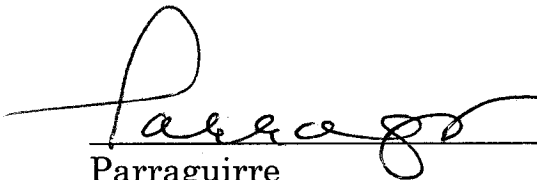
Third, appellant claimed that Polk v. Sandoval, 503 F.3d 903 (9th Cir. 2007), should provide good cause to raise his claim that the State erroneously informed the district court that premeditation was the only element necessary for first-degree murder. Even assuming Polk provided good cause, appellant's claim was belied by the record. Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). Further, appellant failed to demonstrate he suffered actual prejudice. Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (petitioner must demonstrate the errors worked to a petitioner's actual and substantial disadvantage). At the plea canvass, the State informed the district court that the murder committed by appellant was premeditated and appellant agreed with the State's

characterization of the crime. At no time did the State inform the district court that premeditation was the only element needed for first-degree murder.

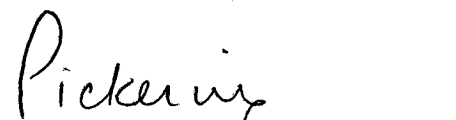
Finally, appellant failed to overcome the presumption of prejudice to the State. Therefore, we affirm the order of the district court dismissing the petition as procedurally barred and barred by laches.

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.¹


_____, C.J.
Parraguirre


_____, J.
Hardesty


_____, J.
Pickering

¹We 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.

cc: Hon. Jackie Glass, District Judge
Kevin Devon Sutton
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk