

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL JOSEPH PAYNE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53710

FILED

FEB 04 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 denying appellant's post-conviction petition for a writ of habeas corpus.¹ Sixth Judicial District Court, Pershing County; Michael Montero, Judge.

Appellant filed his petition on September 4, 2008, nearly 12 years after this court's November 26, 1996, issuance of the remittitur from his direct appeal. See Payne v. State, Docket No. 28289 (Order Dismissing Appeal, November 7, 1996). Appellant's petition was therefore untimely filed. See NRS 34.726(1). Appellant's petition was also successive because he had filed a previous post-conviction petition for writ of habeas corpus in

¹This 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).

1998.² See NRS 34.810(2). Thus, appellant's petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(3).

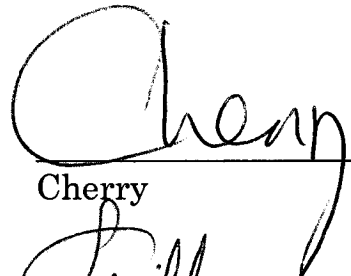
Appellant failed to demonstrate good cause so as to excuse his delay. First, his argument that "new" federal law justified the filing of a new petition because the first petition was improperly denied on procedural grounds was belied by the record. The first petition was decided on the merits, so appellant was not entitled to relief. See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). Second, his argument that the instant petition was warranted because trial counsel admitted in a motion to withdraw guilty plea to error did not excuse delay as that document was filed February 5, 1996, two years before the 1998 petition and was not external to the defense. See Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Finally, his argument that pursuing his remedies in federal court constituted good cause for the delay was contrary to established case law. See Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).


Further, appellant failed to overcome the presumption of prejudice to the State that attached when the State specifically pleaded laches. See NRS 34.800(2). Finally, appellant failed to demonstrate any fundamental miscarriage of justice to overcome these procedural bars. See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). For the


²See Payne v. State, Docket No. 32525 (Order Dismissing Appeal, July 24, 2000).

foregoing reasons, we conclude the district court did not err in denying appellant's petition and, accordingly,

ORDER the judgment of the district court AFFIRMED.³


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Michael Montero, District Judge
Daniel Joseph Payne
Attorney General/Carson City
Pershing County District Attorney
Pershing County Clerk

³We 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.