

IN THE SUPREME COURT OF THE STATE OF NEVADA

TARZ D. MITCHELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55734

FILED

OCT 22 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 a post-conviction petition for a writ of habeas corpus, or alternatively, a petition for a writ of mandamus or request for declaratory judgment.¹ Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellant filed his petition on January 7, 2010, almost eight years after the issuance of the remittitur from his direct appeal on March 12, 2002. Mitchell v. State, Docket No. 35204 (Order of Affirmance, February 12, 2002). 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, and it constituted an abuse of the writ as he raised claims new and

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).

different from those raised in his previous petition.² 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 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).

Appellant first claimed that the procedural bars did not apply because he was not challenging the validity of the judgment of conviction but rather the constitutionality of the laws, jurisdiction, and this court's interpretation of NRS 193.165. Appellant's argument was without merit. Appellant's claims challenged the validity of the judgment of conviction, and thus, the procedural bars do apply in this case.³ NRS 34.720(1); NRS 34.724(1). Further, appellant failed to overcome the presumption of prejudice to the State.

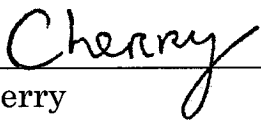
Next, he appeared to claim that a fundamental miscarriage of justice should overcome application of the procedural bars. Specifically, he argued that his due process rights had been violated because the laws reproduced in the Nevada Revised Statutes did not contain an enacting clause as required by the Nevada Constitution. Nev. Const. art. 4, § 23. He further claimed that this court erroneously interpreted NRS 193.165 to require a consecutive sentence. Appellant did not demonstrate a fundamental miscarriage of justice as his arguments fell short of

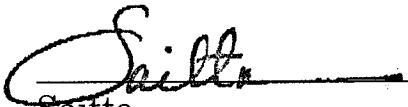
²Mitchell v. State, Docket No. 41460 (Order of Affirmance, July 1, 2004).


³Appellant's claims did not implicate the jurisdiction of the courts. Nev. Const. art. 6, § 6; NRS 171.010.

demonstrating actual innocence. Calderon v. Thompson, 523 U.S. 538, 559 (1998); Schlup v. Delo, 513 U.S. 298, 327 (1995); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). We therefore conclude that the district court did not err in denying appellant's petition.⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Douglas W. Herndon, District Judge
Eighth District Court Clerk
Tarz D. Mitchell
Attorney General/Carson City
Clark County District Attorney

⁴We further conclude that the district court did not err in denying his request for a writ of mandamus or declaratory judgment. NRS 34.170.