

IN THE SUPREME COURT OF THE STATE OF NEVADA

EARNEST EARL STEWART,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55845

FILED

SEP 29 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; Doug Smith, Judge.

Appellant filed his petition on March 31, 2010, more than 21 years after issuance of the remittitur on direct appeal on March 14, 1989. Stewart v. State, Docket No. 16767 (Order Dismissing Appeal, February 22, 1989). Thus, appellant's petition was untimely filed. See NRS 34.726(1); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998).² Moreover, appellant's petition was successive because he had

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).

²We note that the petition was also untimely from the January 1, 1993, effective date of NRS 34.726. See 1991 Nev. Stat., ch. 44, § 5, at 75-6.

previously litigated two post-conviction petitions for a writ of habeas corpus, and the petition was an abuse of the writ as he raised claims new and different from those raised in his previous petitions.³ 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). Moreover, because the State specifically pleaded laches, appellant was required to overcome the rebuttable presumption of prejudice. 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 claim was without merit. Appellant's claim challenged the validity of the judgment of conviction, and thus, the procedural bars applied in this case.⁴ NRS 34.720(1); NRS 34.724(1).


Next, he appeared to argue that a fundamental miscarriage of justice should overcome application of the procedural bars. Specifically, he claimed 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.


³Stewart v. State, Docket No. 28571 (Order Dismissing Appeal, December 28, 1999). Appellant also filed a petition for post-conviction relief on June 7, 1990, but did not file an appeal from the district court's order denying the petition.

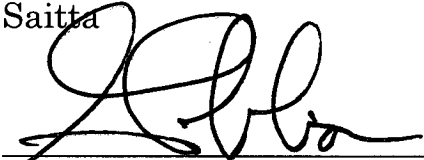
⁴Appellant's claims did not implicate the jurisdiction of the courts. Nev. Const. art. 6, § 6; NRS 171.010.

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 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). In addition, appellant failed to overcome the presumption of prejudice to the State. We therefore conclude that the district court did not err in denying appellant's petition.⁵ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Doug Smith, District Judge
Earnest Earl Stewart
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁵We further conclude that the district court did not err in denying his request for a writ of mandamus or declaratory judgment. NRS 34.170.