

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEAUNDRAY GASTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56130

FILED

NOV 12 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Youney
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; Michael Villani, Judge.

Appellant filed his petition on January 27, 2010, nearly fourteen years after issuance of the remittitur on direct appeal on March 20, 1996. Gaston v. State, Docket No. 26027 (Order Dismissing Appeal, March 1, 1996). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Appellant's petition was also successive because he had previously filed post-conviction petitions for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different

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).

from those raised in his previous petitions.² See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was therefore 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 laches. NRS 34.800(2).

Appellant first argued 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 at issue, 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).

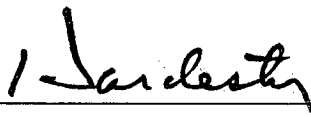
Next, appellant appeared to argue that a fundamental miscarriage of justice should overcome application of the procedural bars. Specifically, he argued that his due process rights had been violated because the laws reproduced in the Nevada Revised Statutes did not contain an enacting clause as required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

²Gaston v. State, Docket No. 33153 (Order Dismissing Appeal, August 16, 2000); Gaston v. State, Docket No. 41096 (Order of Affirmance, December 3, 2003); Gaston v. State, Docket No. 52768 (Order of Affirmance, November 3, 2009).


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

interpreted NRS 193.165 to require a consecutive sentence and that the murder statute was void for vagueness for not referring to the deadly weapon enhancement. Appellant did not demonstrate a fundamental miscarriage of justice as his arguments fell short of demonstrating actual innocence.⁴ 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). 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.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

⁴We note that the Statutes of Nevada contain the laws with the enacting clauses required by the constitution. The Nevada Revised Statutes reproduce those laws as classified, codified, and annotated by the Legislative Counsel. NRS 220.120.

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.

cc: Hon. Michael Villani, District Judge
DeAundray Gaston
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk