IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTON EDWARD SIREX,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
GREGORY SMITH,
Respondent.

No. 56150

FILED

JUL 13 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Appellant filed his petition on March 24, 2009, more than seven years after issuance of the remittitur on direct appeal on August 7, 2001. Sirex v. State, Docket No. 34196 (Order of Affirmance, July 10, 2001). 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 different from those raised in his previous petition.[1] 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).

[1]Sirex v. State, Docket No. 42725 (Order of Affirmance, September 29, 2004).

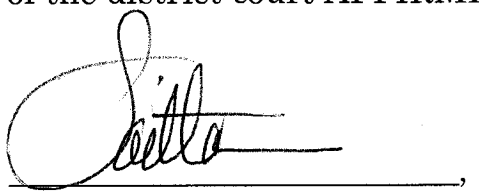
Appellant asserts he has good cause to argue he should be resentenced because his codefendant was granted a new penalty hearing following this court's decision in State v. Harte, 124 Nev. 969, 194 P.3d 1263 (2008) and asserts that he should also benefit from this court's ruling in McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), regarding the felony aggravating circumstance for a sentence of death.

Appellant's reliance upon the Harte decision is misplaced as Harte did not announce a proposition which would alter appellant's sentence of life without the possibility of parole, but rather discussed and applied this court's decision in McConnell. As both the Harte and McConnell cases involved a death sentence and appellant was sentenced to life without the possibility of parole, neither the Harte nor the McConnell decision had impact on appellant's sentence. Therefore, those decisions do not constitute good cause for appellant's delay.

Further, appellant fails to demonstrate actual prejudice because he fails to demonstrate that his claim has merit. Appellant asserts that the jury sentenced him in relation to his codefendant and that a reduction in his codefendant's sentence should result in a corresponding reduction of his own sentence. "[S]entencing is an individualized process," Nobles v. Warden, 106 Nev. 67, 68, 787 P.2d 391, 391 (1990), and we conclude that appellant fails to demonstrate that a new sentencing hearing for his codefendant warrants a reduction in sentence for appellant. See also Dennis v. State, 116 Nev. 1075, 1085, 13 P.3d 434, 440

(2000).[2] Therefore, the district court did not err in dismissing the petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
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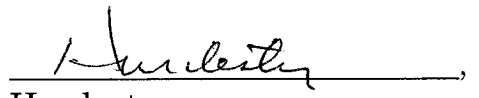

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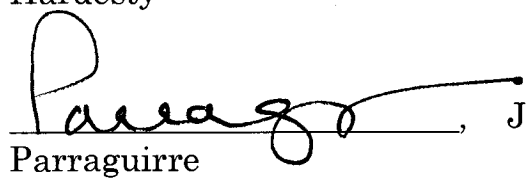

_____, J.
Parraguirre

cc: Hon. Connie J. Steinheimer, District Judge
Janet Bessemer, Esq.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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[2]Appellant asserts that the doctrine of judicial estoppel should prevent the State from arguing that the jury did not sentence appellant and his codefendant proportionally, because he asserts that the State has previously contended that appellant benefited from the jury's comparison to his codefendant. "Judicial estoppel does not preclude changes in position not intended to sabotage the judicial process," and appellant fails to demonstrate that the State took different positions out of "'intentional wrongdoing or an attempt to obtain unfair advantage.'" Mainor v. Nault, 120 Nev. 750, 765, 101 P.3d 308, 318 (2004) (quoting Kitty-Anne Music Co. v. Swan, 4 Cal. Rptr. 3d 796, 800 (Ct. App. 2003)). Therefore, appellant fails to demonstrate that judicial estoppel should preclude this argument by the State.