

IN THE SUPREME COURT OF THE STATE OF NEVADA

GENE ANTHONY ALLEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56586

FILED

FEB 09 2011

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.¹ Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Appellant filed his petition on February 4, 2010, almost six years after this court issued the remittitur from his direct appeal on April 6, 2004. Allen v. State, Docket No. 41274 (Order of Affirmance, March 11, 2004). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he raised claims previously denied on the merits and an abuse of the writ because he appeared to raise new and different claims for relief.² See NRS 34.810(2).

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 Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

²Allen v. State, Docket No. 51940 (Order of Affirmance, November 20, 2008); Allen v. State, Docket No. 54302 (Order of Affirmance, February 4, 2010); Allen v. State, Docket Nos. 49167 and 49612 (Order of Affirmance in Docket No. 49167 and Order Dismissing Appeal in Docket
continued on next page . . .

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

Appellant claimed he had good cause because he did not receive transcripts from his attorney. Appellant failed to demonstrate that this claim should excuse the entire six-year delay. Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Further, this court has held that failure of counsel to send a petitioner his case file does not demonstrate cause to excuse the delay. Hood v. State, 111 Nev. 335, 338, 890 P.2d 797, 798 (1995). Therefore, appellant's claim cannot excuse the delay in filing the petition.

In addition, appellant failed to demonstrate that a fundamental miscarriage of justice required consideration of his procedurally barred petition because he failed to demonstrate that he was actually innocent. Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); Bousley v. United States, 523 U.S. 614, 623-24 (1998). Therefore, we conclude that the district court did not err in denying the petition as procedurally barred.

As set forth earlier, appellant has filed a number of post-conviction challenges. NRS 209.451(1) provides that if an offender:

... continued

No. 49612, September 12, 2007); Allen v. State, Docket No. 47501 (Order of Affirmance, January 10, 2007); Allen v. State, Docket No. 43599 (Order of Affirmance and Dismissing Appeal in Part, December 6, 2004), Allen v. State, Docket No. 42969 (Order of Affirmance, September 17, 2004). There was an additional petition filed in 2005 from which no appeal was taken.

(d) In a civil action, in state or federal court, is found by the court to have presented a pleading, written motion or other document in writing to the court which:

(1) Contains a claim or defense that is included for an improper purpose, including, without limitation, for the purpose of harassing his opponent, causing unnecessary delay in the litigation or increasing the cost of the litigation;

(2) Contains a claim, defense or other argument which is not warranted by existing law or by a reasonable argument for a change in existing law or a change in the interpretation of existing law; or

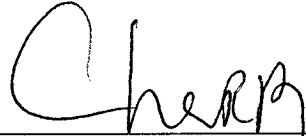
(3) Contains allegations or information presented as fact for which evidentiary support is not available or is not likely to be discovered after further investigation,


he forfeits all deductions of time earned by him before the commission of that offense or act, or forfeits such part of those deductions as the director considers just.


Appellant has filed numerous documents raising claims challenging the validity of his judgment of conviction and the proceedings in the district court. In denying appellant's petition for a writ of habeas corpus in Docket No. 47501 (Order of Affirmance, January 10, 2007), this court cautioned appellant that a prisoner could forfeit all deductions of time earned by the prisoner if the court finds that the prisoner has filed a document in a civil action for an "improper purpose." For the purposes of NRS 209.451, a writ of habeas corpus is a civil action. Appellant's continuous stream of filings is an abuse of this court's appellate jurisdiction. The petition contains allegations concerning the victim presented as fact for which evidentiary support is not available and is not

likely to be discovered after investigation, thus the inclusion of these claims constitutes an improper purpose. Pursuant to NRS 209.451(3), the Director of the Department of Corrections shall determine what forfeiture of credits, if any, is warranted. The Director of the Department of Corrections shall conduct whatever prison disciplinary proceedings deemed necessary. Accordingly, we

ORDER the judgment of the district court AFFIRMED.³


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Pickering

cc: Hon. James M. Bixler, District Judge
Gene Anthony Allen
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk
Director, Department of Corrections

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.