

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN SAMUEL BRAUNSTEIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57332

FILED

JUN 08 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; Michael Villani, Judge.

Appellant filed his petition on September 2, 2010, more than eight years after issuance of the remittitur on direct appeal on March 12, 2002. Braunstein v. State, 118 Nev. 68, 40 P.3d 413 (2002). Thus, appellant's petition was untimely filed.² 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

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).

²An amended judgment of conviction was entered on August 12, 2010, adding 40 days of credit for time served.

previous petition.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 presumption of prejudice to the State. NRS 34.800(2).

To excuse the procedural bars, appellant first claimed that he had good cause because the amended judgment of conviction amounted to a sentencing hearing and therefore, he had a right to be present and to counsel. Appellant's claim was without merit. First, appellant was mistaken in his assertion that the adding of 40 days' credit for time served in an amended judgment of conviction was a new sentencing hearing. See NRS 176.015. Second, appellant did not have a right to be present and he did not demonstrate prejudice from his absence. See Gallego v. State, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001); Kirksey v. State, 112 Nev. 980, 1000, 923 P.2d 1102, 1115 (1996). Third, appellant did not have a right to counsel because the correction to appellant's credit for time served did not implicate his substantial rights. See Mempa v. Rhay, 389 U.S. 128, 134 (1967). Finally, this claim did not overcome the procedural bars for appellant's substantive claims because those claims challenged the original judgment of conviction and could have been raised in a timely post-conviction petition for a writ of habeas corpus. See Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004).


Second, appellant's attempt to overcome his procedural defects by characterizing his petition as a "First Amendment Petition" also lacked

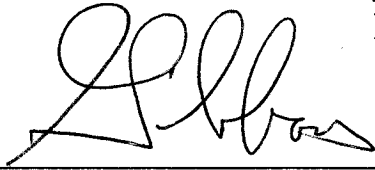
³Braunstein v. State, Docket No. 46609 (Order of Affirmance, December 5, 2006).

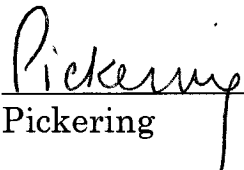
merit, as appellant failed to demonstrate any unconstitutional prior restraint of his First Amendment rights. See NRS 34.185.

Third, appellant claimed that the district court did not have jurisdiction to convict him and he asserted that jurisdictional claims may be raised at any time. Appellant's claims did not implicate the jurisdiction of the courts, Nev. Const. art. 6, § 6; NRS 171.010, and therefore, the district court properly concluded that the petition was procedurally barred. In addition, appellant failed to overcome the presumption of prejudice to the State. Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁴


_____, C.J.
Douglas


_____, J.
Gibbons


_____, J.
Pickering

⁴We note that Chief Justice Douglas presided over the initial arraignment. Given Chief Justice Douglas' minimal involvement with this case in the district court, appellant did not demonstrate that Chief Justice Douglas should recuse himself from consideration of this matter.

We 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.

cc: Hon. Michael Villani, District Judge
Steven Samuel Braunstein
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk