

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM EDWARD FRENCH A/K/A
MICHAEL L. TIPPENS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58095

FILED

SEP 14 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angersal*
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; Michelle Leavitt, Judge.

Appellant filed his petition on November 2, 2010, almost eight years after issuance of the remittitur on direct appeal on October 8, 2002. French v. State, Docket No. 38249 (Order of Affirmance, September 10, 2002). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously litigated a post-conviction petition for a writ of habeas corpus, and it

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).

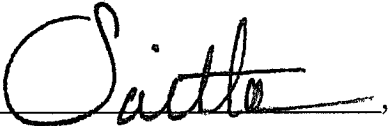
constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.² See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Moreover, because the State specifically pleaded laches, appellant was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

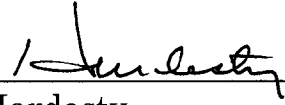
Appellant claimed that he had good cause because the decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), was too new to be applied at his trial or raised on appeal. Appellant failed to demonstrate that his claim challenging the deadly weapon enhancement was not reasonably available to be raised in a timely petition for a writ of habeas corpus. Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Further, to the extent that appellant claimed that a fundamental miscarriage of justice overcame the procedural defects, appellant did not demonstrate actual innocence because he failed to show that "it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." Calderon v. Thompson, 523 U.S. 538, 559 (1998) (quoting 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). Finally, appellant failed to

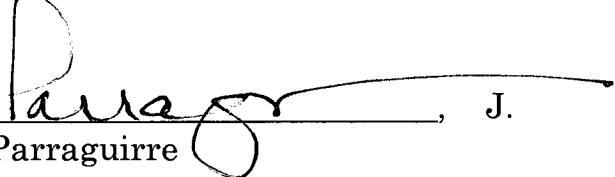
²French v. State, Docket No. 42021 (Order of Affirmance, April 29, 2004).

overcome the presumption of prejudice to the State. We therefore conclude that the district court did not err in denying appellant's petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Saitta


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Michelle Leavitt, District Judge
William Edward French
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk