

IN THE SUPREME COURT OF THE STATE OF NEVADA

LLOYD RICHARD DEERE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60416

FILED

OCT 08 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order 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 November 30, 2011, more than 27 years after issuance of the remittitur on direct appeal on October 23, 1984. Deere v. State, 100 Nev. 565, 688 P.2d 322 (1984). Thus, appellant's petition was untimely filed.² See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously litigated

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).

²Even assuming that the deadline for filing a habeas corpus petition pursuant to NRS 34.726 commenced on January 1, 1993, the date of the amendments to NRS chapter 34, appellant's petition was filed more than 18 years after the effective date of NRS 34.726. See 1991 Nev. Stat., ch. 44, §§ 5, 33, at 75-76, 92; Pellegrini v. State, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001).

several post-conviction petitions for a writ of habeas corpus.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 rebuttable presumption of prejudice. NRS 34.800(2). Good cause must be an impediment external to the defense and must afford a legal excuse. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

Appellant claimed that the district court mistakenly applied statutory laches, NRS 34.800(2), to his first petition because the five-year time period should have been measured from the last date he could have filed a petition for a writ of certiorari to the United States Supreme Court from the decision on direct appeal. Based upon our review of the record on appeal, we conclude that the district court did not err in determining that this did not provide good cause for his late and successive petition. The five-year time period set forth in NRS 34.800(2) is measured from entry of the judgment of conviction or a decision on direct appeal. Nothing in this language indicates that the time limit for purposes of determining finality of a judgment of conviction in retroactivity jurisprudence, see Colwell v. State, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002), is the proper measure under NRS 34.800(2). Further, any challenges to the application of statutory laches should have been litigated in the first post-conviction proceedings. Thus, appellant failed to demonstrate good cause for the

³Deere v. State, Docket No. 21268 (Order Dismissing Appeal, September 4, 1990); Deere v. State, Docket No. 23171 (Order Dismissing Appeal, July 21, 1992); Deere v. State, Docket No. 34283 (Order Dismissing Appeal, September 14, 2000).


entirety of his delay and failed to provide good cause for litigating this claim in this, his fourth, petition.

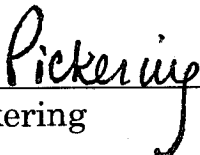
Second, appellant claimed that ineffective assistance of post-conviction counsel prevented him from timely filing his first petition. Appellant noted that the State Bar determined that his post-conviction counsel did not provide competent representation in the filing of his first post-conviction petition. Appellant failed to demonstrate good cause to excuse his procedural defects. Because the appointment of counsel was not statutorily or constitutionally required for the first post-conviction proceeding, a claim of ineffective assistance of post-conviction counsel cannot demonstrate good cause.⁴ See McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996). Further, we note that appellant has previously litigated this good cause argument in his 1991 and 1999 petition proceedings, and this court determined that the district court did not err in denying those petitions as barred by laches and as procedurally barred. Deere v. State, Docket No. 23171 (Order Dismissing Appeal, July 21, 1992); Deere v. State, Docket No. 34283 (Order Dismissing Appeal, September 14, 2000). The doctrine of the law of the case prevents further litigation of this good cause argument. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

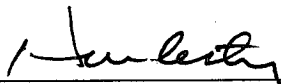
⁴Appellant's reliance upon Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981) is misplaced. As explained in McKague, the court in Grondin misperceived the status of federal law in regards to whether the right to counsel under the United States Constitution extended to state collateral proceedings. 112 Nev. at 164, 912 P.2d at 258. It does not. Coleman v. Thompson, 501 U.S. 722 (1991); Pennsylvania v. Finley, 481 U.S. 551 (1987). Because there was no statute or constitutional, state or federal, right to counsel, appellant cannot demonstrate good cause based upon any deficiencies in the performance of his first post-conviction counsel.

Finally, appellant failed to overcome the presumption of prejudice to the State as required by NRS 34.800(2) because appellant failed to demonstrate a fundamental miscarriage of justice; 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). We therefore conclude that the district court did not err in denying appellant's petition as procedurally barred and barred by laches. Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁵


_____, J.
Saitta


_____, J.
Pickering


_____, J.
Hardesty

⁵We 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
Lloyd Richard Deere
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk