

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLYDE LEWIS A/K/A LEWIS  
RANDOLPH,  
Appellants,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 60522

**FILED**

DEC 12 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Tracie K. Lindeman*  
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.<sup>1</sup> Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Appellant filed his petition on November 22, 2011, challenging two judgments of conviction which were filed in the same case.

Appellant was charged with burglary, robbery with the use of a deadly weapon, battery with the use of a deadly weapon, and first-degree murder with the use of a deadly weapon. In appellant's first trial, the jury convicted appellant of battery with the use of a deadly weapon, but could not agree on the remaining charges. The district court entered a judgment

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<sup>1</sup>This 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).

of conviction for the battery with the use of a deadly weapon on December 14, 1995, and appellant did not take a direct appeal from that conviction.

At the second trial, a jury found appellant guilty of the remaining charges and the district court filed a second judgment of conviction for those charges on May 23, 1997. Appellant filed a post-conviction petition for a writ of habeas corpus stemming from the battery-with-the-use-of-a-deadly-weapon conviction and a direct appeal from the other convictions. The appeals for each were consolidated and this court affirmed the decisions of the district court. Lewis v. State, Docket Nos. 30567 and 33145 (Order of Affirmance, February 7, 2001).

Appellant's November 22, 2011, petition was filed more than 15 years after the judgment for his battery-with-the-use-of-a-deadly-weapon conviction and more than 10 years after issuance of the remittitur on direct appeal on February 11, 2002, for the additional convictions. Lewis v. State, Docket Nos. 30567 and 33145 (Order of Affirmance, February 7, 2001). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, as appellant has already filed a post-conviction petition challenging the battery-with-the-use-of-a-deadly-weapon conviction, his claims in the instant petition challenging that conviction constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition. 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). In addition, because the State specifically pleaded laches, appellant was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

Appellant first claimed he had good cause to overcome the procedural bars because his appellate counsel failed to assert on direct appeal that the premeditation and deliberation instruction was improper, as discussed in Byford v. State, 116 Nev. 215, 235-37, 994 P.2d 700, 713-15 (2000). Claims of ineffective assistance of counsel cannot serve as cause for other procedurally defaulted claims if they are themselves procedurally defaulted. See Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Claims stemming from appellate counsel's failure to raise claims pursuant to Byford were reasonably available to be raised in a timely post-conviction petition and appellant failed to explain the ten-year delay in raising those claims.

Second, appellant claimed he had good cause due to counsel's failure to file a direct appeal from his conviction for battery with the use of a deadly weapon. This failed to explain the 15-year delay in filing the instant post-conviction petition for a writ of habeas corpus and this claim was reasonably available to be raised in a timely manner. See Hathaway, 119 Nev. at 252-53, 71 P.3d at 506.

Third, appellant claimed he had good cause due to High Desert State Prison's use of computers for legal research rather than books and the prison's refusal to allow him to access legal material from


other states. An impediment external to the defense to establish good cause to excuse the procedural bars may be found when “interference by officials’ made compliance impracticable.” Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). Official interference may include a prison’s failure to provide “meaningful” access to the courts through the provision of “adequate law libraries or adequate assistance from persons trained in the law.” Bounds v. Smith, 430 U.S. 817, 828 (1977), limited by Lewis v. Casey, 518 U.S. 343 (1996). In this case, appellant failed to demonstrate that an external impediment prevented him from filing a timely petition. Appellant’s allegations demonstrated he has meaningful access to legal research and his preference for books rather than computers failed to explain the entire delay in filing the instant petition. In addition, appellant provided no explanation for how lack of access to out-of-state legal materials harmed his ability to litigate in Nevada state courts. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

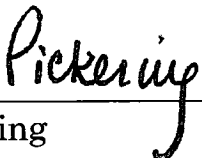
Next, appellant asserted he was actually innocent due to the use of the improper premeditation and deliberation instruction. Appellant did not demonstrate actual innocence because he failed to show that “it is more likely than not that no reasonable juror would have convicted him in light of . . . new 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 overcome the presumption of prejudice to the State. Therefore, the district court did not err in denying appellant's petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>2</sup>

  
Saitta \_\_\_\_\_, J.

  
Pickering \_\_\_\_\_, J.

  
Hardesty \_\_\_\_\_, J.

cc: Hon. Stefany Miley, District Judge  
Clyde Lewis  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>2</sup>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.