

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES KELLY CHAVEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60741

FILED

DEC 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY H. Angbor
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Appellant filed his petition on December 23, 2011, more than 13 years after entry of the judgment of conviction on April 14, 1998.² Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed two post-conviction petitions 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 previous petitions.³ See NRS 34.810(1)(b)(2); NRS

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).

²No direct appeal was taken.

³Chavez v. State, Docket No. 37759 (Order of Affirmance, February 4, 2003); Chavez v. State, Docket No. 44023 (Order of Affirmance, June 29, 2005).

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).

First, appellant claimed the petition was timely filed because he filed it within one year of the issuance of the remittitur in his appeal from the denial of a "motion to correct judgment/clerical mistake/modification of judgment/sentence and estoppel." Chavez v. State, Docket No. 56398 (Order of Affirmance, December 9, 2010). NRS 34.726(1) provides that a post-conviction petition for a writ of habeas corpus must be filed within one year after the entry of the judgment of conviction or the issuance of the remittitur from the denial of a direct appeal from the judgment of conviction. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998). The prior appeal noted by appellant was not a direct appeal from the judgment of conviction. The filing date for a post-conviction petition for a writ of habeas corpus was one year after entry of appellant's judgment of conviction on April 14, 1998. Therefore, the instant petition is untimely filed and appellant failed to demonstrate good cause.

Second, appellant claimed that the procedural bars only apply in post-conviction proceedings, that he filed the petition in the trial court, and that the petition was therefore not bound by the procedural bars. Appellant's argument was without merit; he filed a post-conviction petition for a writ of habeas corpus in the appropriate district court and was therefore governed by the procedural bars. See NRS 34.724(2)(c); State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005)

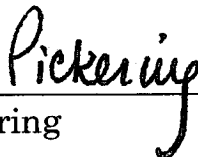
("Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory."). Therefore, the district court did not err in denying the petition as procedurally barred.

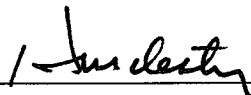
Next, appellant claimed he is actually innocent because the State failed to prove he committed the murder with premeditation. Appellant did not demonstrate actual innocence because he fails to show that "it is more likely than not that no reasonable juror would have convicted him in light of . . . new 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).

Further, appellant fails to overcome the presumption of prejudice to the State. Therefore, the district court did not err in dismissing the petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Saitta _____, J.


Pickering _____, J.


Hardesty _____, J.

cc: Hon. Elissa F. Cadish, District Judge
Charles Kelly Chavez
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk