

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN W. BERRY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35680

FILED

DEC 18 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Schade*
CHIEF DEPUTY CLERK

JOHN W. BERRY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35835

ORDER OF AFFIRMANCE

Docket No. 35680 is a proper person appeal from an order of the district court denying appellant's motion to compel specific performance of plea agreement. Docket No. 35835 is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. We elect to consolidate these appeals for disposition.¹

On June 28, 1994, the district court convicted appellant, pursuant to a guilty plea, of four counts of burglary. The district court sentenced appellant to serve four consecutive terms of ten years in the Nevada State Prison to be served consecutively to district court case no. C116985. Appellant did not file a direct appeal.

On May 19, 1995, appellant filed a proper person post-conviction motion to correct an illegal sentence in the district court. The

¹See NRAP 3(b).

State opposed the motion. On June 2, 1995, the district court denied appellant's motion. This court dismissed appellant's subsequent appeal.²

On December 1, 1997, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a response to the State's opposition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On January 28, 1998, the district court denied appellant's petition. This court dismissed appellant's subsequent appeal.³

Docket No. 35680

On January 10, 2000, appellant filed a proper person post-conviction motion to compel specific performance of the plea agreement in the district court. On February 18, 2000, the district court denied appellant's motion. This appeal followed.

In his motion, appellant contended that the plea agreement was breached. Specifically, appellant contended that pursuant to the plea agreement, the district court should have sentenced him to one term of one to ten years for his four burglary convictions, but instead he was sentenced to four consecutive terms of ten years. He claimed that the district attorney further breached the agreement by requesting to insert additional language in the written guilty plea agreement, by interlineation, that the possible sentence of one to ten years was "on each count" of burglary after appellant signed the agreement. We conclude that the district court did not err in denying appellant's motion. Appellant was convicted of four counts of burglary; thus, the district court could properly sentence appellant to serve four consecutive ten year sentences.⁴ Moreover, appellant's guilty plea agreement stated that he was guaranteed no particular sentence by anyone and that sentencing was determined solely by the court. Lastly, appellant acknowledged during the plea canvass that the possible sentence was "one to ten on each count"

²Berry v. State, Docket No. 27317 (Order Dismissing Appeal, April 20, 1998).

³Berry v. State, Docket No. 31792 (Order Dismissing Appeal, February 25, 2000).

⁴See NRS 205.060.

of burglary, that sentencing was decided by the district court, and that the district court could impose consecutive sentences if it wished. Therefore, appellant is not entitled to relief.

Docket No. 35835

On September 14, 1999, appellant filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition arguing that the petition was procedurally time barred. The State also specifically pleaded laches. Appellant filed a response to the State's opposition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On February 23, 2000, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than five years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.⁵ Appellant's petition was successive because he had previously filed a proper person post-conviction petition for a writ of habeas corpus.⁶ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁷ Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.⁸

In an attempt to excuse his procedural defects, appellant argued he was misinformed by his attorney and the district court that he had no right to file a direct appeal. Based upon our review of the record on appeal, we conclude that appellant failed to demonstrate good cause and failed to overcome the presumption of prejudice to the State.⁹ We conclude that the district court did not err in denying appellant's petition.

⁵See NRS 34.726(1).

⁶See NRS 34.810(2).

⁷See NRS 34.726(1); NRS 34.810(3).

⁸See NRS 34.800(2).


⁹See Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).


Conclusion

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.¹⁰ Accordingly, we

ORDER the judgments of the district court AFFIRMED.¹¹

 J.
Young

 J.
Agosti

 J.
Leavitt

cc: Hon. Sally L. Loehrer, District Judge
Attorney General/Carson City
Clark County District Attorney
John W. Berry
Clark County Clerk

¹⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).

¹¹We have considered all proper person documents filed or received in these matters, and we conclude that the relief requested is not warranted.