

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL PETER CAVARRETTA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 67298

**FILED**

**DEC 29 2015**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from an order of the district court denying a “motion to modify or correct illegal sentence of person in state custody, based upon an unexhausted claim, pursuant to court order on writ of habeas corpus.”<sup>1</sup> Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

The district court construed appellant Michael Cavarretta’s motion as a postconviction petition for a writ of habeas corpus. Based on the nature of the claims raised, we conclude the district court did not err by so construing the motion.

Cavaretta filed his petition on April 22, 2014, more than 5 years after issuance of the remittitur on direct appeal on December 26, 2008. *Cavarretta v. State*, Docket No. 46861 (Order of Affirmance, October 22, 2007). Thus, Cavarretta’s petition was untimely filed. See NRS 34.726(1). Moreover, Cavarretta’s petition was successive because he had

---

<sup>1</sup>Based on the nature of the claims raised, we conclude the district court did not err by construing the motion to be a postconviction petition for a writ of habeas corpus.

previously filed two postconviction petitions for writs 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.<sup>2</sup> See NRS 34.810(1)(b)(2); NRS 34.810(2). Cavarretta'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, Cavarretta was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).


On appeal, Cavarretta claims he has good cause to overcome the procedural bars because the district court failed to keep him informed regarding his first timely petition and because he transferred prisons. The State contends Cavarretta did not raise these good cause claims in his petition. Cavarretta failed to provide this court with a copy of the petition below. "The burden to make a proper appellate record rests on appellant." *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980); see also *Thomas v. State*, 120 Nev. 37, 43 & n.4, 83 P.3d 818, 822 & n.4 (2004). See Further, the district court did not address these good cause claims in its order denying Cavarretta's petition. Therefore, it appears these good cause claims were not raised below, and we need not consider them for the first time on appeal. *Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 1012-13, 103 P.3d 25, 33 (2004).


---

<sup>2</sup>See *Cavarretta v. State*, Docket No. 53515 (Order of Affirmance, October 27, 2009). It appears Cavarretta also filed a petition on March 6, 2013. It does not appear he filed an appeal from the denial of that petition.

Even if this court were to consider Cavarretta's good cause claims on appeal, they are without merit. Cavarretta filed a timely pro se appeal from the denial of his first petition; therefore, the district court did keep him informed regarding his first petition. Also, Cavarretta failed to allege how transferring prisons affected his ability to raise his claims in his first timely petition. Finally, Cavarretta failed to overcome the rebuttable presumption of prejudice to the State. Accordingly, the district court did not err in denying the petition, and we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Kenneth C. Cory, District Judge  
Thomas Michaelides  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk