

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEITH DAVID HOUSTON,
Appellant,
vs.
QUENTIN BYRNE, WARDEN; AND
E.K. MCDANIEL, DIRECTOR,
Respondents.

No. 71647

FILED

NOV 16 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

Keith David Houston appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on December 24, 2015, and supplemental pleading filed on May 4, 2016.¹ First Judicial District Court, Carson City; James Todd Russell, Judge.

Houston filed his petition nearly 33 years after entry of the judgment of conviction on February 14, 1983,² and nearly 23 years after the effective date of NRS 34.726, *see* 1991 Nev. Stat., ch. 44, § 5, at 75, § 33, at 92. Houston's petition was therefore untimely filed. *See* NRS 34.726(1). Houston's petition was also an abuse of the writ insofar as he failed to raise his claims in a previous petition.³ NRS 34.810(2). Houston's petition was

¹This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).

²No direct appeal was taken.

³*See Houston v. State*, Docket No. 67172 (Order of Affirmance, December 17, 2015); *Houston v. Warden*, Docket No. 49910 (Order of Affirmance, March 10, 2008); *Houston v. State*, Docket No. 40652 (Order of

therefore procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(3). Further, because the State specifically pleaded laches, Houston was required to overcome the presumption of prejudice to the State. *See* NRS 34.800(2).

Houston first argued the procedural bars did not apply to him because he was challenging the legality of his restraint pursuant to NRS 34.360 and not seeking postconviction relief pursuant to NRS 34.720, et al. Houston's own pleadings contradicted this. First, he stated in his petition he was bringing it pursuant to NRS 34.738, which falls under postconviction relief. Second, he acknowledged the existence of his 1983 judgment of conviction, the document that is the cause of his imprisonment. Finally, the crux of Houston's claim was his conviction was illegal because it was obtained in violation of NRS 175.011(1) and/or he did not actually enter a guilty plea. This was a challenge to the validity of a judgment of conviction and thus could only be raised in postconviction proceedings. *See* NRS 34.724(2)(b).⁴ Accordingly, Houston was subject to the procedural bars.

Houston also argued he had good cause to overcome the procedural bars because he only learned in August 2015 that, pursuant to

Affirmance, November 14, 2003); *Houston v. Warden*, Docket No. 36271 (Order of Affirmance, August 7, 2001); *Houston v. State*, Docket No. 24101 (Order Dismissing Appeal, March 31, 1994); *Houston v. Warden*, Docket No. 22706 (Order Dismissing Appeal, December 30, 1991).

Because none of Houston's prior petitions were decided on the merits, his petition was not successive. *See* NRS 34.810(2).


⁴Insofar as Houston claimed his conviction was obtained in violation of NRS 175.011, this claim was outside the scope of claims permissible in a postconviction petition for writ of habeas corpus challenging a judgment of conviction based on a guilty plea. *See* NRS 34.810(1)(a).


NRS 175.011, his conviction was illegal because it was not the result of a jury trial. Houston's arguments were unavailing. To overcome a procedural bar, the good cause had to be external to the defense. *See Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Houston's claimed ignorance of law was not external to the defense. Moreover, Houston misunderstood NRS 175.011. His argument relied on the second sentence of NRS 175.011(1) which states, "A defendant who pleads not guilty to the charge of a capital offense must be tried by jury." This provision does not, as Houston suggested, lead to the absurd result that a defendant who initially pleads not guilty may never bargain in exchange for his guilty plea but must always be tried by a jury. *See Missouri v. Frye*, 566 U.S. 134, 143-44 (2012) (discussing the importance of plea bargaining in criminal prosecutions). Rather, it simply means if a defendant chooses a trial, it must be a jury and not a bench trial. *See Riley v. State*, 107 Nev. 205, 211, 808 P.2d 551, 554 (1991). Finally, Houston failed to overcome the presumption of prejudice to the State pursuant to NRS 34.800(2). We therefore conclude the district court did not err in denying Houston's petition as procedurally barred.

The district court appears to have referred Houston to the Nevada Department of Corrections for disciplinary action. In support, the district court first found Houston claimed under penalty of perjury he was found not guilty by a jury. The record contains no such claim by Houston. The district court also found Houston failed to affirmatively state he had pleaded guilty. While this is correct, such an omission is not grounds to refer a petitioner for disciplinary action. *See NRS 209.451*. We therefore conclude the district court erred in referring Houston for disciplinary action,

and we remand this case for the district court to remove any referral for discipline from its order. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. James Todd Russell, District Judge
Keith David Houston
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk