

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID A. HERNANDEZ,

No. 36639

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

OCT 08 2001

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

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On August 24, 1993, the district court convicted appellant, pursuant to a guilty plea, of second degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole. Appellant did not file a direct appeal.

On January 13, 1995, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. 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 14, 1995, the district court denied appellant's petition. This court dismissed appellant's subsequent appeal.¹

On May 10, 2000, 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 and successive. The State also specifically pleaded laches. Appellant filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an

¹Hernandez v. State, Docket No. 26964 (Order Dismissing Appeal, May 26, 1995).

evidentiary hearing. On August 12, 2000, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than six years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.² Appellant's petition was also successive because he had previously filed a proper person post-conviction petition for a writ of habeas corpus.³ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁴ Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.⁵

In an attempt to excuse his procedural defects, appellant argued that for the first three years that he was in prison he was moved from prison to prison and his access to the law library was very minimal.⁶ He argued that once he was placed in Ely State Prison, he was in protective segregation and lock down units which further prevented him adequate access to the law library. He also claimed that the Ely law library is inadequate because it does not contain adequate books, materials, and resources to discover the legal basis for filing a timely petition. He claimed that due to the inadequacies in the law library, it took him over one year to discover his claims. Lastly, he claimed that the prison law clerks are self-taught and were not helpful to him. Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's petition. Appellant failed to demonstrate sufficient cause to excuse the procedural bars and failed to overcome the presumption of prejudice to the State.⁷

²See NRS 34.726(1).

³See NRS 34.810(2).

⁴See NRS 34.726(1); NRS 34.810(3).

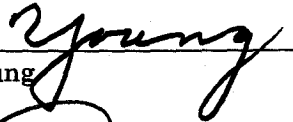
⁵See NRS 34.800(2).

⁶We note that appellant cited to legal authority in his first petition which was filed during his first three years of incarceration.


⁷See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994); Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988).

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.⁸ Accordingly, we


ORDER the judgment of the district court AFFIRMED.



Young J.



Agosti J.



Leavitt J.

cc: Hon. Lee A. Gates, District Judge
Attorney General
Clark County District Attorney
David A. Hernandez
Clark County Clerk

⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).