

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN DEVON SUTTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73651

FILED

APR 25 2018

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

ORDER OF AFFIRMANCE

Kevin Devon Sutton appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Sutton filed his petition on October 5, 2016, more than 15 years after issuance of the remittitur on direct appeal on July 9, 2001.² See *Sutton v. State*, Docket No. 34165 (Order of Affirmance, June 11, 2001). Thus, Sutton's petition was untimely filed. See NRS 34.726(1). Moreover, Sutton's petition was successive because he previously filed several postconviction 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

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

²The district court order states the petition was filed on May 3, 2017. However, Sutton originally filed his petition in the Eleventh Judicial District Court on October 5, 2016, and it was transferred to the Eighth Judicial District Court, and filed there, on May 3, 2017. A petition filed in the incorrect county is "deemed to be filed on the date it is received" in the incorrect county. NRS 34.738(2)(a).

his previous petitions.³ See NRS 34.810(2). Sutton's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3). Moreover, because the State specifically pleaded laches, Sutton was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

Sutton claims the district court erred by determining his petition was a postconviction petition for a writ of habeas corpus rather than a petition filed pursuant to NRS 34.360. Sutton claims he was challenging the jurisdiction of the court sentencing him regarding the deadly weapon enhancement because it is a non-crime and he was not challenging the validity of his judgment of conviction. We disagree. We conclude the district court properly determined Sutton's petition challenged the validity of his judgment of conviction or sentence. NRS 34.724(1), (2)(b).


Further, we conclude Sutton failed to demonstrate good cause and prejudice to overcome the procedural bars. Sutton's claim did not implicate the jurisdiction of the district court. See Nev. Const. art. 6, §6; NRS 171.010. Moreover, the deadly weapon enhancement is not a separate offense but rather is an additional penalty for the primary offense. See NRS 193.165(3); *Nevada Dep't of Prisons v. Bowen*, 103 Nev. 477, 479, 745 P.2d

³See *Sutton v. State*, Docket No. 71025 (Order of Affirmance, July 12, 2017); *Sutton v. State*, Docket No. 67584 (Order of Affirmance, December 18, 2015); *Sutton v. State*, Docket No. 65121 (Order of Affirmance, September 18, 2014); *Sutton v. State*, Docket No. 64244 (Order of Affirmance, June 11, 2014); *Sutton v. State*, Docket No. 53466 (Order of Affirmance, January 12, 2010); *Sutton v. State*, Docket No. 40477 (Order of Affirmance, July 8, 2004).

697, 698 (1987).⁴ Finally, Sutton failed to overcome the presumption of prejudice to the State. Therefore, the district court did not err by denying the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.⁵


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Susan Johnson, District Judge
Kevin Devon Sutton
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁴Sutton asks this court to overrule *Bowen*. Even assuming we had authority to entertain Wilson's request to overrule *Bowen*, we conclude he has failed to demonstrate such action is warranted.

⁵Sutton has requested this court to consolidate this case with a petition filed in the district court on May 6, 2017. Based on the record provided on appeal, it does not appear the district court has resolved the petition he filed on May 6, 2017. Because that petition is not pending in this court, it cannot be consolidated with this case. We therefore deny Sutton's request.