

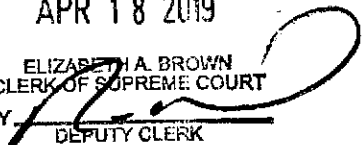
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KARL WILLIAM SCHENKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76746-COA

FILED

APR 18 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

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

Karl William Schenker appeals from an order of the district court denying a “second successive motion to withdraw guilty plea on newly discovered evidence,” filed on May 24, 2018.¹ Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

The district court construed Schenker’s pleading as a postconviction habeas petition per *Harris v. State*, 130 Nev. 435, 329 P.2d 619 (2014), found the petition was procedurally barred, and concluded Schenker failed to overcome any procedural bars. Schenker contends the district court erred by construing his pleading as a postconviction habeas petition, because he was seeking relief pursuant to NRS 176.515(1).

Schenker was convicted, pursuant to a guilty plea, of first-degree murder and sentenced to life in prison without the possibility of parole. NRS 176.515 governs when a defendant may seek a new trial. Thus, on its face, the statute does not apply where a defendant was convicted

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

pursuant to a guilty plea.² Rather, a postsentence motion to withdraw a guilty plea can only be raised in a postconviction petition for a writ of habeas corpus. *See* NRS 34.724(2)(b); *Harris*, 130 Nev. at 448, 329 P.2d at 628. We therefore conclude the district court did not err by construing Schenker's motion as a postconviction petition for a writ of habeas corpus.

However, in denying the petition, the district court expressly refused to allow Schenker the opportunity to cure the petition's defects on the ground that the court had already given Schenker an opportunity to cure defects in his 2016 "first motion to withdraw guilty plea based on newly discovered evidence per NRS 176.515(1)." There, rather than attempt to cure his defects, Schenker emphasized that he was seeking relief per NRS 176.515(1) such that *Harris* should not apply. The district court denied the petition, and this court affirmed. *See Schenker v. State*, Docket No. 73367-COA (Order of Affirmance, May 15, 2018).


Schenker filed the instant pleading one and a half years after the 2016 pleading and only two weeks after this court affirmed its denial. Here, Schenker again claimed he was seeking to withdraw his guilty plea pursuant to NRS 176.515(1) based on newly discovered evidence. *Harris*, which addresses postsentence motions to withdraw a guilty plea that were regularly filed pursuant to NRS 176.165; does not apply to motions filed pursuant to NRS 176.515. Because Schenker specifically relied on NRS 176.515 as the basis for his request for relief, the district court could have resolved the underlying motion under NRS 176.515 without contravening


²Even if the statute did apply to guilty pleas, the motion would have been untimely. It was filed more than nine years after Schenker's 2008 guilty plea, *see* NRS 176.515(3) (stating the motion must be filed "within 2 years after the verdict or finding of guilt"), and NRS 176.515 contains no exception to overcome the two-year time bar.

Harris. However, once the district court chose to apply *Harris*, it was bound to follow *Harris* in its entirety. This included offering Schenker an opportunity to cure any procedural defects in the instant pleading. See *Harris*, 130 Nev. at 448-49, 329 P.2d at 628-29. We therefore conclude the district court erred by denying Schenker's petition without affording him an opportunity to cure the defects. On remand, the district court should select a reasonable time period within which Schenker must file a supplement that includes all of the information required by NRS 34.735. See *id.* 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.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

³To the extent Schenker challenged the district court's disposition of his 2016 petition or this court's affirmance of that disposition, such claims were not properly raised in his motion. See NRS 34.575(1); NRAP 40B.

cc: Hon. Kathleen M. Drakulich, District Judge
Karl William Schenker
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk