

IN THE SUPREME COURT OF THE STATE OF NEVADA

BENJAMIN M. HERRICK,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37154

FILED

MAY 18 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

BENJAMIN M. HERRICK,

Appellant,

vs.

WARDEN, ELY STATE PRISON, E.K.
MCDANIEL,

Respondent.

No. 36668

ORDER OF AFFIRMANCE IN DOCKET NO. 37154, RECALLING REMITTITUR

AND AFFIRMANCE IN DOCKET NO. 36668

Docket No. 37154 is a proper person appeal from an order of the district court denying appellant's "request for relief from judgment and order entered on June 28, 2000, and motion to dismiss counsel." Docket No. 36668 is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.

On October 8, 1997, the district court convicted appellant, pursuant to a guilty plea, of two counts of sexual assault. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the

01-08302

possibility of parole. This court dismissed appellant's direct appeal.¹

On June 28, 1999, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent appellant. On June 28, 2000, after conducting an evidentiary hearing, the district court denied appellant's petition. This court dismissed appellant's appeal for lack of jurisdiction.²

Docket No. 37154

On November 1, 2000, appellant filed a document labeled, "petitioner's request for relief from judgment and order entered on June 28, 2000, and motion to dismiss counsel Scott W. Edwards, Esq." On November 13, 2000, the district court denied appellant's request. This appeal followed.

Appellant requested the district court to vacate and re-enter the order denying his post-conviction habeas corpus petition to allow him to appeal the denial of his petition. Appellant claimed that he was never served with notice of entry of the order. Appellant further claimed that his counsel failed to file an appeal from the order denying his petition despite appellant's request to counsel to file an appeal if the court ruled against him. Appellant argued that NRCP 60(b)

¹Herrick v. State, Docket No. 31348 (Order Dismissing Appeal, October 5, 1998).

²Herrick v. Warden, Docket No. 36668 (Order Dismissing Appeal, October 10, 2000).

allowed the district court to provide him relief due to a mistake, inadvertence or excusable neglect. Finally, appellant moved the district court to remove his counsel.

Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's request. "[T]he provisions of NRS 34.780 expressly limit the extent to which civil rules govern post-conviction habeas proceedings. We cannot turn to the rules of civil procedure for guidance when NRS Chapter 34 has already addressed the matter at issue."³ Because NRS Chapter 34 provides the manner in which a district court should decide a habeas corpus petition, and the manner in which an appeal should be pursued, there is no need to turn to the rules of civil procedure.⁴ Thus, we conclude that the district court did not err in denying appellant's request. Further, we conclude that the district court did not err in denying appellant's request to dismiss counsel. Thus, we affirm the order of the district court.

Docket No. 36668

Our review of the record on appeal in Docket No. 37154 has established that this court improvidently dismissed appellant's appeal in Docket No. 36668 for lack of jurisdiction. Specifically, the record reveals that although

³Mazzan v. State, 109 Nev. 1067, 1073, 863 P.2d 1035, 1038 (1993).

⁴NRS 34.575; NRS 34.830.

the Washoe County Clerk served notice of entry of the order denying appellant's habeas corpus petition on appellant's counsel, notice of entry of the order was never served on appellant as required by NRS 34.830.⁵ Thus, appellant had filed his appeal from the denial of his habeas corpus petition in a timely fashion, and this court had jurisdiction to consider the appeal. We conclude appellant is entitled to have his appeal resolved on the merits. Accordingly, in Docket No. 36668, we recall the remittitur, and we vacate our prior order of October 10, 2000, dismissing appellant's appeal. Nonetheless, we further affirm the order of the district court denying appellant's habeas corpus petition.⁶

After a thorough review of the record on appeal, we conclude that the district court did not err in denying appellant's habeas corpus petition. In his petition, appellant raised claims of ineffective assistance of counsel, involuntary and unknowing guilty plea, prosecutorial error, and trial court error. The district court appointed counsel to represent appellant. At the evidentiary hearing, appellant abandoned all of the claims raised in his petition save one: that the district court erred in considering prior uncharged conduct at the time of sentencing. This claim was presented to and rejected by this court in appellant's direct appeal. The

⁵See also Lemmond v. State, 114 Nev. 219, 954 P.2d 1179 (1998).

⁶We note that we used the record on appeal in Docket No. 37154 to resolve the appeal in Docket No. 36668.

doctrine of the law of the case prevents further relitigation of this issue.⁷ Thus, we affirm the order of the district court denying appellant's habeas corpus petition.

Conclusion

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

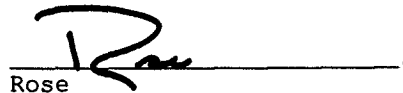
ORDER the judgment of the district court AFFIRMED in Docket No. 37154, AND in Docket No. 36668, we ORDER the remittitur RECALLED, the October 10, 2000 order dismissing appeal VACATED, and the judgment of the district court AFFIRMED.



Shearing J.



Agosti J.



Rose J.

cc: Hon. Brent T. Adams, District Judge
Hon. Peter I. Breen, District Judge
Attorney General
Washoe County District Attorney
Benjamin M. Herrick
Washoe County Clerk

⁷See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

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