

IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY FRANK WADE,

No. 37467

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

OCT 11 2001

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

ORDER OF AFFIRMANCE

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

On August 23, 1996, appellant was convicted of one count of conspiracy to sell a controlled substance and one count of trafficking in a controlled substance. The district court sentenced appellant to life in prison with the possibility of parole after ten years. Appellant filed a direct appeal, and this court affirmed appellant's judgment of conviction.¹ Thereafter, appellant filed a petition for rehearing, which was also denied.² The remittitur issued on October 27, 1999.

On October 4, 2000, appellant filed a post-conviction petition for a writ of habeas corpus, arguing that his counsel was ineffective. The district court ordered the State to file a response. In its response, the State argued that appellant's petition should be dismissed, in part, because it was not verified as required by NRS 34.730.

In an attempt to cure this procedural deficiency, on December 12, 2000, appellant filed a first amended post-conviction petition for a writ of habeas corpus containing a verification from counsel. The State filed a motion to strike appellant's first amended petition, arguing that it was procedurally improper. The district court granted the State's motion to strike. Appellant then filed a motion to amend his post-conviction petition for a writ of habeas corpus. The district court denied appellant's motion to

¹Wade v. State, 114 Nev. 914, 966 P.2d 160 (1998).

²Wade v. State, 115 Nev. 290, 986 P.2d 438 (1999) (denying rehearing and modifying prior opinion).

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amend. Additionally, the district court denied appellant's post-conviction petition for a writ of habeas corpus, finding that it was not cognizable because it was unverified. Appellant filed the instant appeal.

First, appellant argues that the district court erred in denying his petition because counsel's signature under NRCP 11 satisfied the verification requirement contained in NRS 34.730. We disagree. The district court did not err in dismissing appellant's petition because an unverified petition is not cognizable.³ An attorney's signature pursuant to NRCP 11 is not equivalent to a verification under NRS 34.730 because the latter requires counsel to verify that "the petitioner personally authorized him to commence the action."⁴ NRCP 11 contains no such requirement. Further, this court applies the rules of civil procedure only when statutes governing habeas corpus do not address the matter at issue.⁵ Here, because a statute governing habeas corpus, particularly NRS 34.730, addresses the verification requirement at issue, this statute is dispositive.

Second, appellant argues that the district court "waived" the verification requirement by ordering the State to respond to his petition. We conclude that this contention lacks merit because counsel's verification is a statutory requirement that cannot be waived by counsel or the court.⁶

Third, appellant argues that the district court erred in striking his first amended petition. We disagree. The district court did not err in striking the first amended petition because appellant was prohibited, by statute, from filing an amended petition. Indeed, NRS 34.750 authorizes a supplemental petition only where the district court has determined that counsel shall be appointed to represent a petitioner acting in proper person, or where a supplemental petition is ordered by

³See NRS 34.730(1) ("A petition must be verified by petitioner or his counsel."); see also Sheriff v. Scilio, 96 Nev. 776, 616 P.2d 402 (1980); Sheriff v. Chumphol, 95 Nev. 818, 603 P.2d 690 (1979); Sheriff v. Arvey, 93 Nev. 72, 560 P.2d 153 (1977).

⁴NRS 34.730(1).

⁵See Beets v. State, 110 Nev. 339, 871 P.2d 357 (1994); Mazzan v. State, 109 Nev. 1067, 863 P.2d 1035 (1993).

⁶See NRS 34.730.

the court.⁷ Here, the district court neither appointed counsel to represent appellant acting in proper person nor authorized an amended petition. Accordingly, the district court did not err in striking appellant's first amended petition because appellant had no statutory right to amend.

Finally, appellant argues that the district court abused its discretion in denying appellant's motion for leave to amend his post-conviction petition because: (1) the amendment would have been timely since it related back to his original petition; (2) the lack of verification was corrected as soon as it was brought to petitioner's attention; and (3) there is United States Supreme Court precedent holding that cases should be decided on their merits, rather than dismissed based on "mere technicalities." We conclude that the district court acted within its discretion in denying appellant's motion to amend because appellant was not entitled to amend his post-conviction petition as a matter of right.

In affirming the district court's order, we address sua sponte, another issue of great importance. The record reveals that appellant's counsel represented him at trial, on appeal, and on post-conviction, resulting in an actual conflict of interest. In fact, in the original unverified post-conviction petition, counsel for appellant argued his own ineffectiveness.

Trial counsel may not represent appellant in a post-conviction proceeding where appellant claims ineffective assistance of counsel because the ethical code of conduct prohibits an attorney from representing a client in a matter where he is likely to be a witness.⁸ Although a petitioner may waive this existing actual conflict, in so doing, a petitioner would be limiting his potential claims because his trial counsel may not present a claim of his own ineffectiveness. Accordingly, prior to allowing trial counsel to represent a particular petitioner in a post-conviction proceeding, the district court should, on the record, explain the nature of the conflict, the disabilities this would place on potential claims,

⁷NRS 34.750(3)(b) provides, "After appointment by the court, counsel for the petitioner may file and serve supplemental pleadings . . . within 30 days after . . . the date of his appointment." NRS 34.750(5) provides, "No further pleadings may be filed except as ordered by the court."


⁸See SCR 178 ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness").

and the nature of any potential claims that the petitioner would be waiving.⁹ Prior to affirmatively waiving this actual conflict on the record, the district court should inform the petitioner that he would giving up his right to raise the issue of ineffective assistance of counsel.

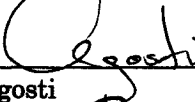
In the instant case, there is no indication that appellant was advised, on the record, about the nature and consequences of retaining counsel with an actual conflict and no indication that appellant waived this conflict. Further, the record reveals that appellant's counsel's inability to argue his own ineffectiveness actually prejudiced appellant and contributed to counsel's failure to verify the post-conviction petition. Accordingly, in affirming the order of the district court, we emphasize that appellant has good cause and actual prejudice for the filing of a successive, untimely petition, and we instruct the district court to allow appellant to file such a petition for consideration on the merits.¹⁰ Should appellant continue to retain trial counsel in future post-conviction proceedings, the district court should elicit, on the record, appellant's affirmative and informed waiver of this actual conflict.

Having considered appellant's contentions and concluded that they lack merit, we


ORDER the judgment of the district court AFFIRMED.



Young J.



Agosti J.



Leavitt J.

⁹See Hayes v. State, 106 Nev. 543, 556-57, 797 P.2d 962, 970 (1990).

¹⁰See NRS 34.810(3) (providing that the district court will consider a second or successive petition if appellant shows good cause for failure to present the claim and actual prejudice).

cc: **Hon. Steven P. Elliott, District Judge**
Attorney General
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