

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN ALLEN SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38022

FILED

MAR 26 2002

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 25, 1993, the district court convicted appellant, pursuant to a jury verdict, of eight counts of incest in district court case no. C92452. Appellant was also convicted of two counts of sexual assault with a minor under fourteen years of age and one count of child abuse and neglect with substantial mental injury in district court case no. C94748. The district court sentenced appellant to serve eight consecutive terms of six years in the Nevada State Prison for the incest convictions. On direct appeal, this court affirmed appellant's convictions as to the eight counts of incest, but reversed appellant's convictions as to the remaining counts and remanded for a new trial on those charges.¹ The remittitur issued on October 27, 1995.

On February 6, 1996, 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

¹Smith v. State, 111 Nev. 499, 507, 894 P.2d 974, 978 (1995).

conduct an evidentiary hearing. On March 11, 1997, the district court denied appellant's petition. This court dismissed appellant's subsequent appeal.²

On April 10, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition arguing that appellant's petition was untimely filed and successive. Moreover, the State specifically pleaded laches. 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 May 30, 2001, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than five years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.³ Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.⁴ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁵ Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.⁶

In an attempt to excuse his procedural defaults, appellant argued that his petition was untimely filed because the United States

²Smith v. State, Docket No. 29801 (Order Dismissing Appeal, February 16, 1999).

³See NRS 34.726(1).

⁴See NRS 34.810(b)(2); NRS 34.810(2).

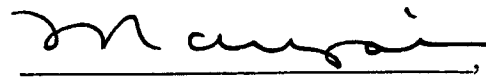
⁵See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

⁶See NRS 34.800(2).

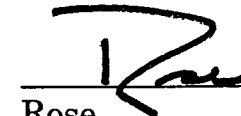
District Court ordered him to return to state court to exhaust his state claims. Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's petition. Appellant failed to demonstrate cause to excuse the procedural defaults and failed to overcome the presumption of prejudice to the State.⁷

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.⁹


_____, C.J.
Maupin


_____, J.
Shearing


_____, J.
Rose

cc: Hon. Donald M. Mosley, District Judge
Attorney General/Carson City
Clark County District Attorney
John Allen Smith
Clark County Clerk

⁷See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994); see also Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989).

⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁹We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.