IN THE SUPREME COURT OF THE STATE OF NEVADA

WAYNE DOUGLAS SMITH,

Appellant,

vs.

WARDEN, NEVADA STATE PRISON,
DON HELLING,

Respondent.

No. 38111

FILED

DEC 05 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY _____
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's post-conviction petitions for writs of habeas corpus in two district court cases.

In district court case CR-0024702, the district court convicted appellant Wayne Douglas Smith, pursuant to a jury verdict, of one count each of burglary and attempted grand larceny. The district court sentenced appellant to serve concurrent prison terms totaling sixteen to seventy-two months. On appeal, this court affirmed the judgment of conviction.[1] The remittitur issued on September 13, 1999.

In district court case CR-0024703, the district court convicted Smith, pursuant to a jury verdict, of felony driving under the influence and sentenced him to serve eighteen to forty-eight months in prison. On appeal, this court affirmed the judgment of conviction.[2] The remittitur issued on February 8, 1999.

On January 12, 2000, Smith filed a proper person post-conviction petition for a writ of habeas corpus in district court case CR-0024703. The district court appointed counsel to represent Smith and counsel filed two supplements to the petition. The State opposed the petition and supplements.

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[1]Smith v. State, Docket No. 32789 (Order Dismissing Appeal, August 16, 1999).

[2]Smith v. State, Docket No. 32788 (Order Dismissing Appeal, January 13, 1999).

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On February 24, 2000, Smith filed a proper person post-conviction petition for a writ of habeas corpus in district court case CR-0024702. The district court appointed counsel to represent Smith and counsel filed two supplements to the petition. The State filed an opposition.

The district court conducted an evidentiary hearing on the petition filed in district court case CR-0024703. On June 18, 2001, the district court entered a single order denying both petitions. This appeal followed.

Smith's sole contention is that the district court erred in rejecting his claim that the petitions should be summarily granted because the State failed to comply with provisions in NRS chapter 34 regarding the filing of an answer and return to a post-conviction petition. We conclude that Smith's contention lacks merit.

NRS 34.745(1) provides that when a post-conviction petition challenges the validity of a judgment of conviction and is the petitioner's first such petition, the district court "shall order the district attorney" to: (a) file "[a] response or an answer to the petition" and, if an evidentiary hearing is warranted, a return; or (b) "[t]ake other action that the judge or justice deems appropriate." The statute does not require the district court to order a response or an answer in every case because it allows the court to order the district attorney to "take other action" that the court deems appropriate. The statute also does not require the district attorney to file a response or an answer in the absence of an order from the district court.[3]
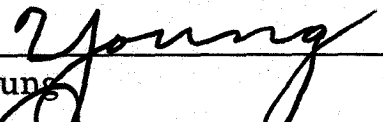
In these cases, the record reveals that the district court ordered the State to file a response or answer and a return to the petition in district court case CR-0024703, but initially did not order a response or answer in district court case CR-0024702. After obtaining an extension of time, the State eventually filed two oppositions in district court case CR-0024703 that addressed the petition and two supplements filed by Smith's counsel. After the district court ordered Smith's counsel to file a second supplement in district court case CR-0024702 and ordered the State to
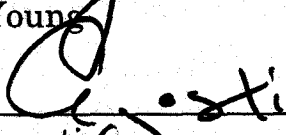
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[3]Cf. NRS 34.430(1) ("Except as otherwise provided in subsection 1 of NRS 34.745, the respondent shall serve upon the petitioner and file with the court a return and an answer that must respond to the allegations of the petition within 45 days or a longer period fixed by the judge or justice.").
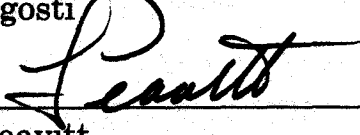
respond thereafter, the State filed an opposition that addressed the petition and supplements in district court case CR-0024702. The State did not, however, file a return in either case.

Even assuming that there was not strict compliance with NRS 34.745(1), we conclude that Smith is not entitled to the relief requested. Smith has not demonstrated that the district court was required to grant the petitions based solely on the alleged procedural defects. NRS 34.745 does not provide a remedy for noncompliance, and Smith has cited no authority requiring the district court to grant a post-conviction petition based on failure to comply with NRS 34.745. As a general rule, we will not consider arguments that are not supported by legal authority.[4] Moreover, we suggested in Warden v. O'Brian[5] that a "default judgment" in favor of a petitioner is not warranted based solely on the filing of a late answer or return or on the failure to file an answer or return. We therefore conclude that Smith's contention lacks merit, and we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. David A. Huff, District Judge
      Attorney General/Carson City
      Churchill County District Attorney
      Rick Lawton
      Robert W. Witek
      Churchill County Clerk

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[4]See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

[5]93 Nev. 211, 212, 562 P.2d 484, 485 (1977) (discussing former version of NRS 34.430 and citing with approval cases holding that "default judgments in habeas corpus proceedings are not available as procedure to empty state prisons" and that courts "'should not blindly and arbitrarily release a prisoner, not entitled to release, because of a late return and answer or even because of total lack of a return or answer'" (quoting Marshall v. Geer, 344 P.2d 440, 442 (Colo. 1959))); see also NRS 34.770(1) ("A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.").

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