

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES COOK,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38686

FILED

JUL 11 2002

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
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 September 26, 1986, the district court convicted appellant, pursuant to a jury verdict, of one count of first degree kidnapping with substantial bodily harm with the use of a deadly weapon, one count of extortion with the use of a deadly weapon, and one count of mayhem with the use of a deadly weapon.<sup>1</sup> The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole and concurrent terms totaling forty years. This court affirmed appellant's conviction and sentence on appeal.<sup>2</sup> The remittitur issued on September 13, 1988.

---

<sup>1</sup>Appellant's four co-defendants, Joseph Clem, Gerald Bridgewater, Kenneth Bridgewater, and James Player, were likewise convicted.

<sup>2</sup>Clem v. State, 104 Nev. 351, 760 P.2d 103 (1988).

On April 12, 1989, appellant filed a proper person petition for post-conviction relief in the district court.<sup>3</sup> The district court appointed counsel to represent appellant in the post-conviction proceedings. On April, 9, 1990, the district court denied the petitions. This court dismissed the subsequent appeal.<sup>4</sup>

On December 13, 1990, appellant and his co-defendants filed proper person petitions for a writ of habeas corpus in the district court. The district court denied the petitions. This court affirmed the decision of the district court on appeal.<sup>5</sup>

On February 1, 1996, appellant filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On February 27, 1996, the district court dismissed the petition. This court dismissed the subsequent appeal.<sup>6</sup>

On June 20, 2001, appellant filed a third proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition arguing the petition was untimely filed and successive. Moreover, the State specifically pleaded laches. Appellant filed a reply. Pursuant to NRS 34.750 and 34.770, the district court

---

<sup>3</sup>Appellant's co-defendants filed identical petitions in the district court on May 15, 1989.

<sup>4</sup>Clem v. State, Docket No. 21422 (Order Dismissing Appeal, October 29, 1990).

<sup>5</sup>Bridgewater v. Warden, 109 Nev. 1159, 865 P.2d 1166 (1993).

<sup>6</sup>Cook v. State, Docket No. 28586 (Order Dismissing Appeal, December 28, 1998).

declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. The district court denied appellant's petition.<sup>7</sup> This appeal followed.<sup>8</sup>

Appellant filed his petition almost thirteen years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.<sup>9</sup> Moreover, appellant's petition was successive because he had previously filed several post-conviction petitions.<sup>10</sup> Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>11</sup> Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.<sup>12</sup>

In an attempt to excuse his procedural defects, appellant argued that the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), constituted a change in law and provided

---

<sup>7</sup>The district court entered three written orders denying appellant's petition on October 2, 2001, October 4, 2001, and October 25, 2001.

<sup>8</sup>In his notice of appeal, appellant stated that he was appealing from the decision entered on October 15, 2001. However, this court's review of the record reveals that no decision was entered on October 15, 2001. We elect to construe this appeal to be from the three written orders denying appellant's June 20, 2001 habeas corpus petition.

<sup>9</sup>See NRS 34.726(1).

<sup>10</sup>See NRS 34.810(1)(b)(2); NRS 34.810(2).

<sup>11</sup>See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

<sup>12</sup>See NRS 34.800(2).

proof that his sentences were improperly enhanced pursuant to NRS 193.165 (the deadly weapon enhancement). Appellant challenged the previous decisions rejecting his challenge to the imposition of the deadly weapon enhancements in his case. Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate adequate cause to excuse his procedural defects and failed to overcome the presumption of prejudice to the State.<sup>13</sup> Moreover, appellant did not demonstrate that failure to consider his petition would result in a fundamental miscarriage of justice.<sup>14</sup>

---

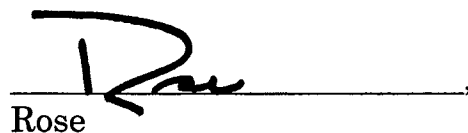
<sup>13</sup>Caspari v. Bohlen, 510 U.S. 383 (1994) (discussing retroactive application of new rules of criminal procedure); Teague v. Lane, 489 U.S. 288 (1989) (same); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994) (holding that good cause must be an impediment external to the defense); Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975) (holding that the law of a first appeal is the law of the case in all later appeals in which the facts are substantially the same; this doctrine cannot be avoided by more detailed and precisely focused argument); see also Rees v. Hill, 286 F.3d 1103 (9th Cir. 2002) (holding that because the decision in Apprendi does not apply retroactively to cases on initial collateral review it does not meet the requirements for filing a second federal petition for habeas relief); United States v. Sanchez-Cervantes, 282 F.3d 664 (9th Cir. 2002) (holding that the new rule of criminal procedure announced in Apprendi does not apply retroactively on initial collateral review).


<sup>14</sup>Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996) (stating that a petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice).

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.<sup>15</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Shearing

 J.  
Rose

 J.  
Becker

cc: Hon. Lee A. Gates, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Charles Cook  
Clark County Clerk

---

<sup>15</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).