

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND GENE PHENIX,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39467

FILED

OCT 15 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

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 May 25, 1995, the district court convicted appellant, pursuant to a jury verdict, of first degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison without the possibility of parole. This court affirmed appellant's conviction and sentence.¹ The remittitur issued on March 17, 1998.

On August 14, 1998, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Appellant filed a reply. On November 23, 1998, the district court denied appellant's petition. Appellant also filed a second post-conviction petition for a writ of habeas corpus and a motion for

¹See Phenix v. State, 114 Nev. 116, 954 P.2d 739 (1998).

discovery of Brady² material. The district court denied relief. This court consolidated the appeals and affirmed the district court's orders denying appellant's petitions and dismissed the appeal from the order denying his motion for discovery of Brady material.³

On January 30, 2002, appellant filed his third proper person post-conviction petition for a writ of habeas corpus in the district court.⁴ The State opposed the petition. Appellant filed a reply. 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 March 19, 2002, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition approximately four years after this court issued the remittitur from his direct appeal. Thus, appellant's

²See Brady v. Maryland, 373 U.S. 83 (1963).

³See Phenix v. State, Docket Nos. 33543, 34063, 34601 (Order of Affirmance and Dismissing Appeal, April 10, 1998).

⁴Appellant labeled his petition a "motion for permission to file a successive petition for a writ of habeas corpus" and then filed a post-conviction petition for a writ of habeas corpus. Because appellant challenged his conviction and sentence, we conclude that the district court properly construed appellant's petition as a post-conviction petition for a writ of habeas corpus. See NRS 34.724(2)(b)(stating that a post-conviction petition for a writ of habeas corpus "[c]omprehends and takes the place of all other common law, statutory or other remedies which have been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them.").

petition was untimely filed.⁵ Moreover, appellant's petition was successive because he had previously filed two post-conviction petitions for writs of habeas corpus.⁶ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁷

In an attempt to excuse his procedural defects, appellant claimed that the State committed a Brady violation by concealing evidence of the arrest of a man who had possession of a ring belonging to appellant's wife that was stolen from her purse. Appellant further claimed that because the State had withheld this evidence, he was unable to argue to the jury that others had committed the crime and that he was the victim of a conspiracy.

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 overcome the procedural bars because his Brady violation claim does not demonstrate that the result of his trial would have been different had the evidence been disclosed.⁸ Moreover, to the extent that appellant claimed actual innocence, his claim is not credible.

⁵See NRS 34.726(1).

⁶See NRS 34.810(2).

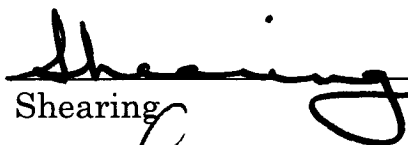
⁷See NRS 34.726(1); NRS 34.810(3).


⁸See Mazzan v. Warden, 116 Nev. 48, 66-67, 993 P.2d 25, 36-37 (2000).

Thus, appellant did not demonstrate that a fundamental miscarriage of justice would result from failure to consider his claims.⁹

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.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 _____, J.
Shearing

 _____, J.
Leavitt

 _____, J.
Becker

cc: Hon. Michael L. Douglas, District Judge
Attorney General/Carson City
Clark County District Attorney
Raymond Gene Phenix
Clark County Clerk

⁹See Mazzan v. Warden, 112 Nev. 838, 843, 921 P.2d 920, 923 (1996).

¹⁰See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).