

IN THE SUPREME COURT OF THE STATE OF NEVADA

KERRY ROY WATKINS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 39614

FILED

FEB 27 2003

ORDER OF AFFIRMANCE

JANETTE ELLISON  
CLERK OF THE SUPREME COURT  
*J. Richard*

This is a proper person appeal from an order of the district court denying a motion to vacate or modify a sentence, a motion to correct an illegal sentence, and a post-conviction petition for a writ of habeas corpus.

On February 12, 1997, the district court convicted appellant Kerry Roy Watkins, pursuant to a jury verdict, of one count of sexual assault and three counts of lewdness with a minor under the age of fourteen. The district court sentenced Watkins to serve a term of life in the Nevada State Prison with the possibility of parole for the sexual assault, and four years for each count of lewdness. The district court further ordered that all sentences were to be served concurrently. This court dismissed Watkins' direct appeal.<sup>1</sup>

On August 13, 1999, Watkins filed his first proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court conducted an evidentiary hearing at which Watkins represented himself. On February 16, 2000, the

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<sup>1</sup>Watkins v. State, Docket No. 30055 (Order Dismissing Appeal, May 10, 1999).

district court denied the petition. This court affirmed the denial of Watkins' first petition.<sup>2</sup>

On December 7, 2000, Watkins filed his first motion to correct an illegal sentence. On January 29, 2001, the district court denied Watkins' motion. This court affirmed the district court's decision on appeal.<sup>3</sup>

On November 28, 2001, Watkins filed a motion to vacate or modify his sentence in the district court. The State opposed the motion and Watkins filed a reply. On December 13, 2001, Watkins filed a motion to correct an illegal sentence in the district court. The State opposed the motion. On January 7, 2002, Watkins filed his second petition for a writ of habeas corpus in the district court. On April 8, 2002, the district court denied Watkins' motions and petition. This appeal followed.<sup>4</sup>

In his motion to vacate or modify his sentence, Watkins claimed that the district court relied on mistaken assumptions about his criminal record. Specifically, Watkins complained that the presentence investigation report misstated the evidence regarding what had occurred in this case. A motion to modify a sentence "is limited in scope to sentences based on mistaken assumptions about a defendant's criminal

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<sup>2</sup>Watkins v. State, Docket No. 35908 (Order of Affirmance, March 1, 2002).

<sup>3</sup>Watkins v. State, Docket No. 37249 (Order of Affirmance, November 30, 2001).

<sup>4</sup>To the extent that Watkins seeks to appeal the district court's denial of his motion for rehearing, this court lacks jurisdiction to consider that appeal. See Phelps v. State, 111 Nev. 1021, 900 P.2d 344 (1995).

record which work to the defendant's extreme detriment."<sup>5</sup> There is no indication in the record that the district court considered "information or accusations founded on facts supported only by impalpable or highly suspect evidence."<sup>6</sup> Moreover, as the district court noted in its order, the court presided over the trial and was therefore aware of all of the pertinent facts. Accordingly, the district court did not err in denying this motion.

In his motion to correct an illegal sentence, Watkins claimed that his sentence was illegal because at the time the crimes were committed, NRS 200.366 provided for a minimum parole eligibility of five years rather than ten. A motion to correct an illegal sentence is limited in scope and may only challenge the facial legality of the sentence: either the district court was without jurisdiction to impose a sentence, or the sentence was imposed in excess of the statutory maximum.<sup>7</sup> Watkins' first motion to correct an illegal raised the same claim. The doctrine of the law of the case prohibits further litigation of this issue.<sup>8</sup> Therefore, the district court did not err in denying the motion.

Watkins filed his petition approximately five years after entry of the judgment of conviction. Thus, the petition was untimely filed.<sup>9</sup> Watkins' petition was also successive because he had previously filed a

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<sup>5</sup>Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

<sup>6</sup>See Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

<sup>7</sup>See Edwards, 112 Nev. at 708, 918 P.2d at 324.

<sup>8</sup>Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

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

petition for post-conviction relief.<sup>10</sup> Accordingly, the petition is procedurally barred absent a demonstration of good cause and prejudice.<sup>11</sup>

Watkins argued that the untimeliness of the filing should be excused because he could not file his second petition while the appeal of the district court's denial of his first petition was pending. This argument is without merit. "[T]he one-year period for filing a post-conviction habeas corpus petition begins to run from the issuance of the remittitur from a timely direct appeal to this court from the judgment of conviction."<sup>12</sup> Watkins argued that the successiveness of the filing should be excused because he "was not in possession of the full discovery of his case and was not afforded amble [sic] opportunity to present these new arguments to the district court for proper review." This does not satisfy the good cause requirement of NRS 34.810. Watkins did not require "discovery" in order to raise his claims of ineffective assistance of counsel.<sup>13</sup> Finally, Watkins did not explain how he would be prejudiced if these claims were not heard, only that "the prejudicial effects" would be "astronomical." Thus, the district court properly determined that Watkins' petition was procedurally barred.

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

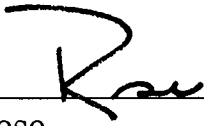
<sup>11</sup>See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

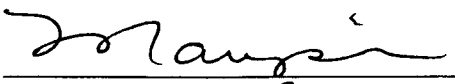
<sup>12</sup>Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133 (1998).


<sup>13</sup>In his petition, Watkins claimed that trial counsel was ineffective for failing to adequately prepare for the preliminary hearing, making improper statements during closing argument, failing to object to prosecutorial misconduct, failing to file a motion to suppress, and using "undue influence" to convince Watkins not to testify on his own behalf.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Watkins is not entitled to relief and that briefing and oral argument are unwarranted.<sup>14</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Steven R. Kosach, District Judge  
Kerry Roy Watkins  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk

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<sup>14</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).