

IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMY LINVILLE DUNCAN A/K/A  
TOMMY LENVILLE DUNCAN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 39714

FILED

MAR 05 2003

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court denying appellant Tommy Linville Duncan's motion to withdraw his guilty plea.

On February 2, 1996, the district court convicted Duncan, pursuant to a guilty plea, of two counts of sexual assault and one count of first-degree kidnapping. The district court sentenced Duncan to serve three consecutive terms of life in the Nevada State Prison with the possibility of parole.

On December 19, 1996, Duncan filed a proper person motion in the district court entitled, "motion for relief from judgment under FRCP 60(b)(1)(3)." The district court clerk transmitted the motion to this court, and this court docketed the motion as a notice of appeal. Thereafter, this court dismissed the appeal concluding that, to the extent the document

could be considered an appeal from the judgment of conviction, it was untimely.<sup>1</sup> The remittitur issued on April 2, 1997.

On April 6, 1998, Duncan 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 NRS 34.770, the district court declined to appoint counsel to represent Duncan or to conduct an evidentiary hearing. On July 17, 1998, the district court denied Duncan's petition, ruling that it was procedurally barred. Duncan appealed, and this court affirmed the order of the district court.<sup>2</sup>

On February 15, 2002, Duncan filed a motion to withdraw the guilty plea. The State opposed the motion. The district court declined to appoint counsel or conduct an evidentiary hearing. On March 21, 2002, the district court denied Duncan's motion to withdraw his guilty plea. This appeal followed.

In the motion, Duncan alleged that he should be allowed to withdraw his guilty plea because allowing his conviction to stand would result in manifest injustice. In particular, Duncan alleged that: (1) his guilty plea was the product of misconceptions about the strength of the State's DNA evidence, as well as his belief that he would receive a more lenient sentence if he pleaded guilty; (2) his trial counsel was ineffective in failing to prepare a presentence motion to withdraw, investigate to

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<sup>1</sup>Duncan v. State, Docket No. 29753 (Order Dismissing Appeal, March 14, 1997).

<sup>2</sup>Duncan v. State, Docket No. 32800 (Order of Affirmance, October 31, 2000).

uncover exculpatory evidence, and obtain an expert to analyze the State's DNA evidence; and (3) he was actually innocent of the crimes to which he pleaded guilty.

Although Duncan acknowledged that his motion was filed six years after the entry of the judgment of conviction, Duncan alleged that his delay was excusable. First, Duncan claimed that the delay was the result of several instances of official interference. In particular, Duncan notes that, in 1996, the district court clerk refused to file his "motion for relief from judgment" and subsequently transmitted that motion to this court, which treated it as an untimely notice of appeal. Duncan also claimed that the proper person habeas corpus petition filed in 1998, which raised some of the same claims as the motion to withdraw the guilty plea, was improperly denied as untimely. Finally, Duncan claimed that the State should be estopped from raising the doctrine of laches because it misrepresented the nature of the DNA evidence and refused to turn over a copy of the DNA report despite Duncan's repeated requests for it.

The application of the doctrine of laches requires "consideration of several factors, including: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudiced the State."<sup>3</sup>

We conclude that Duncan's motion is barred by the doctrine of laches. Duncan filed his motion approximately six years after entry of the

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<sup>3</sup>Hart v. State, 116 Nev. 558, 563-64, 1 P.3d 969, 972 (2000).

judgment of conviction, and Duncan's claims of excusable delay lack merit. Even assuming the district court clerk's refusal to file his "motion for relief from judgment" was official interference, Duncan failed to allege his claim of official interference in a timely manner. The habeas petition filed in 1998 was untimely and procedurally barred.<sup>4</sup> Moreover, Duncan waited approximately one and one-half years from this court's order affirming the dismissal of his habeas petition to file his motion to withdraw his guilty plea. Finally, we disagree with Duncan that the State should be estopped from relying on the doctrine of laches. Our review of the transcript of the plea canvass reveals that the State provided the defense with the DNA report as soon as it became available, on December 15, 1995, and the State did not misrepresent the contents of the report.


Because the State may suffer prejudice if it were forced to proceed to trial after Duncan's six-year delay, we conclude that the doctrine of laches mandates the denial of appellant's motion to withdraw the guilty plea. Moreover, as a separate and independent ground to deny relief, we note that the substance of the claims raised in the motion lack merit. Duncan failed to show that: (1) his guilty plea was not knowing, voluntary, and intelligent; (2) his trial counsel was ineffective; and (3) he was actually innocent of the crimes to which he pleaded guilty.

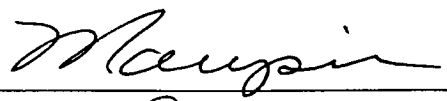
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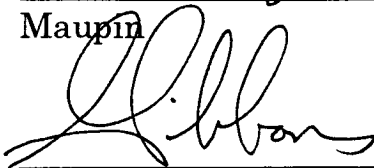
<sup>4</sup>See 34.726(1); Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132 (1998) (noting that the time for filing a timely habeas corpus petition begins to run from the judgment of conviction or the issuance of the remittitur from a timely direct appeal).

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Duncan is not entitled to relief and that briefing and oral argument are unwarranted.<sup>5</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>6</sup>

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

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

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

cc: Hon. Donald M. Mosley, District Judge  
Tommy Linville Duncan  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>5</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>6</sup>We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.