

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MCKINES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40127

FILED

JUN 30 2003

ORDER OF AFFIRMANCE

JANE T. M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
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 and motion for reconsideration.

On January 10, 1983, the district court convicted appellant, pursuant to a guilty plea, of one count of possession of a controlled substance with the intent to sell. The district court sentenced appellant to serve a term of two and one-half years in the Nevada State Prison. No direct appeal was taken.

In 1991 and in 1995, appellant unsuccessfully sought relief from his conviction.¹ On May 21, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition arguing that 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

¹McKines v. State, Docket No. 28196 (Order Dismissing Appeal, September 4, 1998); McKinnis v. State, Docket No. 22756 (Order Dismissing Appeal, December 27, 1991).

court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. The district court orally denied the petition, and on August 7, 2002, appellant filed a motion for reconsideration from the court's oral decision to deny his petition. On August 15, 2002, the district court entered a written order denying appellant's petition. On August 23, 2002, the district court denied appellant's motion for reconsideration. This appeal followed.²

We conclude that appellant was precluded from obtaining relief in a habeas corpus petition because he was not under restraint for the offense at issue at the time he filed his petition.³ This court has held that a defendant who has completed his sentence may not seek habeas corpus relief from that conviction even if that conviction has been used to enhance a sentence that the defendant is presently serving.⁴ "Allowing a petitioner to file a post-conviction habeas corpus petition to challenge a judgment of conviction, after the petitioner has already completed service of the sentence imposed pursuant to that conviction, undermines the

²To the extent that appellant appeals from the denial of his motion for reconsideration, this court lacks jurisdiction to consider that portion of the appeal. See Phelps v. State, 111 Nev. 1021, 900 P.2d 344 (1995).

³See Nev. Const. Art. 6, § 6(1) (stating that the district courts may issue a writ of habeas corpus on petition by "any person who is held in actual custody in their respective districts, or who has suffered a criminal conviction in their respective districts and has not completed the sentence imposed pursuant to the judgment of conviction").

⁴See Jackson v. State, 115 Nev. 21, 973 P.2d 241 (1999).

varied interests in the finality of criminal convictions."⁵ Appellant was not in custody in the instant case at the time he filed the instant petition. In his petition, appellant acknowledged that he was in federal custody pursuant to federal drug charges and that he was seeking to challenge his prior Nevada conviction because it was used to enhance his federal sentence. Furthermore, appellant's petition was procedurally barred as it was filed almost twenty years after entry of the judgment of conviction, and appellant failed to demonstrate good cause to excuse his procedural defects or overcome the presumption prejudice to the State.⁶ Finally, appellant did not demonstrate that failure to consider his petition would result in a fundamental miscarriage of justice.⁷ Therefore, we affirm the order of the district court denying appellant's petition.

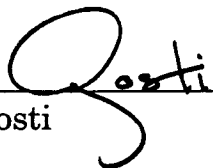
⁵Id. at 23 n.2, 973 P.2d at 242 n.2.


⁶See NRS 34.726(1) (providing that a post-conviction petition for a writ of habeas corpus must be filed within one year after entry of the judgment of conviction); Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998) (holding that an allegation that counsel failed to file a direct appeal is not good cause to excuse the procedural bar); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995) (holding that trial counsel's failure to send a petitioner his files did not prevent the petitioner from filing a timely habeas corpus petition); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994) (holding that good cause must be an impediment external to the defense); Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988) (holding that a petitioner's limited intelligence or poor assistance in framing issues will not overcome procedural bar).

⁷See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

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.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁹


_____, C.J.
Agosti


_____, J.
Shearing


_____, J.
Leavitt

cc: Hon. Michael L. Douglas, District Judge
James McKines
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁹We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.