

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH F. DAVIS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

JOSEPH F. DAVIS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40196

No. 40599

**FILED**

**JUL 15 2003**

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

Docket No. 40196 is a proper person appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Docket No. 40599 is a proper person appeal from an order of the district court denying appellant's motion to withdraw a guilty plea. We elect to consolidate these appeals for disposition.<sup>1</sup>

On March 23, 2000, the district court convicted appellant, pursuant to a guilty plea, of one count of attempted lewdness with a child under the age of fourteen years. The district court sentenced appellant to serve a term of ninety-six to two hundred and forty months in the Nevada State Prison. The district court suspended the sentence and placed appellant on probation for an indefinite term not to exceed five years. The district court revoked appellant's probation, and on January 28, 2002, the

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<sup>1</sup>See NRAP 3(b).

district court entered an amended judgment of conviction modifying appellant's sentence to a term of seventy-seven months to one hundred and ninety-three months in the Nevada State Prison.<sup>2</sup>

Docket No. 40196

On May 28, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss the petition on the ground that the petition was untimely filed. 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 August 7, 2002, the district court dismissed appellant's petition. This appeal followed.<sup>3</sup>

In his petition, appellant claimed that he received ineffective assistance of counsel at his probation revocation hearing. Appellant further claimed that he was not provided notice of the date of the probation revocation hearing. He argued that the lack of notice prevented him from bringing mitigating documents for the court's consideration.

The district court denied appellant's petition on the ground that it was untimely filed pursuant to NRS 34.726(1).<sup>4</sup> We conclude that

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<sup>2</sup>On June 17, 2002, the district court entered a second amended judgment of conviction imposing a special sentence of lifetime supervision.

<sup>3</sup>To the extent that appellant seeks to appeal from the order denying his motion to amend, supplement or reconsider the petition, this court lacks jurisdiction to consider the appeal. See Castillo v. State, 106 Nev. 349, 792 P.2d 1133 (1990).

<sup>4</sup>The July 24, 2002 minutes indicate that the district court denied the petition on the merits and on the procedural time bar. However, the order prepared by the State does not address the merits of any of appellant's claims and focuses exclusively upon the procedural time bar.

the district court erred in applying the procedural time bar of NRS 34.726 to appellant's petition. Appellant did not challenge the validity of his judgment of conviction and sentence in his May 28, 2002 habeas corpus petition; rather, appellant challenged the continued legality of his confinement as a result of alleged errors that occurred during the probation revocation proceedings. NRS 34.726 does not apply to a petition challenging the continued legality of a petitioner's confinement.<sup>5</sup> Thus, the district court erred in determining that appellant's petition was untimely filed. The district court did not make any findings or conclusions regarding the claims raised by appellant in his petition. Specifically, the district court did not make any findings regarding whether appellant was entitled to the effective assistance of counsel in the probation revocation proceedings, and if so, whether appellant's counsel rendered effective assistance of counsel in the proceedings.<sup>6</sup> Thus, we cannot affirm the district court's order dismissing appellant's petition, and we reverse the

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<sup>5</sup>NRS 34.726(1) (setting forth a procedural time bar for "a petition that challenges the validity of a judgment or sentence").

<sup>6</sup>Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (holding that counsel is required if the probationer requests counsel and makes a colorable claim that (1) he did not commit the alleged violations; or (2) that there are justifying or mitigating circumstances which make revocation inappropriate and these circumstances are difficult or complex to present); Fairchild v. Warden, 89 Nev. 524, 516 P.2d 106 (1973) (adopting the approach set forth in Gagnon v. Scarpelli); McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996) (recognizing that an ineffective assistance of counsel claim will lie only where the defendant has a constitutional or statutory right to the appointment of counsel).

order of the district court and remand for further proceedings on appellant's petition.<sup>7</sup>

Docket No. 40599

On August 12, 2002, appellant filed a proper person motion to withdraw a guilty plea in the district court. The State filed an opposition. On August 26, 2002, the district court denied the motion. This appeal followed.

In his motion, appellant claimed that his plea was not knowingly, voluntarily and intelligently entered because he was not aware that he would have to be certified by a psychiatric panel in order to be eligible for parole. Appellant further claimed that his trial counsel was ineffective for failing to advise him of the certification requirement.

Appellant's motion is subject to the equitable doctrine of laches.<sup>8</sup> Appellant filed his motion more than two years after he entered his guilty plea and provided no reasonable explanation for the delay. The State specifically asserted that it would suffer prejudice if it were forced to proceed to trial after appellant's delay. Accordingly, we conclude that the doctrine of laches precludes consideration of appellant's motion on the merits. Therefore, we affirm the order of the district court.

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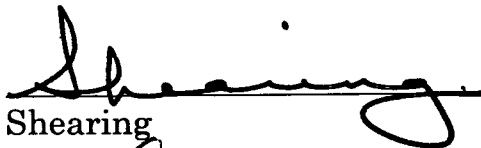
<sup>7</sup>The district court may exercise its discretion and appoint counsel to assist appellant in the proceedings. See NRS 34.750.


<sup>8</sup>See Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000) (holding that the equitable doctrine of laches applies to a post-conviction motion to withdraw a guilty plea).

Conclusion

Having reviewed the records on appeal, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>9</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED IN DOCKET NO. 40599 AND REVERSED AND REMAND the matter in DOCKET NO. 40196 to the district court for proceedings consistent with this order.<sup>10</sup>

 J.  
Shearing

 J.  
Leavitt

 J.  
Becker

cc: Hon. Joseph T. Bonaventure, District Judge  
Joseph F. Davis  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>9</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>10</sup>This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter. We have considered all proper person documents filed or received in these matters, and we conclude that appellant is only entitled to the relief described herein.