

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAFAEL MORENO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40329

FILED

SEP 29 2003

ORDER OF AFFIRMANCE

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

This is a proper person post-conviction appeal from a district court order denying appellant Rafael Moreno's petition for a writ of habeas corpus and motion to withdraw his plea.

On February 10, 1998, the district court convicted Moreno, pursuant to an Alford plea,¹ of one count of attempted murder with the use of a deadly weapon with the intent to promote, further, or assist a criminal gang (count II), and one count of intimidating a witness to influence testimony with the intent to promote, further, or assist a criminal gang (count VII). The district court sentenced Moreno to a term of 240 months in the Nevada State Prison with the possibility of parole in 36 months, plus an equal and consecutive term of imprisonment as a deadly weapon enhancement for count II. The district court also sentenced Moreno to a term of 48 months in the Nevada State Prison with

¹See North Carolina v. Alford, 400 U.S. 25 (1970). Under Nevada law, "whenever a defendant maintains his or her innocence but pleads guilty pursuant to Alford, the plea constitutes one of nolo contendere." State v. Gomes, 112 Nev. 1473, 1479, 930 P.2d 701, 705 (1996).

the possibility of parole in 19 months, plus an equal and consecutive term of imprisonment as a criminal gang enhancement for count VII. Count VII was imposed to run concurrently to count II.

On March 10, 1998, Moreno filed a direct appeal from his judgment of conviction, challenging the district court's denial of a pre-sentence motion to withdraw his plea. This court dismissed Moreno's appeal,² and issued the remittitur on July 7, 1998. Thereafter, on June 7, 1999, Moreno filed a petition for a writ of habeas corpus in the district court. On September 3, 1999, the district court denied Moreno's petition. This court affirmed the district court's decision on appeal.³

On June 19, 2002, Moreno filed a second petition for a writ of habeas corpus in the district court. Attached to the petition was a motion to withdraw a guilty plea. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Moreno or to conduct an evidentiary hearing. On October 2, 2002, the district court denied Moreno's petition. This appeal followed.⁴

²Moreno v. State, Docket No. 31969 (Order Dismissing Appeal, June 17, 1998).

³Moreno v. State, Docket No. 34722 (Order of Affirmance, June 27, 2001).

⁴We note that Moreno has filed motions for reconsideration from the district court's order denying his petition both in the district court and in this court. However, this court lacks jurisdiction over an appeal from the denial of a motion for reconsideration filed in the district court. See Phelps v. State, 111 Nev. 1021, 1022, 900 P.2d 344, 345 (1995).

Our review of the record reveals that Moreno filed the instant petition more than three years after this court issued the remittitur from his direct appeal. Therefore, Moreno's petition was untimely filed.⁵ Moreover, Moreno's petition was successive because he previously filed a petition for a writ of habeas corpus.⁶ By Moreno's own admission, he stated in his current petition that "all the grounds are the same" as those raised in his prior petition. Therefore, Moreno's petition was procedurally barred absent a showing of good cause and prejudice.⁷

In an attempt to excuse these procedural defects, Moreno argued that he unwittingly relied upon the assistance of a fellow inmate to prepare his prior petition. This is not a sufficient reason to excuse Moreno's procedural defects.⁸ We conclude, therefore, that the district court properly denied Moreno's petition as being procedurally barred.

To the extent that Moreno moved to withdraw his plea, we conclude that the district court did not err in denying relief. NRS 176.165

⁵See NRS 34.726(1); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998) (holding that "the 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").

⁶See NRS 34.810(2).

⁷See NRS 34.726(1); NRS 34.810(3).

⁸See Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that an appellant's argument that "he was unable to frame and present the issues properly in his first petition because he had to rely on the assistance of an inmate law clerk unschooled in the law" did not establish good cause and prejudice to overcome procedural bars).

provides that a post-sentence motion to withdraw a guilty plea may be made to correct a manifest injustice. A motion to withdraw a plea, however, is subject to the doctrine of laches.⁹ Analyzing a motion under laches involves considering "(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 prejudice the State."¹⁰ A defendant's failure to identify all grounds for relief in the first instance will weigh against consideration of a successive motion.¹¹

Our review of the record reveals that Moreno has previously filed both pre-sentence and post-sentence motions to withdraw his plea. Those motions were denied by the district court, and dismissed by this court on appeal. Moreno has not shown good cause for any failure to raise all relevant grounds in his prior motions. Additionally, Moreno's current motion was filed over four years after his judgment of conviction. The State would be prejudiced if his motion was granted.¹² Given these considerations, Moreno's motion was barred by laches. Therefore, we conclude that the district court properly denied his motion.

⁹Hart v. State, 116 Nev. 558, 563, 1 P.3d 969, 972 (2000).


¹⁰Id. at 563-64, 1 P.3d at 972.

¹¹Id. at 564, 1 P.3d at 972.


¹²Id. (stating that "a significant delay of even less than one year may bear on consideration of a post-sentence motion to withdraw a plea").

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Moreno is not entitled to relief and that briefing and oral argument are unwarranted.¹³ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁴


_____, J.
Rose


_____, J.
Leavitt


_____, J.
Maupin

cc: Hon. Jackie Glass, District Judge
Rafael Moreno
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹³See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁴We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.