

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND OSCAR LAYMON,
Appellant,
vs.
WARDEN, LOVELOCK
CORRECTIONAL CENTER, CRAIG
FARWELL,
Respondent.

No. 40932

FILED

DEC 03 2003

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

ORDER OF AFFIRMANCE

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.

On December 24, 1992, the district court convicted appellant, pursuant to a jury verdict, of two counts of sexual assault on a child under fourteen years of age, and four counts of lewdness with a child under fourteen years of age. The district court sentenced appellant to serve terms of life in the Nevada State Prison for the sexual assault convictions, and four years in the Nevada State Prison for each of the lewdness convictions. All sentences were imposed to run consecutively. This court dismissed appellant's appeal from his judgment of conviction and sentence.¹ The remittitur issued on March 15, 1994.

On September 27, 1995, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to assist appellant and counsel filed

¹Laymon v. State, Docket No. 23977 (Order Dismissing Appeal, January 20, 1994).

supplemental pleadings. On June 27, 1996, the district court dismissed appellant's petition. This court dismissed appellant's subsequent appeal.²

On July 23, 1999, appellant filed a post-conviction petition for a writ of habeas corpus in federal district court. In addition to claims brought in his previous petition in state court, he alleged new grounds for relief. On November 27, 2001, the federal district court dismissed appellant's petition without prejudice to allow him to pursue all unexhausted claims in state court.

On December 19, 2001, appellant filed the instant proper person petition for a writ of habeas corpus in the district court. Pursuant to NRS 34.750, the district court appointed counsel to represent appellant in the proceedings. The State filed a motion to dismiss the petition, specifically pleading laches. Appellant filed an opposition, and the State filed a reply. On December 11, 2002, the district court denied appellant's petition. On February 10, 2003, appellant filed a notice of appeal.³

²Laymon v. State, Docket No. 28995 (Order Dismissing Appeal, February 10, 1999).

³Appellant was not served with notice of the entry of the district court's December 11, 2002 order, as required by NRS 34.830(2). The district court clerk properly served the district attorney and appellant's counsel, but did not separately serve appellant. This court has held that "under NRS 34.575(1) and NRS 34.830, the time to file a notice of appeal from an order denying a post-conviction habeas petition does not commence to run until notice of entry of an order denying the petition has been separately served by the district court on both the petitioner and the petitioner's counsel." Klein v. Warden, 118 Nev. ___, ___, 43 P.3d 1029, 1032 (2002) (citing Lemmond v. State, 114 Nev. 219, 954 P.2d 1179 (1998)). Because appellant was never served with notice of entry of the district court's order, the thirty-day appeal period provided by NRS 34.575(1) did not commence to run. Id. Therefore, appellant's notice of appeal from the December 11, 2002 order was timely filed.

Appellant filed his petition almost eight years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.⁴ The petition was also successive because he had previously filed a petition for a writ of habeas corpus.⁵ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁶ Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.⁷

Appellant did not attempt to explain his delay in asserting these claims. Rather, appellant argued that in his federal habeas proceeding, the State alleged that there was an adequate and available remedy in state court for the unexhausted claims. Therefore, the State cannot now maintain that the instant petition was untimely filed and should be dismissed without a review on the merits.

Appellant's assertion that the State waived the right to argue that the instant petition was procedurally barred is incorrect. The State's arguments in the federal and state proceeding are not inconsistent. Appellant would be entitled to a review on the merits if he demonstrated adequate cause to excuse his delay.⁸ He failed to do so. Therefore, based

⁴See NRS 34.726(1).

⁵See NRS 34.810(2).

⁶See NRS 34.726(1); NRS 34.810(3).

⁷See NRS 34.800(2).

⁸See NRS 34.726(1); NRS 34.810(3).

upon our review of the record on appeal, we conclude that the district court properly denied his petition.⁹

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.¹⁰ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹¹

Becker J.
Becker

Shearing J.
Shearing

Gibbons J.
Gibbons

cc: Hon. J. Michael Memeo, District Judge
Raymond Oscar Laymon
Attorney General Brian Sandoval/Carson City
Elko County District Attorney
Elko County Clerk

⁹See Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

¹⁰See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹¹On October 30, 2003, this court received a proper person motion for leave to file papers, motions, and briefs. On November 6, 2003, this court received an opposition submitted by the State. We have considered all documents filed or received in this matter, and we conclude that the relief requested is not warranted.