

IN THE SUPREME COURT OF THE STATE OF NEVADA

TAM CONG NGUYEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40955

TAM CONG NGUYEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41549

FILED

JAN 02 2004

ORDER OF AFFIRMANCE

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

Docket No. 40955 is a proper person appeal from an order of the district court denying appellant Tam Cong Nguyen's motion to vacate/set aside an illegal sentence and judgment. Docket No. 41549 is a proper person appeal from an order of the district court denying Nguyen's post-conviction petition for a writ of habeas corpus. We elect to consolidate these appeals for disposition.¹

On January 12, 1999, the district court convicted Nguyen, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon. The district court sentenced Nguyen to serve a term of life in the Nevada State Prison with the possibility of parole, plus an equal and consecutive sentence for the use of a deadly weapon. This court

¹See NRAP 3(b).

dismissed Nguyen's direct appeal.² The remittitur issued on August 1, 2000.

On February 22, 2001, Nguyen filed a proper person petition for a writ of habeas corpus in the district court. On September 13, 2001, the district court denied Nguyen's petition. This court affirmed the order of the district court on appeal.³

Docket No. 40955

On January 15, 2003, Nguyen filed a proper person motion in the district court to vacate/set aside an illegal judgment and sentence. The State opposed the motion. Nguyen filed a reply. On February 14, 2003, the district court denied Nguyen's motion. This appeal followed.

NRS 176.555 provides that a district court may correct an illegal sentence at any time. A motion to correct an illegal sentence, however, may only challenge the facial legality of the sentence: either the district court was without jurisdiction to impose a sentence or the sentence was imposed in excess of the statutory maximum.⁴ "A motion to correct an illegal sentence 'presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence.'"⁵

²Nguyen v. State, Docket No. 33724 (Order Dismissing Appeal, July 7, 2000).

³Nguyen v. State, Docket No. 38415 (Order of Affirmance, October 14, 2002).

⁴Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

⁵Id. (quoting Allen v. United States, 495 A.2d 1145, 1149 (D.C. 1985)).

Based upon our review of the record on appeal, we conclude that the district court did not err in denying Nguyen's motion. Nguyen claimed that the district court was without jurisdiction to impose his sentence because a valid criminal complaint had not been filed in the justice court. Nguyen asserted that, without a valid criminal complaint, the justice court lacked jurisdiction to conduct a preliminary hearing, and therefore could not bind him over for trial in district court. Nguyen's claim is belied by the record.⁶ Nguyen's sentence was facially legal and the district court had jurisdiction in the instant case.⁷ Therefore, we affirm the order of the district court denying Nguyen's motion.

Docket No. 41549

On February 26, 2003, Nguyen filed a second proper person petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Nguyen or to conduct an evidentiary hearing. On May 16, 2003, the district court denied Nguyen's petition. This appeal followed.

Nguyen filed his petition more than two years after this court issued the remittitur from his direct appeal. Thus, Nguyen's petition was untimely.⁸ Moreover, Nguyen's petition was successive because he had

⁶Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984). Here, the record indicates that the State initially filed a criminal complaint on April 7, 1998. The State filed an amended complaint in open court on April 30, 1998. On May 7, 1998, the justice court began the preliminary hearing.

⁷See NRS 200.030(4)(b)(2); NRS 193.165.

⁸See NRS 34.726(1).

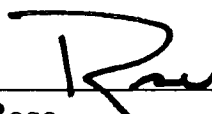
previously filed a post-conviction petition for a writ of habeas corpus.⁹ As such, Nguyen's petition was procedurally barred absent a demonstration of good cause and prejudice.¹⁰


In an attempt to excuse his procedural defects, Nguyen argued that NRS 34.726, 34.800, and 34.810 did not apply to his petition because his petition raised jurisdictional issues which could not be waived. Because jurisdiction was proper for the reasons discussed previously, we conclude that Nguyen failed to establish good cause and prejudice to excuse his untimely and successive petition, and the district court properly determined that his petition was procedurally barred.


Conclusion

Having reviewed the records on appeal and for the reasons set forth above, we conclude that Nguyen is not entitled to relief and that briefing and oral argument are unwarranted.¹¹ Accordingly, we

ORDER the judgments of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Leavitt


_____, J.
Maupin

⁹See NRS 34.810(2).

¹⁰See NRS 34.726(1); NRS 34.810(3).

¹¹See Lockett v. Warden, 91 Nev. 681, 682 541 P.2d 910, 911 (1975).

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