

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEAUNDRAY GASTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41096

FILED

DEC 03 2003

ORDER OF AFFIRMANCE

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

This is a proper person appeal from a district court order denying appellant DeAundray Gaston's post-conviction petition for a writ of habeas corpus.

On July 20, 1994, the district court convicted Gaston, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon. The district court sentenced Gaston to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole in ten years. This court dismissed Gaston's direct appeal from his judgment of conviction.¹ The remittitur issued on March 20, 1996.

On June 22, 1998, Gaston filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court denied the petition as being untimely. This court dismissed Gaston's appeal from the district court's order.²

On July 10, 2002, Gaston filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss, and specifically pleaded laches. Gaston

¹Gaston v. State, Docket No. 26027 (Order Dismissing Appeal, March 1, 1996).

²Gaston v. State, Docket No. 33153 (Order Dismissing Appeal, August 16, 2000).

filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Gaston or to conduct an evidentiary hearing. On February 18, 2003, the district court denied Gaston's petition. This appeal followed.

Gaston's petition was untimely because it was filed more than six years after this court issued the remittitur from his direct appeal.³ Gaston's petition was also successive because he previously filed a proper person post-conviction petition for a writ of habeas corpus.⁴ Therefore, Gaston's petition was procedurally barred absent a showing of good cause and actual prejudice,⁵ unless denying his petition would otherwise result in a fundamental miscarriage of justice.⁶ Further, because the State specifically pleaded laches, Gaston was required to overcome a presumption of prejudice to the State.⁷

In an attempt to excuse the procedural defects in his petition, Gaston contended that he was delayed in filing his petition because his appellate counsel failed to timely return legal files and court transcripts that were necessary to properly prepare his petition. Gaston also contended that Ely State Prison officials lost paperwork dealing with his criminal case.

An appellate counsel's failure to timely send a petitioner his legal files and transcripts does not constitute good cause to excuse a

³See NRS 34.726(1).

⁴See NRS 34.810(2).

⁵See NRS 34.726(1); NRS 34.810(3).


⁶See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

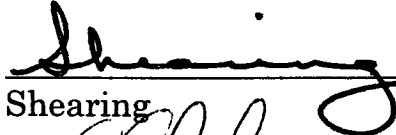
⁷See NRS 34.800(2).


procedural default.⁸ Gaston's allegation that prison officials lost paperwork dealing with his criminal case was unsupported by any specific facts, such as the nature of the paperwork and when it was lost. Even if Gaston could establish good cause and prejudice to excuse his current petition, he failed to explain why the issues in his current petition were not raised in his first petition. Moreover, Gaston failed to overcome the presumption of prejudice to the State. We have reviewed Gaston's claims of actual innocence and conclude that they do not warrant relief. Therefore, we conclude that the district court properly denied his petition.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Gaston is not entitled to the relief requested and that briefing and oral argument are unwarranted.⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Shearing


_____, J.
Gibbons

cc: Hon. Jackie Glass, District Judge
DeAundray Gaston
Attorney General Brian Sandoval/Carson City

⁸See Hood v. State, 111 Nev. 335, 338, 890 P.2d 797, 798 (1995); see also Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988).

⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

Clark County District Attorney David J. Roger
Clark County Clerk