

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID LEO SMITH,
Appellant,
vs.
WARDEN, HIGH DESERT STATE
PRISON, J.M. SCHOMIG,
Respondent.

No. 41266

FILED

FEB 11 2004

ORDER OF AFFIRMANCE

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

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

On September 11, 2000, the district court convicted Smith, pursuant to a guilty plea, of voluntary manslaughter with the use of a deadly weapon. The district court sentenced Smith to serve two consecutive terms of 48 to 120 months in the Nevada State Prison. This court affirmed Smith's judgment of conviction and sentence on appeal.¹ The remittitur issued on March 20, 2001.

On January 3, 2002, Smith filed a proper person post-conviction 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 Smith or to conduct an evidentiary hearing. On March 26, 2003, the district court denied Smith's petition. This court affirmed the order of the district court.²

¹Smith v. State, Docket No. 36870 (Order of Affirmance, February 21, 2001).

²Smith v. State, Docket No. 39424 (Order of Affirmance, September 30, 2002).

On January 21, 2003, Smith filed a post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Smith or to conduct an evidentiary hearing. On March 20, 2003, the district court denied Smith's petition. This appeal followed.

Smith filed his petition almost two years after this court issued the remittitur from his direct appeal. Thus, Smith's petition was untimely filed.³ Moreover, Smith's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.⁴ Smith's petition was procedurally barred absent a demonstration of good cause and prejudice.⁵

In an attempt to excuse his procedural defects, Smith first argued that an improper ex parte evidentiary hearing was conducted in the prior post-conviction matter. The record belies Smith's allegation that an ex parte evidentiary hearing was held in his prior post-conviction matter.⁶ Further, this court previously determined that Smith was not prejudiced by the district court's consideration of a response by Smith's former trial counsel because Smith was not entitled to an evidentiary hearing.⁷ Therefore, this claim does not excuse Smith's procedural defects.

Smith next argued that his untimely and successive petition should be excused because no court has addressed the merits of an issue

³See NRS 34.726(1).

⁴See NRS 34.810(2).

⁵See NRS 34.726(1); NRS 34.810(3).


⁶Cf. Gebbers v. State, 118 Nev. ___, 50 P.3d 1092 (2002).


⁷Cf. Mann v. State, 118 Nev. ___, 46 P.3d 1228 (2002).

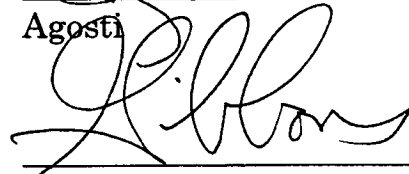
that he raised on direct appeal and in his previous post-conviction matter. Specifically, Smith argued that his plea of guilty to a deadly weapon enhancement was unconstitutional because he never admitted to using a deadly weapon in the commission of voluntary manslaughter. This court, however, addressed the issue of the deadly weapon enhancement on direct appeal and in his previous post-conviction matter and concluded that Smith was not entitled to relief.⁸ Therefore, Smith failed to demonstrate good cause to overcome his procedural defects.

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

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Donald M. Mosley, District Judge
David Leo Smith
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁸See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

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