

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOEL BURKETT A/K/A RAYMOND
HAIRE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41504

FILED

MAR 05 2004

ORDER OF AFFIRMANCE

JANETTE 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 Joel Burkett's post-conviction petition for a writ of habeas corpus.

On July 29, 1981, the district court convicted Burkett, pursuant to a jury verdict, of one count of robbery with the use of a deadly weapon, one count of first-degree kidnapping with the use of a deadly weapon, and two counts of sexual assault. The district court sentenced Burkett to serve a period totaling two consecutive fixed terms of life in the Nevada State Prison with the possibility of parole after thirty years. This court dismissed Burkett's appeal from his judgment of conviction and sentence.¹ The remittitur issued on May 10, 1983.

On August 21, 1986, Burkett filed a post-conviction petition for a writ of habeas corpus in the district court. The district court denied the petition. This court dismissed Burkett's subsequent appeal.²

¹Burkett v. State, Docket No. 13600 (Order Dismissing Appeal, April 21, 1983).

²Burkett v. Warden, Docket No. 19446 (Order Dismissing Appeal, November 21, 1989).

On February 2, 1994, Burkett filed a post-conviction petition for a writ of habeas corpus in the district court. In his petition, Burkett alleged that there was a discrepancy between the district court's oral pronouncement of his sentence and the written judgment of conviction. On February 28, 1994, the district court corrected the error and filed an amended judgment of conviction.

On June 7, 1999, Burkett filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On August 18, 1999, the district court denied Burkett's petition. This court affirmed the order of the district court.³

On November 19, 2001, Burkett filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On February 14, 2002, the district court denied Burkett's petition. On appeal, this court reversed and remanded the case to the district court on the sole issue of whether Burkett was denied certification pursuant to NRS 213.1214 only because he was housed outside of Nevada and not under observation by a Nevada institution.⁴ On May 14, 2003, the district court denied Burkett's claim on remand.⁵

³Burkett v. State, Docket No. 34767 (Order of Affirmance, July 10, 2001).

⁴Burkett v. State, Docket No. 39400 (Order of Reversal and Remand, February 6, 2003).

⁵To the extent that Burkett's instant notice of appeal concerns the May 14, 2003 district court order denying Burkett's claim that he was refused certification pursuant to NRS 213.1214 simply because he was housed outside of Nevada, we conclude that Burkett is not entitled to relief. A psychological panel from the Nevada Department of Prisons determined that Burkett could not "be certified as not representing a menace to the health, safety or morals of other." There is no indication

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On February 19, 2003, Burkett filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss, specifically pleading laches. Burkett filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent Burkett or to conduct an evidentiary hearing. On May 15, 2003, the district court denied Burkett's petition. This appeal followed.

Burkett filed his petition almost twenty years after this court issued the remittitur from his direct appeal. Thus, Burkett's petition was untimely filed.⁶ Moreover, Burkett's petition was successive because he had previously filed four petitions for a writ of habeas corpus.⁷ Burkett's petition was procedurally barred absent a demonstration of good cause and prejudice.⁸ Further, because the State specifically pleaded laches, Burkett was required to overcome the presumption of prejudice to the State.⁹

In an attempt to excuse his procedural defects, Burkett argued that he received ineffective assistance of counsel in his 1986 post-conviction matter. Burkett contended that he did not raise this allegation in an earlier proceeding because he did not learn of this court's 1997

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that Burkett was denied certification because he was housed outside of Nevada. Therefore, the district court did not err in denying this claim.

⁶See NRS 34.726(1).

⁷See NRS 34.810(1)(b)(2); NRS 34.810(2).

⁸See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

⁹See NRS 34.800(2).

decision in Crump v. Warden¹⁰ until recently. Burkett has been housed outside of Nevada for much of his sentence and claimed that he did not have access to Nevada legal materials.

Based upon our review of the record on appeal, we conclude that Burkett failed to demonstrate good cause to excuse his untimely and successive petition. Even assuming that this court's decision in Crump constituted an "impediment external to the defense,"¹¹ Burkett failed to adequately explain his subsequent six-year delay in filing the instant petition. Burkett was housed in Nevada for five months in 2000, and again from January 2002 until the present. Additionally, Burkett's 2001 habeas petition, which included arguments and references to Nevada law, was filed during the period he was housed out-of-state. Thus, Burkett's excuse that he was unable to access Nevada legal materials until early 2003, when he filed the instant petition, is not convincing. Consequently, Burkett's belated discovery of this court's decision in Crump did not provide the necessary good cause to overcome the procedural bars.

Moreover, we have examined Burkett's claims of ineffective assistance of counsel in his 1986 post-conviction matter, and conclude that Burkett failed to demonstrate that he would be unduly prejudiced by the dismissal of his petition because he did not establish that his counsel was ineffective. Therefore, we conclude that the district court properly determined that Burkett's petition was procedurally barred.

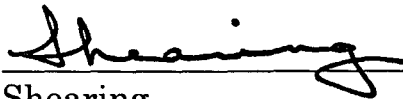
¹⁰113 Nev. 293, 934 P.2d 247 (1997). Crump held "that a petitioner who has counsel appointed by statutory mandate is entitled to effective assistance of that counsel." Id. at 303, 934 P.2d at 253. In 1986, Burkett was appointed counsel pursuant to NRS 177.345(1), which at that time required the appointment of counsel if the petitioner proved that he was indigent.


¹¹Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998).


Burkett also claimed that he is actually innocent of the crimes. Burkett contended that medical evidence would demonstrate that he did not sexually assault the victim. We conclude that Burkett's claim of actual innocence is not credible, and he did not demonstrate that a fundamental miscarriage of justice would result from failure to consider his claims.¹²

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Burkett 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


_____, C.J.
Shearing


_____, J.
Becker


_____, J.
Gibbons

¹²See Mazzan v. Warden, 112 Nev. 838, 843, 921 P.2d 920, 923 (1996).

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

¹⁴We have reviewed all documents that Burkett has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that Burkett has attempted to present claims or facts in those submissions that were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Michael L. Douglas, District Judge
Joel Burkett
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk