

IN THE SUPREME COURT OF THE STATE OF NEVADA

HAROLD TRAVIS LYONS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42462

FILED

OCT 06 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 Harold Lyons' post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

On February 28, 1989, the district court convicted Lyons, pursuant to a jury verdict, of one count each of conspiracy to manufacture methamphetamine, possession of a controlled substance, attempt to manufacture methamphetamine, trafficking in methamphetamine, and racketeering. Lyons was additionally adjudicated a habitual criminal. The district court sentenced Lyons to serve a term of life in the Nevada State Prison without the possibility of parole for the racketeering count, and lesser concurrent terms for the remaining counts. This court affirmed Lyon's judgment of conviction and sentence on appeal.¹ The remittitur issued on December 27, 1990.

On December 18, 1991, Lyons filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Lyons obtained counsel, and the district court conducted an evidentiary hearing

¹Lyons v. State, 106 Nev. 438, 796 P.2d 210 (1990).

on his petition. On April 29, 1994, the district court denied Lyons' petition. This court dismissed Lyons' subsequent appeal.²

On August 6, 1998, Lyons filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. On March 1, 1999, the district court denied Lyons' petition, and this court affirmed the order of the district court.³

On January 21, 2000, Lyons, with the assistance of counsel, filed a motion to correct an illegal sentence. On September 8, 2000, the district court denied Lyons' motion, and this court affirmed the order of the district court.⁴

On September 4, 2002, Lyons filed a proper person post-conviction petition for a writ of habeas corpus in the district court.⁵ The State opposed the petition. Both Lyons and the State filed additional pleadings. Pursuant to NRS 34.750 and 34.770, the district court declined

²Lyons v. State, Docket No. 26261 (Order Dismissing Appeal, June 10, 1999).

³Lyons v. State, Docket No. 33996 (Order of Affirmance, October 25, 2000).

⁴Lyons v. State, Docket No. 36627 (Order of Affirmance, May 15, 2002).

⁵Lyons labeled his petition a "motion to vacate judgment." Because he is challenging the validity of his conviction, we elect to construe Lyons' motion as a post-conviction petition for a writ of habeas corpus. See NRS 34.724(2)(b) (stating that a post-conviction petition for a writ of habeas corpus "[c]omprehends and takes the place of all other common law, statutory or other remedies which have been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them"). Lyons' reliance on NRCP 60(b) is misplaced because it is inconsistent with NRS 34.724(2)(b). See NRS 34.780.

to appoint counsel to represent Lyons or to conduct an evidentiary hearing.⁶ On December 24, 2003, the district court denied Lyons' petition. This appeal followed.

In his petition, Lyons contended that possession of a controlled substance is a lesser-included offense of attempt to manufacture methamphetamine, and his conviction of both offenses violated the Double Jeopardy Clause.⁷ In support of this argument, Lyons pointed out that this court vacated his co-defendant's conviction for possession of a controlled substance with intent to sell because it was a lesser-included offense of attempt to manufacture methamphetamine.⁸ Lyons claimed that his conviction for possession of a controlled substance should be similarly vacated.

Lyons filed his petition approximately twelve years after this court issued the remittitur from his direct appeal. Thus, the petition was untimely filed.⁹ Moreover, Lyons' petition was successive because he had previously filed two post-conviction habeas petitions.¹⁰ Lyons' petition was procedurally barred absent a demonstration of good cause and prejudice.¹¹

⁶Prior to the district court's resolution of this matter, Lyons retained counsel to assist him.

⁷See U.S. Const. amend. V.

⁸See Crutchfield v. State, Docket Nos. 19943, 19814 (Order Dismissing Appeals, October 24, 1990).

⁹See NRS 34.726(1).

¹⁰See NRS 34.810(1)(b)(2), (2).

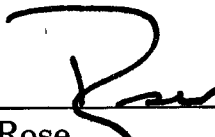
¹¹See NRS 34.726(1); 34.810(1)(b), (3).


Further, because the State specifically pleaded laches, Lyons was required to overcome the presumption of prejudice to the State.¹²


Lyons did not attempt to excuse his untimely petition, or explain why he was unable to raise this claim in his earlier petitions. Consequently, the district court did not err in determining that Lyons' petition was procedurally barred. Moreover, as an alternate and independent ground to deny relief, Lyons' claim that his conviction violated the Double Jeopardy Clause is without merit.¹³

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Lyons is not entitled to relief and that briefing and oral argument are unwarranted.¹⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

¹²See NRS 34.800(2).

¹³See Barton v. State, 117 Nev. 686, 30 P.3d 1103 (2001).

¹⁴See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. John S. McGroarty, District Judge
Harold Travis Lyons
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk