

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEREK A. COSTANTINO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42609

FILED

AUG 23 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's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On August 27, 1996, the district court convicted appellant, pursuant to a guilty plea, of second-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve a term of 25 years for the second-degree murder conviction plus an additional 25 years for the deadly weapon enhancement in the Nevada State Prison. This court dismissed appellant's appeal from his judgment of conviction and sentence.<sup>1</sup> The remittitur issued on March 18, 1997.

On April 7, 1997, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court declined to appoint counsel, but held an evidentiary hearing regarding appellant's ineffective

---

<sup>1</sup>Costantino v. State, Docket No. 28854 (Order Dismissing Appeal, February 26, 1997).

assistance of counsel claims.<sup>2</sup> Following the hearing, the district court denied appellant's petition on July 14, 1997. On September 11, 1997, appellant filed a second habeas corpus petition in the district court. The district court declined to appoint counsel or hold an evidentiary hearing.<sup>3</sup> The district court denied appellant's petition on October 13, 1997. Appellant appealed the district court's orders denying his April 7, 1997, and September 11, 1997, petitions.<sup>4</sup>

On September 10, 2003, appellant filed his third habeas corpus petition. The State opposed the petition asserting that it was untimely filed and successive. Moreover, the State specifically pleaded laches. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. The district court concluded that appellant's petition was untimely filed and successive pursuant to NRS 34.726 and NRS 34.810(2) respectively. The district court further concluded that appellant failed to overcome the presumption of prejudice to the state under NRS 34.800. The district court determined that appellant failed to overcome the procedural defaults to his petition and denied the petition on January 9, 2004. This appeal followed.

Appellant filed his petition more than six years after this court issued the remittitur from his direct appeal. Thus, appellant's petition

---

<sup>2</sup>See NRS 34.750.

<sup>3</sup>See *id.*; NRS 34.770.

<sup>4</sup>Costantino v. State, Docket No. 31276 (Order Dismissing Appeals, December 10, 1999).

was untimely filed.<sup>5</sup> Moreover, appellant's petition was successive because he previously had filed two habeas corpus petitions.<sup>6</sup> Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>7</sup> Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State.<sup>8</sup>

In an attempt to excuse his procedural defects, appellant argued that it took him several years to research and review his case and to find an educated prison law clerk. He also claimed that being in prison restricted his ability to research his case.

Although appellant claimed that he did not have adequate access to the law library, the instant petition and other proper person documents in the record contain legal citations. Thus, appellant failed to demonstrate that his access was constitutionally inadequate. Also, appellant's difficulty in finding an experienced prison law clerk does not constitute good cause.<sup>9</sup> Finally, appellant failed to overcome the presumption of prejudice to the State. Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate adequate cause to excuse

---

<sup>5</sup>See NRS 34.726(1).

<sup>6</sup>See NRS 34.810(1)(b)(2); NRS 34.810(2).

<sup>7</sup>See NRS 34.726(1); NRS 34.810(1)(b), (3).


<sup>8</sup>See NRS 34.800(2).


<sup>9</sup>See Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988) (holding that organic brain damage and lack of legal assistance are not sufficient good cause).

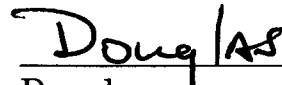
his defects and failed to overcome the presumption of prejudice to the State. Therefore, we affirm the order of the district court denying appellant's petition as time-barred.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>10</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>11</sup>

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

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

---

<sup>10</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>11</sup>We have reviewed all documents that appellant 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 appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.