

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUPE GUSMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53589

FILED

FEB 03 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.¹ Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

Having reviewed the record on appeal, we conclude that substantial evidence supports the decision of the district court to deny relief, and that the district court did not err as a matter of law. Riley v. State, 110 Nev. 638, 878 P.2d 272 (1994). We therefore affirm the denial of the petition for the reasons stated in the attached district court order. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Robert H. Perry, District Judge
Lupe Gusman
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

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HOWARD W. CONYERS, CLERK

By: *[Signature]*
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

LUPE GUSMAN,

Petitioner,

Case No. CR97P-0121

vs.

Dept No. 9

THE STATE OF NEVADA,

Respondent.

ORDER

The Court has reviewed and considered Petitioner's *Exparte Motion and Order for Transportation of Inmate for Court Appearance* and has also received Petitioner's subsequent *Writ of Habeas Corpus* originally filed in Carson City in December, 2008 and Petitioner's *Motion for Appointment of Counsel* for review.

Although the right of an indigent defendant to counsel at trial is fundamental, there is no Constitutionally-mandated right to appointed counsel at government expense in cases where the defendant has made a discretionary appeal to the Nevada Supreme Court. *See Ross v. Moffitt*, 417 U.S. 600, 611, 94 S.Ct. 2437, 2444 (1974).

In this instance, Petitioner has filed another subsequent *Habeas Petition*. Accordingly, the Court finds that the appointment of counsel is not justified.

Petitioner was convicted of sexual assault on November 18, 1997. Petitioner filed a *Direct Appeal* with the Nevada Supreme Court that was dismissed on July 21, 1998. Petitioner filed a post-

1 conviction *Writ of Habeas Corpus*, which was also dismissed. Petitioner then appealed to the
2 Nevada Supreme Court and that appeal was denied on October 3, 2000. Petitioner then filed another
3 post-conviction *Writ of Habeas Corpus* which was also dismissed by this Court on December 20,
4 2002. Petitioner again appealed to the Nevada Supreme Court in which they again denied his appeal
5 and issued an *Order of Affirmance* on October 21, 2003. This subsequent *Writ of Habeas Corpus* has
6 been transferred to this Court upon a finding of lack of jurisdiction of the First Judicial Court in
7 Carson City.

8 However, Petitioner has filed this Petition more than six years after this Court and the
9 Nevada Supreme Court, issued a denial of his prior petitions and appeals. Accordingly, this *Petition*
10 is also untimely filed. Additionally, Petitioner's *Petition* is also successive because he had
11 previously filed several other post-conviction petitions. Thus, Petitioner's *Petition* is procedurally
12 barred absent a demonstration of good cause and prejudice, *see* NRS 34.726(1), NRS 34.810(1)(b)
13 and NRS 34.810(3).

14 A Petitioner may be entitled to review of defaulted claims if failure to review the claims
15 would result in a fundamental miscarriage of justice, *see Mazzan v. Warden*, 112 Nev. 838, 921 P.2d
16 920 (1996). Petitioner has not demonstrated good cause or prejudice to excuse these procedural
17 defects. Petitioner argues that he is actually innocent of the crime of sexual assault and that there was
18 insufficient evidence to establish that the sex was non-consensual and as such, his trial counsel was
19 ineffective for failing to dismiss the charges. Further, Petitioner argues that Justice Court Magistrate
20 Volk did not have sufficient evidence in which to bind him over to the District Court.

21 The Court has reviewed the entire file, the pleadings, points and authorities, and exhibits
22 filed therein and conclude that Petitioner's claim of actual innocence is not supported by the record.
23 Petitioner's claim of innocence is a rehashing of the testimony presented to the jury during his trial.
24 There was sufficient evidence in which a jury convicted Petitioner of the crime of sexual assault and
25 in turn, there was sufficient evidence presented in order to bind Petitioner over to the District Court.

26 Further, these claims have been adequately examined and determined to lack merit by this
27 Court and affirmed by the Nevada Supreme Court. As such, they are precluded as a matter of law of
28 the case and will not be determined by this Court, yet again.

1 Accordingly, and good cause appearing, IT IS HEREBY ORDERED that *Request for*
2 *Appointment of Counsel* is DENIED.

3 IT IS FURTHER HEREBY ORDERED that Petitioner's Writ of Habeas Corpus is DENIED,
4 and as such, Petitioner's *Exparte Motion and Order for Transportation of Inmate for Court*
5 *Appearance* is also DENIED.

6
7 DATED: This 27 day of March, 2009.

8
9 
10 DISTRICT JUDGE

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 27 day of March, 2009, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Lupe Gusman, #56124
N.N.C.C.
P.O. Box 7000
Carson City, NV 89702

Appellate Division
Washoe County District Attorney's Office
(via interoffice mail)


Administrative Assistant
Department 9