

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT CARLOS CUNNINGHAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59523

FILED

MAR 29 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Malone*
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 Eighth Judicial District Court, Clark County; Doug Smith, Judge.

Appellant filed his petition on May 24, 2011, more than 11 years after entry of the judgment of conviction on September 8, 1999. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice. See NRS 34.726(1). Good cause must be an impediment external to the defense. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Moreover, because the State specifically pleaded laches, appellant was required to overcome the rebuttable presumption of prejudice. NRS 34.800(2).

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).

In an attempt to excuse his procedural defects, appellant first argued that he had cause for his eleven-year-delay in filing because he requested counsel to file a direct appeal on his behalf, and counsel never did so. A petitioner may establish good cause for the delay in filing a petition "if the petitioner establishes that the petitioner reasonably believed that counsel had filed an appeal and that the petitioner filed a habeas corpus petition within a reasonable time after learning that a direct appeal had not been filed." Hathaway, 119 Nev. at 255, 71 P.3d 508. Here, appellant failed to allege that he reasonably believed for eleven years that counsel had filed an appeal; he merely alleged that counsel failed to file an appeal. Accordingly, appellant failed to set forth sufficient factual allegations which, if true, would entitle him to relief. Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Further, even if appellant had believed that counsel had filed an appeal, to hold this belief for an eleven-year-period without taking further action is presumptively unreasonable. Therefore, the district court did not err in denying this claim.

Next, appellant claimed that he had good cause to excuse his procedural default because counsel did not send him his case file until 2011. Appellant failed to demonstrate how counsel's failure to send his case file excused his procedural default. First, appellant did not file a formal motion requesting his file until December 20, 2010. Appellant failed to allege any good cause for the ten-year period between his judgment of conviction and the filing of this formal request. Second, appellant failed to allege any specific facts demonstrating how his case files were necessary to the preparation of his post-conviction petition. See id.; see also Hood v. State, 111 Nev. 335, 338, 890 P.2d 797, 798 (1995) (holding that counsel's failure to send appellant his file did not prevent

appellant from filing a timely post-conviction petition). Therefore, the district court did not err in denying this claim.

Next, appellant claimed that he was not subject to the procedural bar of NRS 34.726(1) because he filed his petition pursuant to the provisions of NRS 34.360. Because appellant challenged the validity of his judgment of conviction, appellant's petition was properly construed to be a post-conviction petition for a writ of habeas corpus and was subject to the procedural bars set forth in NRS Chapter 34. NRS 34.720(1); NRS 34.724(2)(b). Therefore, the district court did not err in denying this claim.

Finally, appellant claimed that a fundamental miscarriage of justice should overcome the procedural default because he was only guilty of voluntary manslaughter, not first-or second-degree murder. Appellant did not demonstrate actual innocence because he failed to show that "it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." Calderon v. Thompson, 523 U.S. 538, 559 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). We therefore conclude that the district court did not err in denying appellant's petition as procedurally barred and barred by laches. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. Doug Smith, District Judge
Albert Carlos Cunningham
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk