

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALEX ANTONIO FRIXIONE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61632

FILED

NOV 13 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order denying a motion to withdraw a guilty plea.¹ Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

In his motion filed on February 1, 2012, and supplement filed on February 14, 2012, appellant claimed that his counsel was ineffective for advising him to enter a guilty plea when the prior felony was dismissed prior to entry of the plea and his counsel was ineffective for failing to advise him of the immigration consequences of his 2005 guilty plea contrary to *Padilla v. Kentucky*, 559 U.S. 356 (2010).² The State opposed the motion on the merits and argued that the motion was not cognizable

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).

²Appellant was convicted of unlawful possession of a firearm by a felon. At the time he possessed the firearm, appellant had a prior felony conviction from California. However, subsequent to his arrest, but prior to entry of the plea in the instant case, the California felony conviction was dismissed. The dismissal of his California felony conviction did not result in the restoration of his right to possess a firearm.

under the doctrine of laches due to the delay and the prejudice to the State. The district court denied the motion on the merits and ignored the doctrine of laches.

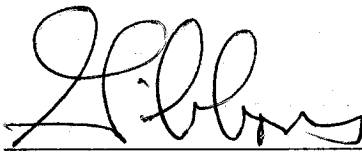
This court has held that a motion to withdraw a guilty plea is subject to the equitable doctrine of laches. *Hart v. State*, 116 Nev. 558, 563, 1 P.3d 969, 972 (2000). Application of the doctrine requires consideration of various factors, including: “(1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the defendant’s knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State.” *Id.* at 563-64, 1 P.3d at 972.

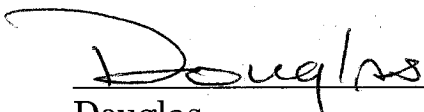
Appellant’s first claim relating to the dismissal of the prior felony conviction was subject to the doctrine of laches. Appellant filed his motion more than six years after the judgment of conviction was entered. Although this claim was available to be raised within one year of entry of the judgment of conviction, appellant failed to provide any explanation for the delay in raising this claim. Finally, the State would suffer prejudice if it were forced to proceed to trial after such an extensive delay. Although the district court incorrectly reached the merits of this claim, we nevertheless affirm the denial of this claim as the correct result. See *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

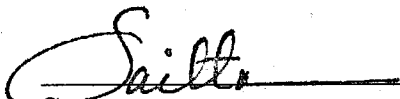
Appellant’s second claim relating to the failure to provide advice about the immigration consequences was also subject to the doctrine of laches. Appellant offered no explanation for his delay. Even assuming that appellant intended to argue that the recent decision in *Padilla* should excuse his delay, the decision in *Padilla* would not sufficiently explain the delay as the decision in *Padilla* does not apply retroactively. *Chaidez v. United States*, 568 U.S. ___, ___, 133 S. Ct. 1103, 1105 (2013). The State would suffer prejudice if it were forced to proceed

to trial after such an extensive delay. Although the district court incorrectly reached the merits of this claim, we nevertheless affirm the denial of this claim as the correct result.³ See *Wyatt*, 86 Nev. at 298, 468 P.2d at 341. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Saitta

cc: Hon. Linda Marie Bell, District Judge
Alex Antonio Frixione
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³Even assuming that appellant could overcome application of the doctrine of laches, appellant failed to demonstrate that he was prejudiced. The guilty plea agreement informed appellant that he could be deported due to the conviction. Appellant failed to demonstrate that there was a reasonable probability that he would not have entered a guilty plea and would have gone to trial had he received further advice about the immigration consequences. See *Kirksey v. State*, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996); see also *Hill v. Lockhart*, 474 U.S. 52 (1985).