

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERALD C. CUNNINGHAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 32234

FILED

OCT 1 2000

THE NEVADA SUPREME COURT
J. R. BIRCH
CLERK

JERALD C. CUNNINGHAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 32601

JERALD C. CUNNINGHAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36001

JERALD C. CUNNINGHAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

NO. 36001

ORDER OF AFFIRMANCE

Docket No. 32234 is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Docket No. 32601 is a proper person appeal from an order of the district court denying

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00-17997
00-18001
00-18063

appellant's post-conviction petition for a writ of habeas corpus and appellant's motion for an evidentiary hearing. Docket No. 36001 is a proper person appeal from an order of the district court denying appellant's motion to correct clerical errors. Docket No. 36129 is a proper person appeal from an order of the district court denying appellant's "motion to dismiss lack of probable facts criminal complaint for violation of the statute of limitations of actions." We elect to consolidate these appeals for disposition. See NRAP 3(b).

Procedural History

On April 26, 1983, the district court convicted appellant, pursuant to a jury trial, of one count of sexual assault (Count I), one count of attempted sexual assault (Count II), and one count of lewdness with a minor child under the age of fourteen (Count III). The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole for Count I and concurrent terms of twenty and ten years for Counts II and III. This court affirmed appellant's judgment of conviction. *Cunningham v. State*, 100 Nev. 396, 683 P.2d 500 (1984). The remittitur issued November 2, 1984.

On November 26, 1984, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On November 28, 1984, the district court denied appellant's petition. This court dismissed appellant's appeal. *Cunningham v. State*, Docket No. 16629 (Order Dismissing Appeal, March 4, 1985).

On February 7, 1986, appellant filed a proper person petition for a writ of habeas corpus in the district court. On March 20, 1986, the district court denied appellant's petition.

This court dismissed appellant's appeal. *Cunningham v. State*, Docket No. 17199 (Order Dismissing Appeal, March 31, 1987).

On August 4, 1988, appellant filed a proper person document labeled, "writ of error coram nobis pursuant to NRS 177.315 et seq. motion to vacate judgment . . . motion to arrest judgment" in the district court. The district court treated this document as a petition for post-conviction relief. On August 5, 1988, the district court denied the petition. This court dismissed appellant's appeal. *Cunningham v. State*, Docket No. 19383 (Order Dismissing Appeal, November 9, 1988).

On February 13, 1991, appellant filed a proper person document labeled "motion in bar" in the district court. The district court treated that document as a petition for a writ of habeas corpus. On March 22, 1991, the district court denied the petition. This court dismissed appellant's appeal. *Cunningham v. State*, Docket No. 22154 (Order Dismissing Appeal, June 27, 1991).

May 1, 1991, appellant filed a proper person document labeled, "motion for leave of this court to file a bill of review (audita querela) pursuant to NRCP 60(b)" in the district court. On June 3, 1991, the district denied appellant's motion. This court dismissed appellant's appeal. *Cunningham v. State*, Docket No. 22376 (Order Dismissing Appeal, October 24, 1991).

On November 24, 1997, appellant filed a proper person petition for a writ of mandamus in the district court. The State moved to dismiss the petition. On March 3, 1998, the district court dismissed appellant's petition. This court dismissed appellant's appeal. *Cunningham v. State*, Docket No. 31976 (Order Dismissing Appeal, June 3, 1998).

In addition, appellant has also filed proper person documents in this court, which this court has denied. Cunningham v. State, Docket No. 32477 (Order Denying Petition, July 2, 1998); Cunningham v. District Court, Docket No. 34181 (Order Denying Petition, June 9, 1999); Cunningham v. District Court, Docket No. 34858 (Order Denying Petition, October 25, 1999); Cunningham v. Justice Court, Docket No. 35120 (Order Denying Petition, December 15, 1999).

Docket Nos. 32234 & 32601

On December 12, 1997, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss the petition. Appellant filed a response. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On April 8, 1998, the district court denied appellant's petition. Appellant's appeal is docketed in this court in Docket No. 32234.

On June 5, 1998, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On June 11, 1998, appellant filed a motion for an evidentiary hearing labeled, "motion to set the State of Nevada deliberate bypass of prevailing NRS state family morals laws for a hearing: and to set the repeal of state laws that apply directly to this case in controversy that still exists for a hearing: and to set Mr. Cunningham's fundamental due process equal protection of the law for a hearing." Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On June 16, 1998, the district court denied appellant's petition and

motion. Appellant's appeal is docketed in this court in Docket No. 32601.

Appellant's December 12, 1997, and June 5, 1998 petitions were filed approximately thirteen and fourteen years after the remittitur issued from appellant's direct appeal. Thus, appellant's petitions were untimely filed. See NRS 34.726(1). Moreover, appellant's petitions were successive because he had previously challenged the validity of his conviction and sentence in a direct appeal and numerous post-conviction petitions, motions and documents filed in the district court. See NRS 34.810(1)(b)(2); NRS 34.810(2). Therefore, appellant's petitions were procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

In an attempt to excuse his procedural defects, appellant first argued that he had not received the proper assistance of a legal prison law clerk until his December 12, 1997 petition and that he only had a grammar school education. Appellant believed that a fundamental miscarriage of justice had occurred because he had been convicted of counts for which he was not arrested or properly charged. Appellant believed he was the victim of a "one-man-grand-jury-inquisition." Finally, he asserted that the district attorney and the district court judge conspired to have him convicted so that they would be able to control the construction business in the Carson Valley.

Based upon our review of the record on appeal, we conclude that the district court did not err in determining appellant failed to adequately excuse his procedural defects. See *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994); *Phelps v. Director, Prisons*, 104 Nev. 656, 764 P.2d 1303 (1988). Further,

we conclude that appellant did not demonstrate that failure to consider his petitions would result in a fundamental miscarriage of justice. See *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996) (stating that a petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice). Therefore, we affirm the orders of the district court denying appellant's petitions.¹

Docket No. 36001

On December 30, 1999, appellant filed a proper person document labeled, "motion to correct the courts clerical errors NRS 176.565 and pursuant to NRS 1.210 enforcement of real party in interest in the State of Nevada presentment order of its charges entered in 1982 by Judge Ray" in the district court. On April 7, 2000, the district court denied appellant's motion. Appellant's appeal is docketed in this court in Docket No. 36001.

In his motion, appellant did not raise any clerical errors, rather, appellant raised incomprehensible arguments challenging the validity of his conviction and sentence. We conclude that the district court did not err in denying appellant's motion. Appellant's claims fell outside the scope of a motion to correct clerical errors. See NRS 176.565 ("Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders."). Therefore, we affirm the order of the district court.

¹We conclude that the district court did not err in determining that appellant was not entitled to an evidentiary hearing. See NRS 34.770(2).

Docket No. 36129

On February 28, 2000, appellant filed a proper person document labeled, "motion to dismiss lack of probable cause facts criminal complaint for violation of statute of limitations of actions" in the district court. On May 4, 2000, the district court denied appellant's motion. Appellant's appeal is docketed in this court as Docket No. 36129.

In his motion, appellant challenged the justice court's probable cause determination to bind him over to the district court. Appellant resurrected claims raised in previous petitions challenging the pre-trial proceedings. Appellant asserted that the State was barred by the statute of limitations from retrying him.

The district court found that appellant's motion was "not grounded in fact, nor warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." The district court further found that appellant's motion was frivolous and interposed for an improper purpose. Finally, the district court found that appellant's motion was so "incomprehensible, illegible, and unintelligible" that it lacked "any perceivable merit upon which relief could possibly be granted." Based upon our review of the record on appeal, we conclude that the district court did not err. See generally Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Accordingly, we affirm the order of the district court.

Conclusion

Having reviewed the records 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. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d

910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).

Accordingly, we affirm the orders of the district court.

It is so ORDERED.²

Maupin, J.
Maupin

Leavitt, J.
Leavitt

Becker, J.
Becker

cc: Hon. William A. Maddox, District Judge
Attorney General
Carson City District Attorney
Jerald C. Cunningham
Carson City Clerk

²We have considered all proper person documents filed or received in these matters, and we conclude that the relief requested is not warranted.

Appellant has repeatedly challenged the pre-trial proceedings. We caution appellant that a prisoner may forfeit all deductions of time earned by the prisoner if the court finds that the prisoner has filed a document in a civil action for an "improper purpose." See NRS 209.451(1)(d)(1). A "civil action" includes a petition for a writ of habeas corpus filed on or after October 1, 1999. See 1999 Nev. Stat., ch. 59, §§ 5, 6, at 146-47. Further, pursuant to NRS 22.010(7), a district court may find an individual in contempt of court for "[a]busing the process or proceedings of the court."