IN THE SUPREME COURT OF THE STATE OF NEVADA

GENE ANTHONY ALLEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54302

FILED

FEB 04 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
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; James M. Bixler, Judge.

Appellant filed his petition on June 8, 2009, more than five years after this court issued the remittitur from his direct appeal on April 6, 2004. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because it was arguably the thirteenth petition and an abuse of the writ because he appeared to raise new and different claims for relief.[2] See NRS 34.810(2). Appellant's

[1]This 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 Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

[2]Allen v. State, Docket No. 51940 (Order of Affirmance, November 20, 2008); Allen v. State, Docket Nos. 49167 and 49612 (Order of

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petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(3).

Appellant first appeared to claim that this court's decision in Abbott v. State, 122 Nev. 715, 138 P.3d 462 (2006), provided good cause as he could not raise this claim earlier. This did not provide good cause because it did not excuse the entire length of his delay; notably, Abbott was decided in 2006 and appellant waited until 2009 to raise this claim. Moreover, the factual underpinning to this claim, that the district court denied a motion for psychological examination, is belied by the record as the district court granted the defense motion for a psychological examination of the victim.

Next, appellant claimed that he had good cause because he only received a copy of the presentence investigation report in May 2008. This does not provide good cause as appellant did not demonstrate that the presentence investigation report would not have been previously available to him to raise claims in a timely petition. Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003). Moreover, appellant failed to raise any

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Affirmance in Docket No. 49167 and Order Dismissing Appeal in Docket No. 49612, September 12, 2007); Allen v. State, Docket No. 47501 (Order of Affirmance, January 10, 2007); Allen v. State, Docket No. 43599 (Order of Affirmance and Dismissing Appeal in Part, December 6, 2004), Allen v. State, Docket No. 42969 (Order of Affirmance, September 17, 2004). There was an additional petition filed in 2005 from which no appeal was taken.

specific, cogent arguments relating to the presentence investigation report; thus, the failure to obtain the report earlier does not excuse the delay or the filing of a fourteenth petition.

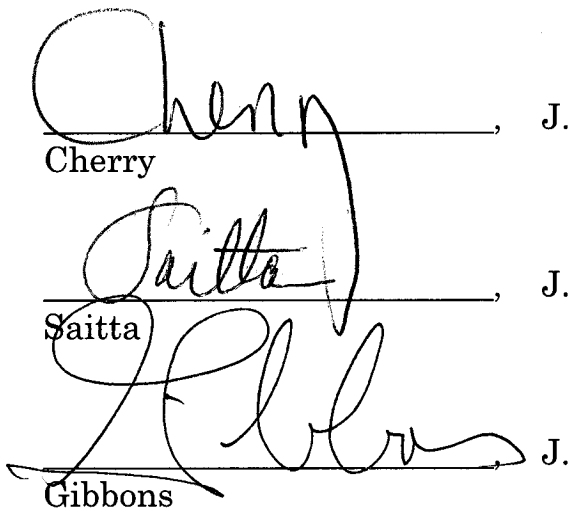
Next, appellant appeared to claim that the State withheld evidence from a Colorado police report in violation of Brady v. Maryland, 373 U.S. 83 (1963) and that this provided good cause. Appellant did not specifically identify any report, and thus, the claim lacked sufficient factual specificity to warrant relief. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). In light of this, appellant failed to demonstrate that the report was favorable to the accused, that it was withheld by the State, and that it was material—the requirements for demonstrating good cause and prejudice in an untimely, successive petition raising a Brady claim. State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003).

Finally, appellant failed to demonstrate that a fundamental miscarriage of justice required consideration of his procedurally barred petition because he failed to demonstrate that he was actually innocent simply because there was no DNA evidence. Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); Bousley v. United States, 523 U.S. 614, 623-24 (1998). Therefore, we conclude that the district court did not err in denying the petition as procedurally barred.

Finally, in light of the numerous, frivolous petitions previously filed, we conclude that the district court did not err in referring appellant

to the Department of Corrections for the forfeiture of statutory good time credits. NRS 209.451. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[3]



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. James M. Bixler, District Judge
Gene Anthony Allen
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[3]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.