

IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD RAY LEE,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
DON HELLING,
Respondent.

No. 43697

FILED

MAY 19 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court denying appellant Donald Lee's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

On February 7, 1986, the district court convicted Lee, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon and four counts of attempted murder with the use of a deadly weapon. The district court sentenced Lee to two consecutive prison terms of life without the possibility of parole and eight consecutive prison terms of twenty years each. This court dismissed Lee's direct appeal.¹ The remittitur issued on April 11, 1991.

On February 19, 1992, Lee filed his first petition for post-conviction relief with the district court, alleging ineffective assistance of counsel. The district court summarily dismissed the petition. However, this court determined that Lee's petition was not untimely and remanded it for further proceedings.² The district court subsequently conducted an

¹Lee v. State, Docket No. 17214 (Order Dismissing Appeal, September 14, 1990).

²Lee v. State, Docket No. 24267 (Order of Remand, March 31, 1994).

evidentiary hearing and denied the petition, and we dismissed Lee's appeal.³

On February 7, 2000, Lee petitioned for a writ of habeas corpus in federal district court. He claimed among other things that he was "deprived of due process due to [the] presiding judge's health condition and erratic behavior." After determining that Lee had not exhausted his remedies in state courts, the federal district court dismissed Lee's petition without prejudice.

On April 20, 2004, Lee filed his second petition for post-conviction relief with the district court. The State filed a motion to dismiss, which Lee opposed. Following a hearing on the motion, the district court concluded that Lee's claims were procedurally barred and denied his petition. This appeal follows.

Lee contends that the district court erred in dismissing his petition because he had demonstrated sufficient good cause and prejudice to overcome the procedural bars of NRS 34.726 and NRS 34.810. The procedural rules pertinent to this case are as follows. NRS 34.726(1) provides in part that absent a showing of good cause for delay, a petition challenging the validity of a judgment or sentence must be filed within one year after this court issues its remittitur on direct appeal. Good cause requires the petitioner to demonstrate that the delay was not his fault and that dismissal of the petition will unduly prejudice him.⁴

NRS 34.810(2) provides that "[a] second or successive petition must be dismissed if . . . it fails to allege new or different grounds for relief

³Lee v. State, Docket No. 26920 (Order Dismissing Appeal, June 23, 1998).

⁴NRS 34.726(1).

and . . . the prior determination was on the merits or, if new and different grounds are alleged, . . . the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."⁵ A petitioner can avoid dismissal if he meets the burden of pleading and proving specific facts that demonstrate good cause for his failure to present a claim before and actual prejudice.⁶

To show good cause, a petitioner must demonstrate that an impediment external to the defense prevented him from complying with procedural default rules.⁷ Actual prejudice requires a petitioner to demonstrate "not merely that the errors of trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions."⁸

Despite a failure to show good cause, this court will consider claims if the petitioner demonstrates that failure to consider them will result in a fundamental miscarriage of justice.⁹ "The fundamental miscarriage of justice standard requires a colorable showing that constitutional error has resulted in the conviction of one who is actually innocent."¹⁰

⁵See also NRS 34.810(1)(b).

⁶NRS 34.810(3).

⁷See Crump v. Warden, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997).

⁸Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)).

⁹See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

¹⁰Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 526 (2003).

Lee claims that good cause exists because he received ineffective assistance from his post-conviction counsel. However, Lee did not have a statutory right to post-conviction counsel,¹¹ and, as we have previously held, "[w]here there is no right to counsel there can be no deprivation of effective assistance of counsel and hence, 'good cause' cannot be shown based on an ineffectiveness of post-conviction counsel claim."¹² Moreover, our review of the record reveals that post-conviction counsel was appointed six years after the statutory period for filing a post-conviction habeas petition had run.¹³ Consequently, post-conviction counsel is not to blame for Lee's untimely petition, and we conclude that the district court did not err in dismissing Lee's petition on this ground.

Lee also claims that good cause exists because he did not have notice that Judge Paul Goldman, the judge who presided over his trial, suffered from a mental illness until after his first habeas petition had been filed. He contends that notice of Judge Goldman's mental illness was not available until this court published Goldman v. Nevada Commission on Judicial Discipline in April 1992.¹⁴ And he asserts that Judge Goldman's

¹¹See NRS 34.750 (providing that a district court may appoint counsel for an indigent petitioner).

¹²Pellegrini v. State, 117 Nev. 860, 887-88, 34 P.3d 519, 537-38 (2001) (quoting McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996)).

¹³The remittitur for Lee's direct appeal was issued on April 11, 1991. The period for filing a post-conviction habeas petition ended on April 11, 1992. The post-conviction counsel who Lee claims was ineffective was not appointed until 1998.

¹⁴108 Nev. 251, 830 P.2d 107 (1992), overruled on other grounds by Matter of Fine, 116 Nev. 1001, 1022 n.17, 13 P.3d 400, 414 n.17 (2000). In Goldman, we concluded that clear and convincing evidence supported the

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mental illness is the basis for his claim that the judge's "incapacitation and/or judicial misconduct" deprived him of his right to a fair trial before an impartial judge.

We have previously stated that good cause might be demonstrated by "showing that a factual or legal basis for a claim was not reasonably available" during the statutory period for filing the petition.¹⁵ Here, however, we conclude that Lee failed to demonstrate that the delay was not his fault. The basis for Lee's claim was reasonably available during the statutory period for filing a habeas petition: Lee had an opportunity to observe the judge during his trial and object to any behavior he believed amounted to judicial misconduct, the local newspapers carried stories concerning the judge's medical problems and unusual actions in court,¹⁶ and this court published five opinions which

. . . continued

Nevada Commission on Judicial Discipline's finding that Judge Goldman "is not, and has not been, physically or mentally disabled to perform the duties of his office, in the sense contemplated by the Nevada Constitution and statutes." *Id.* at 270, 830 P.2d at 120.


¹⁵See *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).


¹⁶Lee attached a number of newspaper clippings to his second habeas petition. These articles discussed the postponement of Lee's trial while Judge Goldman was hospitalized, our decisions regarding Judge Goldman's contempt orders, and Judge Goldman's decision to retire. Several of the articles noted that Judge Goldman had been relieved of his duties for medical purposes after suffering two strokes and serious family problems, and that he claimed to be "permanently incapacitated for medical reasons to perform the duties of [his] office." The newspaper articles predate the remittitur issued on Lee's direct appeal.

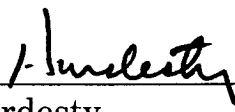
discussed the judge's misconduct.¹⁷ Moreover, Lee failed to show good cause for filing his second habeas petition twelve years after Goldman was published. We conclude that this unexplained twelve-year delay constitutes an abuse of the writ and that the district court did not err in dismissing Lee's petition on this ground.

For the reasons set forth above, we conclude that Lee failed to demonstrate that the district court erred in denying his petition for a writ of habeas corpus. We further conclude that Lee's claims do not demonstrate prejudice, let alone that failure to consider the petition on its merits would result in a fundamental miscarriage of justice. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

¹⁷Goldman v. Bryan, 106 Nev. 30, 787 P.2d 372 (1990); Goldman v. Bryan, 104 Nev. 644, 764 P.2d 1296 (1988); Cunningham v. District Court, 102 Nev. 551, 729 P.2d 1328 (1986); Bowman v. District Court, 102 Nev. 474, 728 P.2d 433 (1986); Clark Cty. Dist. Atty. v. District Court, 101 Nev. 843, 710 P.2d 1384 (1985).

cc: Hon. Michael A. Cherry, District Judge
J. Chip Siegel, Chtd.
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Clark County District Attorney David J. Roger
Clark County Clerk