

IN THE SUPREME COURT OF THE STATE OF NEVADA

MIGUEL CRUZ SARINANA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43972

FILED

JUN 20 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On March 16, 1998, the district court convicted appellant Miguel Sarinana, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. Sarinana was sentenced to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole in 10 years on each term. This court affirmed Sarinana's conviction and sentence on direct appeal.¹ The remittitur issued on April 6, 1999.

Sarinana filed a proper person post-conviction petition for a writ of habeas corpus in the district court on March 28, 2000, raising numerous claims of ineffective assistance of counsel. After a hearing, the

¹Sarinana v. State, Docket No. 32174 (Order Dismissing Appeal, March 11, 1999).

district court denied Sarinana relief on his petition. Sarinana appealed, and this court affirmed the district court's decision.²

On June 21, 2004, and with the assistance of appointed counsel, Sarinana filed his second post-conviction petition for a writ of habeas corpus in the district court. After a hearing, the district court denied Sarinana relief on his petition. This appeal followed, raising a single issue.

Sarinana contends that his appellate counsel was ineffective for failing to challenge on direct appeal the district court's denial of his proposed jury instruction regarding voluntary manslaughter. He maintains that the instruction given to the jury during his trial was incomplete and warrants the reversal of his conviction.

Before the merits of Sarinana's claim can be properly reached, we must determine whether his petition was procedurally defaulted. The State maintains that it was. We agree.

Our review of the record reveals that the State originally opposed Sarinana's petition, contending that it was procedurally barred. Although the district court acknowledged that procedural bars might be applicable to Sarinana's petition, it proceeded to address his petition on its merits, omitting any further discussion or application of the relevant procedural bars governing post-conviction habeas petitions.

²Sarinana v. State, Docket No. 36600 (Order of Affirmance, May 30, 2002).

Application of procedural bars to a post-conviction petition for a writ of habeas corpus is mandatory and may not be disregarded.³ Thus, we conclude that the district court erred by merely acknowledging the existence of procedural bars to Sarinana's petition, but not applying them. Yet because the district court ultimately denied Sarinana relief, we conclude that this error was harmless, and we affirm the district court's denial of Sarinana's petition, albeit on procedural grounds.

Two procedural bars are applicable to Sarinana's petition. NRS 34.726(1) provides in part that a petition challenging the validity of a judgment or sentence must be filed within one year after this court issues the remittitur from a direct appeal, unless a petitioner can establish good cause to excuse his delay and that the dismissal of his petition as untimely would result in undue prejudice.⁴ NRS 34.810 provides in part that a second or successive petition must be dismissed if a new claim is alleged, unless the petitioner can demonstrate good cause for not raising the claim earlier and that the dismissal of his petition would result in actual prejudice.⁵

Here, Sarinana's instant petition was filed on June 21, 2004, which was over five years after the remittitur issued from his direct

³See State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003).

⁴See Pellegrini v. State, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001).

⁵See NRS 34.810(2), (3); Crump v. Warden, 113 Nev. 293, 301-02, 934 P.2d 247, 252 (1997).

appeal. His petition was untimely pursuant to NRS 34.726(1). Sarinana's instant petition was also the second petition that he has filed in the district court, so it was also successive pursuant to NRS 34.810(2). We conclude therefore that Sarinana's petition was defaulted under NRS 34.726(1) and NRS 34.810(2), unless he can demonstrate good cause and prejudice to overcome these procedural bars.

Sarinana omits any discussion of the procedural bars applicable to his petition in his opening brief on appeal. In his reply brief, however, he raises a good cause argument. He asserts that he cannot speak, read, or understand the English language at any level. Because he was not appointed counsel or provided with a Spanish language interpreter during his first post-conviction proceeding, he maintains that he was "substantially handicapped" in his prior efforts to obtain relief.


The record, however, reveals that Sarinana timely raised over thirty allegations of ineffective assistance of trial and appellate counsel in his first habeas petition. The record thus belies Sarinana's claim that his lack of proficiency in the English language prevented him from timely raising his instant claim in his first petition when he was able to raise so many other claims in that petition.⁶ We conclude that Sarinana's argument fails to establish good cause under NRS 34.726 and NRS 34.810.

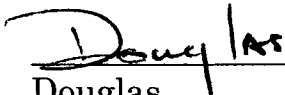
Absent a demonstration of good cause, we do not need to address whether Sarinana has shown prejudice other than to determine whether the denial of his petition on procedural grounds would result in a

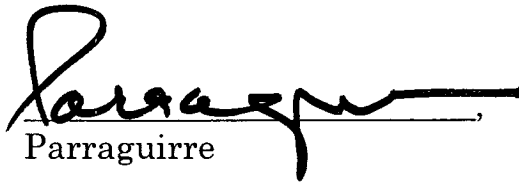
⁶See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).

fundamental miscarriage of justice.⁷ Our review of the record reveals that the jury was adequately instructed regarding voluntary manslaughter and that the application of procedural bars to Sarinana's petition would not result in a miscarriage of justice. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Hon. Sally L. Loehrer, District Judge
Federal Public Defender/Las Vegas
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁷See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).