

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLIFFORD GRAHAM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44001

FILED

DEC 02 2004

ORDER OF AFFIRMANCE

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

This is a proper person appeal from an order of the district court dismissing appellant's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

On January 27, 1995, the district court convicted appellant, pursuant to a jury verdict, of one count of first degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole after ten years had been served. This court dismissed appellant's appeal from his judgment of conviction.¹ The remittitur issued on June 8, 1999.

On February 3, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The

¹Graham v. State, Docket No. 26788 (Order Dismissing Appeal, May 13, 1999).

State filed an opposition. On April 14, 2000, the district court denied the petition. This court affirmed the order of the district court on appeal.²

On June 18, 2004, appellant filed a second 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 to the motion to dismiss. 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 August 31, 2004, the district court dismissed appellant's petition. This appeal followed.

Appellant filed his petition more than five years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.³ Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.⁴ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁵

In the instant petition, appellant claimed that his counsel was ineffective for failing to impeach Melvin Norwood's testimony on the basis of a prior inconsistent statement about appellant's possession of knives.

²Graham v. State, Docket No. 35992 (Order of Affirmance, April 16, 2002).

³See NRS 34.726(1).

⁴See NRS 34.810(1)(b)(2); NRS 34.810(2).

⁵See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

This claim, without any supporting facts, was previously raised in the 2000 petition. In an attempt to excuse his procedural defects, appellant argued that he was raising the claim again in order to exhaust state remedies. Appellant further argued that pursuant to NRS 34.750(4) the district court improperly denied his first petition without permitting him an opportunity to respond to an alleged motion to dismiss filed by the State.

Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate good cause for his delay.⁶ Failure to exhaust state remedies does not excuse a procedurally defaulted petition. Contrary to appellant's argument that the State filed a motion to dismiss the first petition, the record reveals that the State filed an opposition to the petition. Consequently, NRS 34.750(4) did not apply. The district court further did not err in denying the petition without providing appellant an opportunity to respond because appellant was required to set forth all of the facts supporting the claims on the face of the petition or seek permission from the district court to file further pleadings.⁷ Appellant did not set forth specific facts on the face of the petition, and no leave was ever sought in the district court to file further pleadings. Therefore, we conclude that the

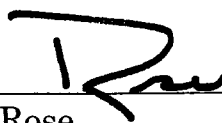
⁶See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994) (holding that good cause must be an impediment external to the defense).

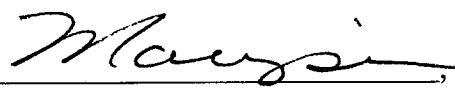
⁷See NRS 34.735; NRS 34.750(5).

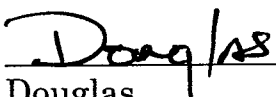
district court did not err in dismissing appellant's untimely and successive petition as procedurally barred.

Having reviewed the record 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.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. Jackie Glass, District Judge
Clifford Graham
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁸See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).