

IN THE SUPREME COURT OF THE STATE OF NEVADA

VINCENT DEPASQUALE,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K.
MCDANIEL,
Respondent.

No. 44741

FILED

MAY 02 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
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. First Judicial District Court, Carson City; William A. Maddox, Judge.

On September 26, 1989, appellant Vincent Depasquale was convicted, pursuant to a jury verdict, of first-degree murder and received a sentence of death. Depasquale filed a direct appeal, and this court affirmed the judgment of conviction.¹ The remittitur issued October 23, 1991.

On March 5, 1992, Depasquale, with the assistance of counsel, filed a post-conviction petition for a writ of habeas corpus in the district court. Subsequently, the State and Depasquale entered into a signed, written agreement wherein (1) the State agreed to confess error in the penalty phase, (2) the State and Depasquale agreed to the imposition of a prison sentence of life without the possibility of parole, (3) Depasquale

¹DePasquale v. State, 106 Nev. 843, 803 P.2d 218 (1990).

agreed not to appeal from an amended judgment of conviction and to dismiss the petition for post-conviction relief, and (4) the State agreed that Depasquale was eligible for placement in the extended care unit at the Ely State Prison. The district court conducted a hearing, during which the district court thoroughly canvassed Depasquale about his understanding of the agreement. At the conclusion of the hearing, the district court found that Depasquale was competent and that he knowingly and voluntarily entered into the agreement. On January 19, 1993, the district court entered an amended judgment of conviction sentencing Depasquale to life in the Nevada State Prison without the possibility of parole.

On January 4, 2000, Depasquale filed a proper person notice of appeal from the amended judgment of conviction. This court dismissed the appeal as untimely filed.² On August 16, 2000, Depasquale filed another proper person notice of appeal in this court, purporting to appeal from an order of the district court dismissing a petition for post-conviction relief. This court granted the State's motion to dismiss the appeal, concluding that no final judgment had been entered in district court denying such a petition.³

On July 15, 2003, Depasquale, with the assistance of counsel, filed a post-conviction petition for a writ of habeas corpus. The State moved to dismiss the petition, arguing that it was untimely filed and

²Depasquale v. State, Docket No. 35445 (Order Dismissing Appeal, March 7, 2000).

³Depasquale v. State, Docket No. 36583 (Order Dismissing Appeal, November 29, 2000).

successive.⁴ Also, the State specifically pleaded laches, claiming that the delay in filing the petition created a rebuttable presumption of prejudice to the State.⁵ Counsel for Depasquale filed a reply to the motion to dismiss. Without conducting an evidentiary hearing, the district court dismissed the petition, ruling that it was successive, untimely, barred by the doctrine of laches, and that Depasquale failed to show good cause and prejudice to excuse these procedural defaults. Depasquale filed this timely appeal.

Depasquale's petition was untimely. It was filed more than twelve years after issuance of the remittitur in his direct appeal, and more than ten years after the entry of the amended judgment of conviction.⁶ His petition was also successive because he previously filed a petition for post-conviction relief.⁷ Depasquale's petition was procedurally barred absent a demonstration of good cause for the delay and prejudice.⁸ Additionally, because the State pleaded laches, Depasquale was required to overcome the presumption of prejudice to the State.⁹

First, Depasquale argues that the district court erred in dismissing his petition because three of his claims were not procedurally

⁴See NRS 34.726(1); NRS 34.810(2),(3).

⁵See NRS 34.800(2).

⁶See NRS 34.726(1).

⁷See NRS 34.810(2).

⁸See NRS 34.726(1).

⁹See NRS 34.800(2).

barred since they were raised in his timely 1992 post-conviction petition. While acknowledging that he dismissed that petition in 1993 in exchange for a life sentence, Depasquale argues that the waiver was not voluntary and, thus, this petition "would simply be a revival or a renewal of the timely filed claims." Depasquale alleges that he has been attempting to challenge the waiver in various courts since 1993 but the documents he filed were procedurally defective.

Alternatively, Depasquale argues that the district court erred in dismissing the petition because he had good cause to overcome the procedural bar. Relying on federal case law, Depasquale argues that his profound mental illness rendered him incapable of filing a timely petition. Depasquale also argues that the district court erred in dismissing the petition for laches because the State failed to show it was prejudiced by the passage of time. Finally, Depasquale argues that several of his claims "were not reasonably available" and could not have been raised earlier in the 1992 timely petition because they concerned conduct occurring in 1993. In particular, those claims included the following: (1) his waiver of the right to challenge the sentencing agreement was unknowing and involuntary; (2) defense counsel was ineffective for failing to investigate Depasquale's competency to enter into the sentencing agreement; and (3) post-conviction counsel Thomas Perkins had an actual conflict of interest because he was also appellate counsel and failed to raise his own ineffectiveness on appeal in the 1992 habeas action.

We conclude that the district court did not err in dismissing the petition. Depasquale failed to show that he raised the issue regarding the voluntariness of his dismissal of his post-conviction petition in a timely

manner and, even assuming he did, his argument that his waiver was involuntary is belied by the record.¹⁰ Additionally, Depasquale has failed to demonstrate good cause to excuse his procedural default,¹¹ and failed to overcome the presumption of prejudice that attaches when the State pleads laches. Finally, Depasquale's claims involving the 1993 proceeding do not constitute good cause. Allegations of ineffective assistance of counsel are not an impediment external to the defense sufficient to overcome a procedural default.¹² Further, Depasquale has failed to demonstrate that he could not have raised the allegations involving the 1993 proceeding prior to the filing of the 2003 habeas petition.¹³ Accordingly, the district court did not err in ruling that the petition was procedurally barred.

¹⁰Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

¹¹See Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that organic brain damage and limited intelligence do not constitute cause to excuse procedural default); see also Mazzan v. Warden, 112 Nev. 838, 921 P.2d 920 (1996); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

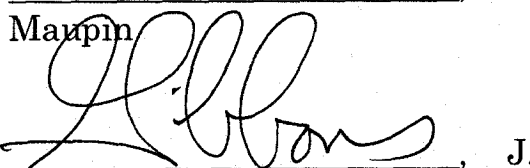
¹²See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) ("in order [for a claim of ineffective assistance of counsel] to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted").

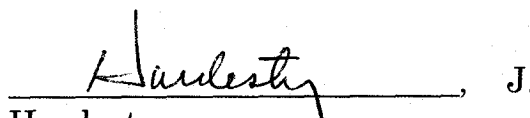
¹³See generally id. at 253-55, 71 P.3d at 507-08 (claims of ineffective assistance of counsel available to the petitioner must be raised in a reasonable time of discovery of the claim). We note that Depasquale waited approximately ten years before raising his claims involving the 1993 proceeding; ten years is not a reasonable time.

Having considered Depasquale's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

 J.

Maupin
 J.
Gibbons

 J.
Hardesty

cc: Hon. William A. Maddox, District Judge
Lindsay A. Weston
Attorney General George Chanos/Carson City
Carson City District Attorney
Carson City Clerk