

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY LYNN YEATS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46620

FILED

MAY 19 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
J. Bloom
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court dismissing an untimely and successive post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

On January 29, 2001, the district court convicted appellant, pursuant to a jury trial, of one count of burglary. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve a term of ten to twenty-five years in the Nevada State Prison. This court affirmed the judgment of the district court on appeal.¹ The remittitur issued on September 26, 2001.

On July 13, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to assist appellant, and counsel filed a supplement to the petition. The State opposed the petition. On March 5,

¹Yeats v. State, Docket No. 37395 (Order of Affirmance, June 12, 2001).

2002, without conducting an evidentiary hearing, the district court denied the petition. This court affirmed the order of the district court on appeal.²

On July 25, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus and a memorandum of good cause in the district court. 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 December 15, 2005, the district court dismissed appellant's petition. This appeal followed.

Appellant filed his petition almost four 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 as 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

²Yeats v. State, Docket No. 39362 (Order of Affirmance, July 25, 2002).

³See NRS 34.726(1).

⁴See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant raised new claims for relief in the instant petition, and thus, his petition was an abuse of the writ. See NRS 34.810(2). To the extent that appellant re-raised any claims previously litigated, appellant's petition was likewise procedurally defective. See id.

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

In an attempt to excuse his procedural defects, appellant argued that he received ineffective assistance of trial, appellate and post-conviction counsel.

Based upon our review of the record on appeal, we conclude that the district court did not err in dismissing appellant's petition as procedurally barred. Appellant failed to demonstrate that an impediment external to the defense excused his procedural defects.⁶ Although a claim of ineffective assistance of trial or appellate counsel may in some circumstances constitute good cause, appellant failed to demonstrate that ineffective assistance of trial or appellate counsel excused his procedural defects in the instant case as his claim of ineffective assistance of trial and appellate counsel is itself procedurally defaulted.⁷ Further, appellant cannot demonstrate good cause in the instant case based upon a claim of ineffective assistance of post-conviction counsel as the appointment of counsel in the prior proceeding was discretionary.⁸ Therefore, we affirm the order of the district court.

⁶See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

⁷See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

⁸See Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997); McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996).

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.⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁰

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Janet J. Berry, District Judge
Gary Lynn Yeats
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁰We 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.