

IN THE SUPREME COURT OF THE STATE OF NEVADA


HAROLD STONEBARGER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47112

FILED

OCT 10 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

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

On April 16, 2002, the district court convicted appellant, pursuant to a guilty plea, of one count each of first-degree kidnapping and sexual assault of a minor under sixteen years of age. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after five years for kidnapping, and a consecutive term of five to twenty years for sexual assault. Appellant did not file a direct appeal.

On April 15, 2003, appellant, with the assistance of counsel, filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. On August 4, 2003, the district

court denied appellant's petition. This court affirmed the denial of the petition on appeal.¹

On February 23, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant filed a motion to dismiss his petition without prejudice so that he could submit a new petition with the assistance of counsel. The State moved to dismiss the petition with prejudice. The district court denied both motions and allowed appellant's retained counsel to file a supplemental petition. The State opposed and moved to dismiss the petition and supplemental petition. Appellant filed a response. On May 5, 2006, after conducting an evidentiary hearing, the district court denied appellant's petition. This appeal followed.

The district court denied appellant's petition on the merits. However, appellant filed his petition more than three and one-half years after the entry of the judgment of conviction. Thus, appellant's petition was untimely filed.² Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.³ Additionally, to the extent that appellant's petition raised new grounds of ineffective assistance of appellant's pre-plea counsel, John

¹Stonebarger v. State, Docket No. 41745 (Order of Affirmance August 27, 2004).

²See NRS 34.726(1).

³See NRS 34.810(2).

Lukens, and his plea counsel, John Momot, Jr., the petition constituted an abuse of the writ because he had a previous opportunity to litigate his claims against Lukens and Momot.⁴ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁵

In an attempt to excuse his procedural defects, appellant argued that new evidence had come to light and he could not have raised the claims asserted in this petition earlier. The new evidence appellant referred to was witness affidavits. The record on appeal reveals that the affidavits in question were presented to the district court as supplemental exhibits to appellant's first petition. Accordingly, we conclude that appellant failed to demonstrate that new evidence existed that excused his procedural defects.

Appellant also argued that his petition was not procedurally barred as being successive because he has a common law right to pursue habeas corpus relief. This claim is patently without merit.⁶

Appellant appears to have also argued that good cause existed to excuse his procedural defects because his sentencing counsel, Robert Langford, also filed the first post-conviction petition for a writ of habeas corpus. We conclude that this would not have constituted good cause for raising new claims of ineffective assistance of Lukens and Momot. Even

⁴See id.

⁵See NRS 34.726(1); NRS 34.810(3).

⁶See NRS 34.810(2), (3).

assuming, without deciding, that appellant demonstrated good cause with respect to his claims of ineffective assistance of Langford because it is unlikely that Langford would have challenged his own effectiveness in the first petition, we conclude that appellant failed to demonstrate actual prejudice or a fundamental miscarriage of justice because he failed to raise any claims that had merit.⁷

Appellant claimed that Langford was ineffective for failing to challenge the guilty plea before sentencing and for allowing him to be sentenced on an invalid plea. Appellant failed to demonstrate that there was a "fair and just" "substantial reason" for withdrawing his guilty plea prior to sentencing.⁸ Further, appellant failed to demonstrate that his guilty plea was invalid.⁹ Because this claim lacked merit, we conclude appellant failed to demonstrate actual prejudice to excuse his procedural defects.

Appellant also claimed that Langford was ineffective for failing to prepare a sentencing memo or call witnesses in mitigation of sentence. Appellant failed to demonstrate that a sentencing memo would have altered the sentence he received. Further, appellant did not have a

⁷See Hogan v. Warden, 109 Nev. 952, 959-60, 860 P. 2d 710, 716 (1993).

⁸See NRS 176.165; Woods v. State, 114 Nev. 468, 475, 958 P.2d 91, 95 (1998).

⁹See State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000); Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

right to present witnesses on his behalf at sentencing.¹⁰ Because this claim lacked merit, we conclude appellant failed to demonstrate actual prejudice to excuse his procedural defects.

Appellant also claimed that Langford was ineffective for failing to file a direct appeal after being requested to do so. The district court conducted an evidentiary hearing on this issue. The district court found that appellant did not hire Langford to perfect a direct appeal on his behalf. The district court's determination was supported by substantial evidence and was not clearly wrong.¹¹ Because this claim lacked merit, we conclude appellant failed to demonstrate actual prejudice to excuse his procedural defects.¹²

Appellant failed to demonstrate good cause and actual prejudice to excuse his procedural defects. Therefore, the district court

¹⁰See NRS 176.015(2) (providing that only the defendant and defendant's counsel may address the court on behalf of the defendant at the sentencing hearing).

¹¹See Riley v. State, 110 Nev. 638, 878 P.2d 272 (1994).

¹²To the extent that appellant also argued that his appeal deprivation claim constituted good cause to excuse his procedural defects, we conclude that because the claim lacks merit appellant failed to demonstrate good cause.

reached the correct result in denying appellant's petition, and we affirm the decision of the district court to deny post-conviction relief.¹³

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.¹⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁵

Becker J.
Becker

Hardesty J.
Hardesty

Parraguirre J.
Parraguirre

¹³See generally Kraemer v. Kraemer, 79 Nev. 287, 291, 382 P.2d 394, 396 (1963) (holding that a correct result will not be reversed simply because it is based on the wrong decision).

¹⁴See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁵We 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.

cc: Hon. Sally L. Loehrer, District Judge
Harold Stonebarger
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk