

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES KEVIN MACK, SR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47684

FILED

JAN 08 2007

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

ORDER OF AFFIRMANCE AND REMAND FOR CORRECTION OF
JUDGMENT OF CONVICTION

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

On September 3, 2003, the district court convicted appellant, pursuant to a jury trial, of one count of sexual assault, one count of first degree kidnapping, and one count of burglary. The district court adjudicated appellant a habitual criminal and sentenced appellant to serve a single term of life in the Nevada State Prison without the possibility of parole. This court affirmed appellant's judgment of conviction on appeal.¹ The remittitur issued on May 17, 2005.

On August 26, 2004, while his appeal was pending, appellant filed a proper person post-conviction petition for a writ of habeas corpus.

¹Mack v. State, Docket No. 42031 (Order of Affirmance, April 21, 2005).

The State filed a motion to dismiss the petition. On April 5, 2005, the district court dismissed the petition. This court dismissed appellant's subsequent appeal for lack of jurisdiction as the notice of appeal was untimely filed.²

On December 23, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant requested the appointment of counsel. 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 June 29, 2006, the district court denied appellant's petition. This appeal followed.³

Appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus and he raised some of the same claims raised in the prior petition and his petition was an abuse of the writ because he raised new claims not previously raised in

²Mack v. State, Docket No. 45290 (Order Dismissing Appeal, August 23, 2005).

³To the extent that appellant appealed the decision of the district court to deny his request for counsel, we conclude that the district court did not abuse its discretion in denying his request. See NRS 34.750(1).

the prior petition.⁴ Therefore, appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice.⁵

Appellant failed to make any good cause arguments in support of his petition. Therefore, appellant failed to demonstrate that an impediment external to the defense excused his procedural defect, and we conclude that the district court did not err in determining that appellant's petition was procedurally barred.⁶

In reviewing the record on appeal, this court observed an error in the judgment of conviction. The judgment of conviction contains a single sentence of life without the possibility of parole. However, appellant committed three separate offenses. When the district court adjudicates a defendant as a habitual criminal, the habitual criminal statute allows for enhancement of the sentence for the substantive crimes charged.⁷ Thus, in such cases, the district court uses the habitual criminal statute to determine the penalty to be imposed for each of the substantive

⁴See NRS 34.810(1)(b)(2); NRS 34.810(2). Notably, appellant did not raise any claims of ineffective assistance of appellate counsel in his 2005 petition, the only claims that would arguably not be subject to the procedural bars set forth in NRS 34.810 as these claims would not have been reasonably available until the conclusion of the direct appeal.

⁵See NRS 34.810(1)(b); NRS 34.810(3).

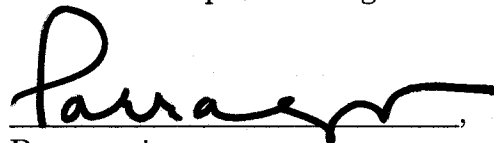
⁶See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

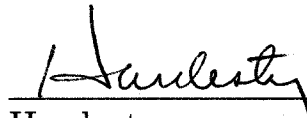
⁷See NRS 207.010(1); Hollander v. State, 82 Nev. 345, 353, 418 P.2d 802, 806-07 (1966).


crimes charged.⁸ Accordingly, we remand this matter to the district court to conduct further proceedings to impose a sentence for each of the offenses.

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 AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Parraguirre


_____, J.
Hardesty


_____, J.
Saitta

cc: Hon. Steven R. Kosach, District Judge
James Kevin Mack Sr.
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁸Hollander, 82 Nev. at 353, 418 P.2d at 806-07.

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