

IN THE SUPREME COURT OF THE STATE OF NEVADA

PABLO GARCIA CEBALLOS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 47988

**FILED**

APR 26 2007

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order dismissing appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

On January 24, 2003, appellant Pablo Garcia Ceballos was convicted, pursuant to a jury verdict, of burglary (count I) and uttering a forged instrument (count II). The district court adjudicated Ceballos as a habitual criminal and sentenced him to serve a prison term of 72 to 180 months for count I and a concurrent prison term of 12 to 48 months for count II. Ceballos filed a direct appeal, and this court affirmed the judgment of conviction.<sup>1</sup>

On July 1, 2004, Ceballos filed a proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel to represent Ceballos, and counsel filed a supplement to the petition. The State filed a motion to dismiss the petition, and counsel for Ceballos filed

---

<sup>1</sup>Ceballos v. State, Docket No. 40929 (Order of Affirmance, December 23, 2003).

an opposition to the motion to dismiss. After hearing arguments from counsel, the district court dismissed the petition. Ceballos filed this timely appeal.

Ceballos claims that the district court erred in dismissing his petition. More specifically, Ceballos claims that his appellate counsel was ineffective for failing to allege that the habitual criminal adjudication should have been determined by the jury pursuant to Apprendi v. New Jersey<sup>2</sup> and Kaua v. Frank.<sup>3</sup> We disagree.

To establish ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense.<sup>4</sup> "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."<sup>5</sup>

Ceballos was not prejudiced by appellate counsel's failure to challenge the habitual criminal adjudication because the issue had no

---

<sup>2</sup>530 U.S. 466 (2000).

<sup>3</sup>436 F.3d 1057, 1062 (9th Cir. 2006), cert. denied \_\_\_ U.S. \_\_\_, 127 S. Ct. 1233 (U.S. February 20, 2007).

<sup>4</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

<sup>5</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

reasonable probability of success on appeal.<sup>6</sup> This court recently clarified that the sentencing court's determination of the habitual criminal allegation does not violate Appendi.<sup>7</sup> In particular, this court explained that NRS 207.010 vests the sentencing court with discretion to dismiss a habitual criminal allegation, not the discretion to impose such an adjudication based on factors other than prior convictions, and, therefore, a habitual criminal adjudication does not serve to increase the punishment.<sup>8</sup> In affirming the habitual criminal adjudication in O'Neill, this court expressly refused to embrace Kaua.<sup>9</sup> Accordingly, Ceballos failed to show that his appellate counsel was ineffective for failing to challenge the habitual criminal adjudication on the ground that it violated Appendi.

---

<sup>6</sup>Ceballos also challenges the constitutionality of the habitual criminal adjudication independent from his claim of ineffective assistance of counsel. We decline to consider his challenge because it falls outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus. Ceballos failed to raise the allegation on direct appeal from the judgment of conviction and did not allege good cause for his failure to do so. See NRS 34.810(1)(b); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

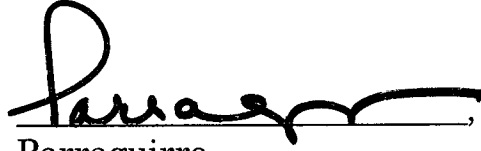
<sup>7</sup>O'Neill v. State, 123 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (Adv. Op. No. 2, March 8, 2007).


<sup>8</sup>Id. at \_\_\_, \_\_\_ P.3d at \_\_\_.


<sup>9</sup>Id. at \_\_\_, \_\_\_ P.3d at \_\_\_ (citing Kaua, 436 F.3d at 1062).

Having considered Ceballos' contention and concluded that it lacks merit, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Parraguirre

 J.  
Hardesty

 J.  
Saitta

cc: Hon. Janet J. Berry, District Judge  
Scott W. Edwards  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk