


IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM GARDNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48148

FILED

JUL 23 2007

JANEITE M. BLOOM
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

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. Fifth Judicial District Court, Nye County; John P. Davis, Judge.

On March 11, 2004, the district court convicted appellant, pursuant to a guilty plea, of offer, attempt, or commission of unauthorized act(s) relating to controlled substance and conspiracy to commit burglary. The district court sentenced appellant to serve a term of 28 to 72 months in the Nevada State Prison for the unauthorized act relating to the controlled substance and a concurrent term of one year for the conspiracy. Appellant did not file a direct appeal.

On May 5, 2005, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. The district court denied appellant's petition. This court affirmed the denial of appellant's petition on the basis

that appellant's petition was untimely filed and appellant failed to demonstrate cause to excuse the procedural defect.¹

On August 1, 2006, appellant filed another proper person post-conviction petition for a writ of habeas corpus in the district court. On August 31, 2006, appellant filed a first amended petition. 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 September 15, 2006, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than two years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.² Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice.³ A petitioner may demonstrate cause to excuse the procedural default by demonstrating that an impediment external to the defense prevented appellant from filing a timely petition.⁴

In an attempt to demonstrate cause for the delay, appellant argued that his petition should have been filed on March 9, 2005. The petition filed on August 1, 2006, was dated February 11, 2005, and

¹Gardner v. State, Docket No. 45689 (Order of Affirmance, November 28, 2005).

²See NRS 34.726(1).

³See id.

⁴See Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944 (1994).

appears to be an exact copy of a petition received by the district court on February 15, 2005, which was never filed. Had the district court filed the February 11, 2005, petition upon receipt, the petition would have been timely. Because the district court's failure to file the February 11, 2005, petition constituted an impediment external to the defense, and because appellant would be prejudiced by dismissal of appellant's petition as untimely, we conclude the district court did not err by addressing the petition on the merits.

In his petition, appellant claimed that his counsel was ineffective for failing to investigate the elements needed for conviction. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial.⁵ The court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one.⁶

Appellant failed to provide any facts to support his claim that his counsel was ineffective.⁷ Further, appellant failed to identify what

⁵Hill v. Lockhart, 474 U.S. 52 (1985); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

⁶Strickland v. Washington, 466 U.S. 668, 697 (1984).

⁷See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

investigation would have uncovered that would have altered appellant's decision to plead guilty.⁸ Accordingly, we conclude the district court did not err by denying this claim.

Appellant also claimed that his sentence was illegal because the requirements needed to sustain the conviction were non-existent, the court lacked jurisdiction to prosecute a non-crime and he was actually innocent. These claims fell outside the scope of claims permissible in a post-conviction petition for a writ of habeas corpus that challenged a judgment of conviction based on a guilty plea.⁹ Accordingly, we conclude the district court did not err by denying these claims.

Finally, in his first amended petition, appellant claimed that his guilty plea was invalid because he is actually innocent of offer, attempt, or commission of unauthorized act(s) relating to controlled substance, a violation of NRS 453.321(1)(c).

"[A]ctual innocence' means factual innocence, not mere legal insufficiency."¹⁰ To demonstrate actual innocence, appellant would have to establish that "it is more likely than not that no reasonable juror would

⁸See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

⁹See NRS 34.810(1)(a).

¹⁰Bousley v. United States, 523 U.S. 614, 623 (1998); see also Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

have convicted him."¹¹ Further, appellant had to demonstrate that he is actually innocent of more serious charges that were foregone by the State in the course of plea bargaining.¹²

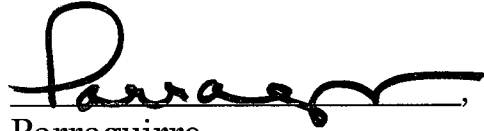
In support of his claim that he is actually innocent, appellant argued that he did not violate the statute to which he pleaded guilty. The record reveals that as part of a plea package, appellant pleaded guilty to a violation of NRS 453.321(1)(c), although prior to entry of the plea, he had been charged with violating NRS 453.322. The charge appellant pleaded guilty to was a less serious offense than the offense appellant was initially charged with. Further as part of the plea package, the State agreed to dismiss additional charges that were pending against appellant in other district court cases. Appellant failed to demonstrate that it is more likely than not that no reasonable juror would have convicted him of the more serious offense of manufacturing or attempting to manufacture a controlled substance under NRS 453.322, the crime for which he was originally charged. Further, appellant made no attempt to demonstrate that it is more likely than not that no reasonable juror would have convicted him of all the charges the State dismissed against him as part of the plea package. Accordingly, we conclude this claim lacked merit, and the district court did not err by denying appellant's petition.

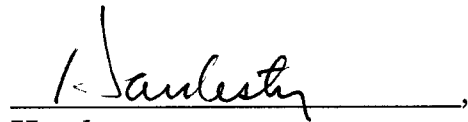
¹¹Bousley, 523 U.S. at 623 (quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995)).


¹²Id. at 624.

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.¹³ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Parraguirre

 J.
Hardesty

 J.
Saitta

cc: Hon. John P. Davis, District Judge
William Gardner
Attorney General Catherine Cortez Masto/Carson City
Nye County District Attorney/Tonopah
Nye County Clerk

¹³See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).