

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ROBERT RIKER,
Appellant,
vs.
DIRECTOR, NEVADA DEPARTMENT
OF CORRECTIONS, HOWARD
SKOLNIK,
Respondent.

No. 50216

FILED

FEB 17 2009
TRACIE W. LINDEMAN
CLERK OF SUPREME COURT
BY [Signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus in a death penalty case. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant David Robert Riker was convicted, pursuant to a guilty plea, of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon and was sentenced to death by a three-judge panel. This court affirmed Riker's judgment of conviction and death sentence. Riker v. State, 111 Nev. 1316, 905 P.2d 706 (1995). Remittitur issued on January 30, 1996. Riker filed his first post-conviction petition for a writ of habeas corpus, with the assistance of appointed counsel, in November 1996, which the district court denied in 1998. This court dismissed his subsequent appeal in December 1998. Riker v. Warden, Docket No. 31791 (Order Dismissing Appeal, December 8, 1998). Riker then filed a second post-conviction petition in March 2003, more than eight years after this court decided Riker's direct appeal and five years after this court dismissed his appeal from the denial of his first post-conviction petition. The State filed a motion to dismiss the petition

as procedurally barred pursuant to NRS 34.726, NRS 34.800, and NRS 34.810. After original writ proceedings in this court to require the district court to consider applicable procedural bars, State v. Dist. Ct. (Riker), 121 Nev. 225, 112 P.3d 1070 (2005), the district court granted Riker relief from the death sentence on the ground that the sole aggravator—that the murder was perpetrated during the commission of a robbery—was invalid under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), but denied the remainder of Riker’s claims without conducting an evidentiary hearing based on procedural bars. Riker appeals from the district court’s order.

Riker argues that the district court erred by denying his post-conviction petition as procedurally barred without conducting an evidentiary hearing. Riker further contends that the application of any procedural bars is unconstitutional because this court has arbitrarily and inconsistently applied them, resulting in disparate treatment of similarly situated capital habeas petitioners.

Application of procedural bars

Riker contends that the district court improperly applied the procedural default rules provided in NRS 34.726, NRS 34.800(2), and NRS 34.810. For the reasons below, we conclude that Riker failed to show that the district court erred by denying his post-conviction petition as procedurally barred.

NRS 34.726

Riker argues that the district court erred by denying his petition pursuant to NRS 34.726 because any delay in filing his petition was not his fault. In particular, he argues that the district court relied on the wrong standard for a showing of good cause under the statute and erred in failing to conduct an evidentiary hearing on Riker’s assertion that the delay was not his fault. Riker further argues that his claims of

ineffective assistance of post-conviction counsel constitute good cause to excuse the delay. We disagree.

This court has consistently and repeatedly stated that to satisfy the good cause requirement under NRS 34.726(1)(a), a defendant must establish that an impediment external to the defense precluded the timely filing of a post-conviction petition for a writ of habeas corpus. See, e.g., Sullivan v. State, 120 Nev. 537, 542, 96 P.3d 761, 765 (2004); Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998). “An impediment external to the defense may be demonstrated by a showing ‘that the factual or legal basis for a claim was not reasonably available to counsel, or that “some interference by officials,” made compliance impracticable.’” Hathaway, 119 Nev. at 252, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)); Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). This standard recognizes that good cause means that some event or circumstance beyond a defendant’s control precluded the filing of a timely habeas petition. We conclude that the definition contemplates conditions that are not the “fault of the petitioner.”

Riker, however, suggests that the term “fault of the petitioner” shows that the legislative intent of NRS 34.726(1)(a) “is that petitioner himself must act or fail to act to cause the delay.” He asserts that this court has implicitly adopted this subjective standard for good cause relative to NRS 34.726 in Pellegrini and Bennett v. State, 111 Nev. 1099, 901 P.2d 676 (1995). However, nothing in Pellegrini supports Riker’s contention in this regard and Bennett presented a different procedural posture than this case. We conclude that the district court applied the correct standard to determine whether Riker had shown good cause to

excuse his delay. To the extent Riker argues that he was entitled to an evidentiary hearing to establish that any delay in filing his petition was not his fault, he failed to provide any factual allegations supporting his contention. Because Riker asserted only a bare claim for relief, he was not entitled to an evidentiary hearing. See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

Finally, Riker suggests that the delay in raising his ineffective-assistance-of-post-conviction-counsel claims should be excused because he could not have raised them within the one-year time period after his direct appeal—they were not “ripe” within that period. In this, Riker suggests that our prior decision in this case erroneously concluded that a post-conviction counsel claim could not establish good cause. We recognized in that decision that claims of ineffective assistance of first post-conviction counsel are not immune from procedural default for untimeliness, but we did not specifically address what would constitute cause for raising such claims in an untimely fashion. State v. Dist. Ct. (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077 (2005). And here, Riker has not demonstrated cause for the five-year delay after the district court denied his first post-conviction petition in raising his claims of ineffective assistance of first post-conviction counsel. Absent specific factual allegations to support a finding of good cause, Riker was not entitled to an evidentiary hearing to support his claim of good cause. See Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

We conclude that Riker failed to show that the district court improperly applied NRS 34.726 to bar consideration of his untimely petition. Accordingly, the district court did not err by summarily denying Riker’s petition as procedurally barred pursuant to NRS 34.726.

NRS 34.800

Riker contends that because he sufficiently rebutted the presumption of prejudice to the State, the district court erred by summarily denying his petition as procedurally barred pursuant to NRS 34.800(2). In particular, Riker argues that the victim's murder was fully litigated during his recent trial in California for another murder, demonstrating that the State would not be prejudiced in its ability to prosecute him in a new trial.

NRS 34.800(2) provides that “[a] period exceeding 5 years between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction creates a rebuttable presumption of prejudice to the State.” The statute affords a petitioner the opportunity to respond to the State's allegations of prejudice before the district court rules on any motion to dismiss based on that prejudice.

Considering the nature and extent of the evidence admitted during the California prosecution, we conclude that Riker rebutted the presumption of prejudice to the State respecting its ability to retry him for the victim's murder. See NRS 34.800(1)(b). However, it is unclear whether Riker rebutted the presumption of prejudice to the State respecting its ability to respond to the petition due to the passage of time. See NRS 34.800(1)(a). Nonetheless, as explained above, Riker's petition was procedurally barred pursuant to NRS 34.726. Therefore, even if the district court erred by finding Riker's petition procedurally barred pursuant to NRS 34.800, Riker has not demonstrated that he is entitled to relief.

NRS 34.810

Riker contends that the district court erred by denying his petition as procedurally barred under NRS 34.810 because he established that the failure to present his claims in his first petition was due to the ineffective assistance of post-conviction counsel, which constitutes good cause under Crump v. Warden, 113 Nev. 293, 296-97, 934 P.2d 247, 249 (1997). To the extent that the district court dismissed Riker's claims of ineffective assistance of first post-conviction counsel as successive, the district court erred. Riker was appointed first post-conviction counsel by statutory mandate, NRS 34.820(1)(a), and therefore was entitled to the effective assistance of that counsel. Crump, 113 Nev. at 303, 934 P.2d at 253. Under Crump, such claims may provide cause for filing a successive petition. Id. at 303-05, 934 P.2d at 253-54. However, the district court's proper application of NRS 34.726, discussed above, nevertheless supports the denial of Riker's habeas petition. Therefore, we conclude that the district court did not err by denying Riker's petition as procedurally barred without conducting an evidentiary hearing.¹

Alleged inconsistent application of procedural bars

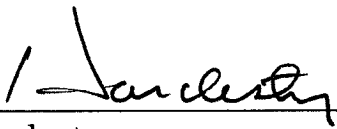
Riker argues that he should be excused from procedural default rules because this court arbitrarily and inconsistently applies them. This court has previously rejected this precise claim, concluding, after painstaking analysis, that it does not arbitrarily "ignore procedural

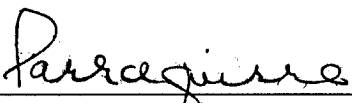
¹To the extent Riker contends that the district court ignored his claims of ineffective assistance of first post-conviction counsel, we conclude that the record before us and the district court's order on the whole show that the district court was aware of Riker's claims respecting post-conviction counsel and concluded that they were procedurally barred.

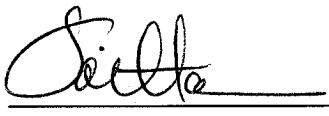
default rules” and that “any prior inconsistent application of statutory default rules would not provide a basis for this court to ignore[] the rules, which are mandatory.” State v. Dist. Ct. (Riker), 121 Nev. 225, 236, 112 P.3d 1070, 1077 (2005). Accordingly, we conclude that Riker’s contention lacks merit.

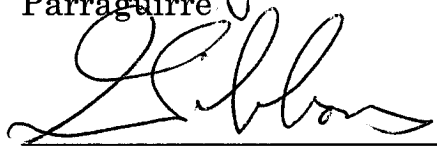
Having considered Riker’s arguments and concluded that the district court did not err by denying his post-conviction petition without conducting an evidentiary hearing, we

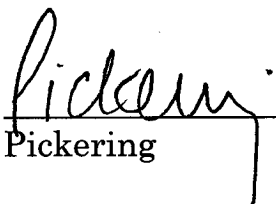
ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Hardesty


_____, J.
Parraguirre


_____, J.
Saitta


_____, J.
Gibbons


_____, J.
Pickering

cc: Hon. Michael Villani, District Judge
Federal Public Defender/Las Vegas
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

²The Honorables Michael L. Douglas and Michael Cherry, Justices, voluntarily recused themselves from participation in the decision in this matter.