

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANSELL MATRIA JORDAN,
Appellant,
vs.
WARDEN, LOVELOCK
CORRECTIONAL CENTER, JACK
PALMER,
Respondent.

No. 50954

FILED

MAY 21 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

On April 10, 2003, the district court convicted appellant, pursuant to a jury verdict, of one count of sexual assault on a child. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after twenty years. This court affirmed the judgment of conviction and sentence on appeal. Jordan v. State, Docket No. 41414 (Order of Affirmance, July 1, 2004). The remittitur issued on July 27, 2004.

On April 6, 2005, appellant filed a proper person petition for an extraordinary writ in this court. This court declined to review the petition, and instead informed appellant that his claims must be raised in the district court in the first instance. Jordan v. State, Docket No. 45030 (Order Denying Petition, April 22, 2005).

On July 26, 2005, appellant filed a proper person post-conviction petition for a writ of habeas in the district court. On August 23,

2005, without ordering the State to respond, the district court denied appellant's petition. This court affirmed the decision of the district court on appeal. Jordan v. State, Docket No. 45957 (Order of Affirmance, February 21, 2006).

On November 9, 2007, appellant, through his federal public defender appointed in federal habeas proceedings, filed a post-conviction petition for a writ of habeas corpus in the district court. Pursuant to 34.770, the district court declined to conduct an evidentiary hearing. On December 21, 2007, without ordering a response from the State, the district court dismissed appellant's petition. This appeal followed.

In his petition, appellant claimed that he received ineffective assistance of counsel because trial counsel failed to cross-examine the victim regarding the victim's prior allegations of rape and assault. Appellant also claimed that he received ineffective assistance of appellate counsel because appellate counsel failed to raise the issue of the district court's bias on direct appeal.

Appellant filed his petition more than three years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was an abuse of the writ because he filed new and different claims from those previously litigated in the prior petition.¹ See NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of

¹Contrary to appellant's argument that this court cannot apply the procedural bars found in NRS 34.810 because the district court's order does not rely on NRS 34.810, there is no statutory authority to ignore procedural bars. The district court's failure to include NRS 34.810 as a procedural bar does not entitle appellant to relief.

good cause and prejudice. See NRS 34.726(1); NRS 34.810(3). To show good cause, a petitioner must demonstrate that an impediment external to the defense prevented him from complying with the procedural default rules. Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

Appellant's Assignments of Error on Appeal

Appellant raises four issues on appeal arguing that the district court erred by summarily dismissing his post-conviction petition for a writ of habeas corpus: (1) the dismissal deprived appellant of the ability to show cause and prejudice; (2) the dismissal deprived appellant of his statutory right to the discretionary appointment of counsel and right to supplement his petition; (3) the dismissal deprived appellant of his statutory right to an evidentiary hearing; (4) appellant was denied the right to be present during the post-conviction proceedings; and (5) the district court dismissed the petition because the court is biased against the appellant. In addition, appellant argues that this court inconsistently applies its procedural bars.

Ability to Show Cause and Prejudice

Appellant argues on appeal that the district court's summary dismissal of the instant petition deprived appellant of the ability to show cause and prejudice. Appellant is not entitled to any relief on this argument. No statutory authority prevents a district court from summarily dismissing an untimely second petition. A petitioner is required to demonstrate cause and prejudice on the face of the petition. State v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681 (2003). Moreover, a petitioner does not have the right to supplement his petition. NRS 34.750(5). Instead, he must first seek permission of the district court. Id. Further, appellant alleged three grounds of cause and prejudice

in his petition below and has not demonstrated why he was unable to raise all of his claims in the 2007 petition. Accordingly, appellant has failed to demonstrate that the district court erred in dismissing the petition.

Denial of “Statutory Rights”

Second, appellant argues that because the district court summarily dismissed his petition, he was deprived of his statutory right to discretionary appointment of counsel, right to supplement his petition, and right to an evidentiary hearing. See NRS 34.750 and NRS 34.770. This claim lacks merit. Contrary to appellant’s contention, it is within the district court’s discretion to appoint counsel, and to allow appellant to supplement his petition. Id. Therefore, appellant has failed to demonstrate that the district court erred in summarily dismissing the petition.

Right to an Evidentiary Hearing

Appellant argues that he was denied the right to an evidentiary hearing. This claim lacks merit. NRS 34.770(2) provides that the district court may dismiss a petition without a hearing when the district court determines the petitioner is not entitled to relief. An evidentiary hearing is not required when the factual allegations are belied by the record. Byford v. State, 123 Nev. 67, 70 156 P.3d 691, 693 (2007). Appellant is not entitled to an evidentiary hearing simply because he filed a petition. Appellant failed to demonstrate that he was entitled to an evidentiary hearing or that the district erred by denying his petition.

Right to Be Present at Post-Conviction Hearing

Appellant claims, in addition to being denied the right to a hearing, he was denied the right to be present at a hearing that the district court held on the merits of the petition, in violation of his due process rights. Appellant appears to claim that because the district court

dismissed the petition on the merits, appellant should have been present when the district court actually dismissed it and cites Gebers v. State, 118 Nev. 500, 50 P.3d 1092 (2002) for this proposition. This claim lacks merit. First, a dismissal of a petition based on procedural bars is not a decision on the merits. Second, Gebers only requires the presence of the petitioner when an evidentiary hearing is conducted. Id. Our review of the record reveals that the district court did not hold an evidentiary type of hearing on appellant's petition. Appellant has not demonstrated any hearing happened on the 2007 petition. Therefore, we conclude that the district court did not err in summarily dismissing the petition.

District Court Bias

Appellant argues that Judge Steven Elliott was biased against him and that bias was the reason the district court summarily dismissed the instant petition. Appellant contends that Judge Elliott was biased because Judge Elliott presided over a previous trial on similar charges where appellant was acquitted. Judge Elliott later apparently made statements to appellant's trial counsel that he was surprised that appellant was acquitted because, in his opinion, the evidence against appellant was overwhelming. Prior to trial in the instant case, appellant's attorney unsuccessfully attempted to have Judge Elliott recuse himself. Judge Elliott stated at the hearing on the motion for recusal, that he respected the previous jury's verdict and could sit impartially through this trial. Appellant has failed to explain why he did not raise this issue in his previous petition or why he did not move to disqualify Judge Elliott when he filed his second petition. Therefore, we conclude that the district court did not err in denying the petition.

Fundamental Miscarriage of Justice

Appellant claims that it would be a fundamental miscarriage of justice to not reach the merits of his claims because he is actually innocent of the charges and because numerous violations of his constitutional rights occurred. Appellant claims that testimony and evidence presented at trial was contradictory, and therefore, he is actually innocent of the charges. Appellant raised sufficiency of the evidence on direct appeal. This court found that there was sufficient evidence to convict appellant, and therefore, this claim is barred by the doctrine of law of the case. State v. Dist. Ct. (Riker), 121 Nev. 225, 232, 112 P.3d 1070, 1075 (2005). In addition, appellant fails to explain how his constitutional rights were violated, and therefore, failed to show cause and prejudice. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Accordingly, we conclude that the district court did not err in denying the petition.

Consistent Application of Procedural Bars

Appellant also claims that this court does not consistently apply its procedural bars. Appellant concedes that this issue has been decided adversely to him in Pellegrini v. State, 117 Nev. 860, 879-80, 34 P.3d 519 532-33 (2001); see also Riker, 121 Nev. at 236, 112 P.3d at 1077. Further, this claim does not provide a good cause explanation. Therefore, we conclude that appellant's contention lacks merit.

Appellant's Good Cause Arguments Raised in Petition

Appellant also argues that the district erred in rejecting the three good cause arguments he raised in his petition: (1) that the district erred by summarily denying his first petition; (2) that this court erred by ignoring his request for remand of his first petition; and (3) that he lacked

the requisite legal knowledge to include all of his claims in his first petition.

Failure to Order the State to Respond

First, appellant claims that the district court erred in rejecting his good cause argument that the district court should have required the State to respond to appellant's first petition. We conclude that this claim does not warrant relief because appellant has failed to demonstrate that he was harmed by the district court's summary denial. NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"). Appellant argues that he would have added claims to his original petition, however, NRS 34.750(5) does not allow further pleadings except as ordered by the district court. Therefore, had the district court ordered the State to respond, appellant did not have the right to supplement his petition to add additional claims. Accordingly, we conclude that the district court did not err in denying this claim.

Request for Remand

Second, appellant claims that the district court erred in rejecting his good cause argument that this court erred when it ignored his request for remand of the previous petition on appeal. Appellant filed a motion with this court in his previous petition requesting that this court remand the petition to the district court so that he could amend the petition. The request for remand was filed prior to this court's order affirming the district court's denial of appellant's previous petition. Contrary to appellant's claim that this court ignored his motion to remand, this court considered and rejected his motion for remand in a

footnote in the order of affirmance.² Therefore, we conclude that the district court did not err in denying this claim.

Lack of Legal Knowledge

Finally, appellant argues that the district court erred in rejecting his good cause argument that he lacked the requisite knowledge of the law to have included all his grounds for relief in his first petition. This claim lacks merit. Lack of legal knowledge is not an impediment external to the defense. See Hathaway, 119 Nev. at 252-53, 71 P.3d at 506-07. See also Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that petitioner's claim of organic brain damage, borderline mental retardation, and reliance on assistance of inmate law clerk unschooled in the law did not constitute good cause for the filing of a successive post-conviction petition). Therefore, we conclude that the district court did not err in denying this claim.

Remaining Claims

On appeal, appellant raised several additional grounds in order to excuse his untimely and successive petition. Appellant argues:

²The footnote stated:

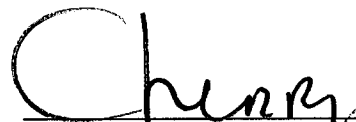
The district court did not order a response from the State. In a subsequent submission to this court, appellant requested we remand the case to allow the State the opportunity to respond. The State has not sought that opportunity, and we decline to order a remand to allow the State to respond when the State does not make that request itself. Appellant has no right to file a supplemental pleading except as provided by NRS 34.750.


(1) the district court's bias against the appellant caused the district court to summarily deny his first petition; (2) appellant was deprived of the statutory right to discretionary counsel when the district court summarily denied his first petition; (3) appellant was deprived of the right to be present to attend hearings regarding his first petition; and (4) appellate counsel was ineffective for failing to raise claims in the direct appeal. These claims were not raised in the district court and we decline to address them for the first time on appeal.

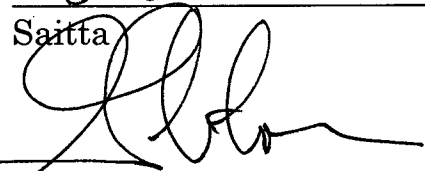
Conclusion

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

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Steven P. Elliott, District Judge
Federal Public Defender/Las Vegas
Attorney General Catherine Cortez Masto/Reno
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk