

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARBARO V. GRASS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52002

FILED

FEB 04 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
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. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On December 11, 1990, the district court convicted appellant, pursuant to jury verdict, of four counts of sexual assault. The district court sentenced appellant to serve four consecutive terms of life in the Nevada State Prison with the possibility of parole. This court dismissed appellant's appeal from his judgment of conviction and sentence. Grass v. State, Docket No. 21911 (Order Dismissing Appeal, December 4, 1991). The remittitur issued on February 19, 1992. Appellant unsuccessfully sought post conviction relief by way of an untimely petition for writ of habeas corpus filed on July 26, 1995. Grass v. State, Docket No. 27683 (Order Dismissing Appeal, June 23, 1998).

On April 3, 2008, appellant filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition on the ground that the petition was untimely. Moreover, the State specifically pleaded laches. 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 dismissed a claim regarding denial of parole without prejudice. On September 5, 2008, the district court dismissed the remainder of appellant's petition. This appeal followed.

In his petition, appellant claimed that the Parole Board's denial of parole on June 20, 2007 violated his rights to equal protection and due process. Appellant also argued that the State presented insufficient evidence to sustain a conviction at trial, that the district court incorrectly instructed the jury that a sexual assault victim's testimony need not be supported by corroborating evidence, that he was entitled to a jury instruction on the issue of reasonable mistaken belief of consent, that he was denied access to the courts as a result of his inability to speak English, that he received ineffective assistance of trial and appellate counsel, and that the cumulative effect of these errors deprived him of his Fifth, Sixth, and Fourteenth amendment rights.

As indicated above, the district court dismissed appellant's claims regarding the denial of parole without prejudice. Because the proper party to respond to appellant's claims regarding the denial of parole was the attorney general's office, we conclude that the district court did not err in dismissing this claim. See generally NRS 34.360; NRS 34.738.¹

¹Pursuant to NRS 34.738(1), a petition challenging denial of parole must also "be filed with the clerk of the district court for the county in which the petitioner is incarcerated."

With respect to appellant's claim regarding sufficiency of the evidence, we note that "[t]he law of a first appeal is the law of the case in all later appeals in which the facts are substantially the same, and that law cannot be avoided by more detailed and precisely focused argument made after reflecting upon previous proceedings." State v. Haberstroh, 119 Nev. 173, 188-89, 69 P.3d 676, 686 (2003). On direct appeal, this court considered appellant's arguments regarding sufficiency of the evidence, and concluded that sufficient evidence existed to support appellant's conviction. Accordingly, further consideration of this claim is barred by law of the case doctrine. Therefore, we conclude that the district court did not err in denying this claim.

With respect to appellant's remaining claims, we note that appellant filed his petition approximately sixteen 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 successive. See NRS 34.810(1)(b)(2). Therefore, appellant's petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(1)(b). Further, because the State specifically pleaded laches, appellant was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

In an attempt to excuse his procedural defects, appellant argued that he cannot "speak, read, or write the English language," indicating that he was unable to understand the trial transcript, or any of the materials contained in the prison law library, and that no Spanish speaking interpreters were available to assist him.

Based upon our review of the record on appeal, we conclude that appellant failed to demonstrate good cause to excuse his procedural

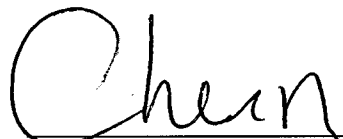
defects. As this court stated in Hathaway v. State, “[i]n order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules.” 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Impediments external to the defense include “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 [with statutory time limits] impracticable.’” Id. (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986) (internal citations omitted)). As established by the United States Supreme Court in Bounds v. Smith, this type of impediment may include a prison’s failure to provide “meaningful” access to the courts through the provision of “adequate law libraries or adequate assistance from persons trained in the law.” 430 U.S. 817, 828 (1977), limited by Lewis v. Casey, 518 U.S. 343 (1986). In cases where a party speaks no English, federal courts have indicated that Bounds may also require prisons to provide some type of bilingual assistance. See, e.g. Acevedo v. Forcinito, 820 F. Supp. 886, 888 (D. N.J. 1993).

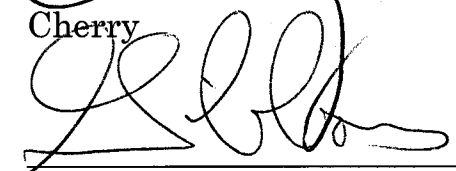
In this case, beyond his limited understanding of the English language, appellant demonstrated no external impediment that prevented him from filing his claim. While appellant’s limited understanding of the English language, combined with the prison’s alleged failure to provide bilingual law clerks may have initially established good cause for his delay in filing, appellant failed to demonstrate that he had good cause for the entire length of the sixteen-year delay. Notably, appellant filed his first proper person petition for writ of habeas corpus in English, in 1998. As established by the Sixth Circuit Court of Appeals, “where a petitioner’s alleged lack of proficiency in English has not [previously] prevented the


petitioner from accessing the courts, that lack of proficiency is insufficient to justify [good cause for further delay].” Cobas v. Burgess, 306 F.3d 441, 444 (6th Cir. 2002) (finding that petitioner’s alleged inability to speak English was no excuse for delay when the petitioner had previously filed several post-conviction motions and habeas corpus petitions in state court, even if the petitioner had received assistance in drafting those petitions). Therefore, appellant failed to demonstrate that an impediment external to the defense prevented access to the courts. Further, even if appellant had demonstrated good cause, appellant failed to overcome the presumption of prejudice to the State. Therefore, the district court did not err in dismissing appellant’s petition.

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.
Gibbons


_____, J.
Saitta

cc: Hon. Donald M. Mosley, District Judge
Barbaro V. Grass
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk