

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 52910

FILED

SEP 29 2009

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

This is a proper person 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; Janet J. Berry, Judge.

On January 24, 2003, the district court convicted appellant, pursuant to a jury verdict, of burglary and uttering a forged instrument. The district court adjudicated appellant a habitual criminal and sentenced him to serve a term of 72 to 180 months in the Nevada State Prison for burglary and a concurrent term of 12 to 48 months for uttering a forged instrument. This court affirmed appellant's judgment of conviction and sentence. Ceballos v. State, Docket No. 40929 (Order of Affirmance, December 23, 2003). The remittitur issued on January 21, 2004.

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

petition, and counsel filed an opposition to the motion to dismiss. After hearing arguments from counsel, the district court dismissed the petition. This court affirmed the order of the district court on appeal. Ceballos v. State, Docket No. 47988 (Order of Affirmance, April 26, 2007).

On March 17, 2008, appellant filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss and appellant filed a reply to the motion to dismiss. 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 November 19, 2008, the district court dismissed appellant's petition. This appeal followed.

In his petition, appellant raised five claims of ineffective assistance of counsel: (1) allowing too many continuances prior to the preliminary hearing, (2) letting a plea offer "slip away," (3) erroneously telling him to wait to take a plea until the day of the preliminary hearing to see if the victim would appear for the preliminary hearing, (4) failing to secure an impartial jury, and (5) failing to call witnesses appellant requested. Further, appellant challenged his adjudication as a habitual criminal because this determination was not made by a jury and because his previous felonies were non-violent.

Appellant filed his petition more than four 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 because he had previously filed a post-conviction

petition for a writ of habeas corpus alleging the same grounds raised in the instant petition. See NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(3).


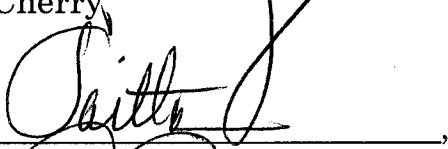
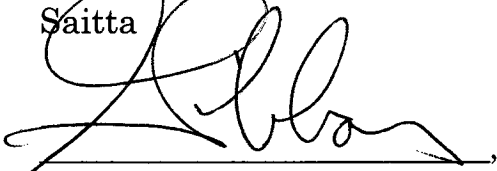
In an attempt to excuse his procedural defects, appellant claimed that he received ineffective assistance of post-conviction counsel. Specifically, he claimed that post-conviction counsel was ineffective for failing to raise on appeal that trial counsel was ineffective for not securing a plea deal before the preliminary hearing and for failing to exhaust his claims on appeal.

Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate good cause to excuse his procedural defects. Appellant cannot demonstrate good cause based upon a claim of ineffective assistance of post-conviction counsel as the appointment of counsel in the prior proceeding was discretionary. See Crump v. Warden, 113 Nev. 293, 302-03, 934 P.2d 247, 252-53 (1997); McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996). Further, failure to exhaust state remedies is not good cause to file a late and successive petition raising the same claims abandoned in the first post-conviction proceedings. Therefore, we affirm the order of the district court dismissing appellant's petition as procedurally barred.

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.¹

 _____ J.
Cherry
 _____ J.
Saitta
 _____ J.
Gibbons

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

¹We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.