


IN THE SUPREME COURT OF THE STATE OF NEVADA

WILBERT EMORY LESLIE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52954

FILED

OCT 21 2009

TRACE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

On June 4, 1996, the district court convicted appellant, pursuant to jury verdict, of burglary (count one), robbery with the use of a deadly weapon (count two), and first-degree murder with the use of a deadly weapon (count three). The district court sentenced appellant to serve terms in the Nevada State Prison of 10 years for count one and 15 years for count two, plus an equal and consecutive term for the deadly weapon enhancement. The district court sentenced appellant to death for count three. Count two was to be served consecutive to counts one and three. On appeal, this court affirmed the judgment of conviction and sentence. Leslie v. State, 114 Nev. 8, 952 P.2d 966 (1998). The remittitur issued on November 3, 1998.

On November 12, 1998, appellant filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court denied the petition on July 31, 2000. On appeal, this court affirmed in part, but vacated the death

sentence and remanded for a new sentencing hearing. Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002). The remittitur issued on January 14, 2003.

The district court entered an amended judgment of conviction on March 16, 2007. The district court sentenced appellant to serve terms in the Nevada State Prison of 10 years for count one and 15 years for count two, plus an equal and consecutive term for the deadly weapon enhancement. For count three, the district court sentenced appellant to serve a term of life without the possibility of parole, plus an equal and consecutive term for the deadly weapon enhancement. The terms for each count imposed were to be served concurrently. Appellant voluntarily withdrew his direct appeal from the amended judgment of conviction. Leslie v. State, Docket No. 49121 (Order Dismissing Appeal, May 7, 2008).

On July 2, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition on the grounds that the petition was untimely, successive, and barred by 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. On December 26, 2008, the district court denied the petition. This appeal followed.

In his petition, appellant claimed that his appellate counsel was ineffective for the following: (1) failing to argue that a photographic line-up, a physical line-up, and the in-court identification were suggestive; (2) failing to argue prosecutorial misconduct for coercing Rochelle Jones' testimony; and (3) failing to argue that a distorted videotape was inadmissible.

Appellant also claimed that his post-conviction counsel was ineffective for the following: (4) failing to raise a claim that his trial counsel was ineffective for failing to present expert testimony on unreliability of eyewitness identifications; (5) failing to raise a claim that his trial counsel was ineffective for failing to call "Big Dave" as a witness at trial; (6) failing to raise a claim that his trial counsel was ineffective for failing to present evidence tending to show some other person was the shooter; (7) failing to raise a claim that his trial counsel was ineffective for failing to object to the admission of a distorted videotape; (8) failing to raise a claim that his appellate counsel was ineffective for failing to argue that a photographic line-up, a physical line-up, and the in-court identification were suggestive; and (9) failing to raise a claim that his appellate counsel was ineffective for failing to argue prosecutorial misconduct for coercing Rochelle Jones' testimony.

The petition was filed almost 10 years after this court issued the remittitur from appellant's direct appeal and almost 6 years after this court issued its decision concerning appellant's previous post-conviction petition for a writ of habeas corpus. 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. See NRS 34.810(1)(b)(2). Further, appellant's petition constituted an abuse of the writ as all of the claims were new and different from those claims raised in his previous post-conviction petition for a writ of habeas corpus. See NRS 34.810(2). Appellant's petition was

procedurally barred absent a demonstration of good cause and prejudice.¹ See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). In addition, because the State specifically pleaded laches, he was required to overcome the presumption of prejudice to the State. See NRS 34.800(2).

To excuse his procedural defects, appellant first claimed that his appellate counsel failed to raise claims that he had asked to be included in his direct appeal. Appellant claimed that the failure of his appellate counsel to include those claims should excuse his procedural defects. We disagree. In Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003), this court explained that “to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted.” See also Edwards v. Carpenter, 529 U.S. 446, 452-53 (2000) (concluding that claims of ineffective assistance of counsel cannot serve as cause for another procedurally defaulted claim). In other words, a petitioner must demonstrate cause for raising an ineffective assistance of counsel claim in an untimely fashion. Appellant’s claims challenge the original judgment of conviction and could have been raised in a timely petition. NRS 34.726(1). That appellant asked his appellate counsel to raise claims in his direct appeal does not explain or excuse the

¹We note that appellant’s petition was untimely filed from the remittitur for his direct appeal. The amended judgment of conviction did not provide good cause to raise claims that challenge the original judgment of conviction and could have been raised in a timely post-conviction petition for a writ of habeas corpus. See Sullivan v State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004) (stating “untimely post-conviction claims that arise out of the proceedings involving the initial conviction . . . and that could have been raised before the judgment of conviction was amended are procedurally barred”).

almost 10-year delay from the issuance of the remittitur from his direct appeal. Following the filing of an amended judgment of conviction, it would be highly disruptive to the finality of judgments to allow challenges to the original judgment of conviction to be made in an untimely and successive petition. See Sullivan, 120 Nev. at 541, 96 P.3d at 764. Therefore, we conclude that the district court did not err in rejecting his argument that he had good cause based upon his claims of ineffective assistance of appellate counsel.

Second, appellant claimed that his post-conviction counsel failed to raise claims that he had asked to be included in his previous post-conviction petition for a writ of habeas corpus. Appellant claimed that the failure of his post-conviction counsel to include those claims should excuse his procedural defects. We disagree. At the time of appellant's previous post-conviction petition for a writ of habeas corpus, appellant was sentenced to death and therefore entitled to post-conviction counsel. NRS 34.820(1). As he was statutorily entitled to counsel, he was entitled to the effective assistance of counsel in that proceeding. Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); McKague v. Warden, 112 Nev. 159, 165 n.5, 912 P.2d 255, 258 n.5 (1996). While the ineffective assistance of post-conviction counsel may provide good cause for filing a successive petition, this principle is not unfettered. McKague, 112 Nev. at 167, 912 P.2d at 259-60; Hathaway, 119 Nev. at 252-53, 71 P.3d at 506.

Appellant's claims challenge the original judgment of conviction and could have been raised within one year after the remittitur from the appeal of the denial of his previous post-conviction petition for a writ of habeas corpus. See NRS 34.726(1). That appellant asked his post-conviction counsel to raise claims which were ultimately not alleged in his

previous post-conviction petition for a writ of habeas corpus does not explain or excuse the almost 6-year delay from the issuance of the remittitur from his post-conviction appeal. Appellant did not demonstrate good cause for the entire length of his delay. Therefore, the district court did not err in rejecting his argument that he had good cause based upon his claims of ineffective assistance of post-conviction counsel.

Third, appellant stated that the procedural defects should be excused because he is not legally trained and he had limited access to the prison law library. Lack of legal knowledge does not demonstrate good cause. See generally 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). Further, that appellant had limited access to the prison law library does not explain the almost 10-year delay from the remittitur from his direct appeal or the almost 6-year delay from the decision concerning appellant's previous post-conviction petition for a writ of habeas corpus. Therefore, the district court did not err in rejecting this good cause argument.

Fourth, appellant claimed that laches should not apply because the delay in bringing his claims was not his fault because appellate and post-conviction counsel failed to raise claims that he requested be raised. As almost 10 years passed between the issuance of the remittitur from appellant's direct appeal and the filing of the instant petition, there was a rebuttable presumption that the delay prejudiced the State. NRS 34.800(2). As appellant claimed that he asked for the claims to be raised previously, he necessarily failed to demonstrate that the

petition was based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred. NRS 34.800(1)(a). Further, he failed to demonstrate that a fundamental miscarriage of justice had occurred in the proceedings. NRS 34.800(1)(b). Thus, he failed to overcome the presumption of prejudice to the State. Therefore, the district court did not err in determining that the petition was barred by laches.

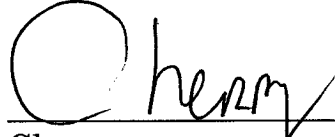
Fifth, appellant stated that he is attempting to exhaust his claims, which would allow federal court review. That appellant is seeking to exhaust claims in order to proceed federally is not good cause. See generally Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). Therefore, the district court did not err in determining that his claims were procedurally barred.

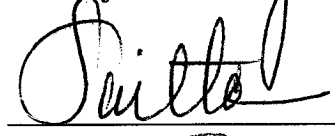
Based upon our review of the documents before this court, we conclude that the district court did not err in denying appellant's petition as procedurally barred. Appellant's claims challenge the original judgment of conviction and could have been raised in a timely petition. Appellant's petition is subject to the procedural bars in NRS 34.726(1) and NRS 34.810(2). Appellant failed to demonstrate good cause to excuse the procedural defects or that an impediment external to the defense excused the procedural defects. See Hathaway, 119 Nev. at 252, 71 P.3d at 506; Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). Finally, appellant failed to overcome the presumption of prejudice to the State. NRS 34.800(2). Therefore, the district court did not err in denying the 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 Luckett 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: Eighth Judicial District Court Dept. 15, District Judge
Wilbert Emory Leslie
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk