

IN THE SUPREME COURT OF THE STATE OF NEVADA

DARYL STANLEY WRIGHT,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53057

**FILED**

SEP 23 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 a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

On October 18, 2004, the district court convicted appellant, pursuant to a jury verdict, of one count of first-degree kidnapping with the use of a deadly weapon and one count of robbery with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life with the possibility of parole and two consecutive terms of 36 to 150 months in the Nevada State Prison, the latter to be served consecutively to the former. This court affirmed the judgment of conviction on direct appeal. Wright v. State, Docket No. 44276 (Order of Affirmance, June 29, 2006). The remittitur issued on July 25, 2006.

On April 20, 2007, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. 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 September 6, 2007, the district court denied appellant's petition. This court affirmed the order of the district

court in part, but remanded the matter to the district court to strike the deadly weapon enhancements because there was insufficient evidence that a deadly weapon was used in the commission of the offenses. Wright v. State, Docket No. 50067 (Order Affirming in Part, Reversing in Part and Remanding, July 10, 2008).<sup>1</sup>

The amended judgment of conviction was filed in the district court on August 14, 2008. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after 5 years for first-degree kidnapping and a consecutive term of 36 to 150 months for robbery.

On August 29, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. 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 16, 2008, the district court denied the petition. This appeal followed.

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<sup>1</sup>In a footnote, the order also stated that jury instruction 11 regarding the deadly weapon enhancement was flawed. Jury instruction 11 stated ““it is not always necessary for the State to prove that the deadly weapon was seen by the victim such as when the defendant’s statements or conduct produce a fear of harm from that weapon.” The order stated that jury instruction 11 was without legal support because use of a deadly weapon is established by conduct which produces a fear of harm or force by means or display of the deadly weapon. See NRS 193.165; Allen v State, 96 Nev. 334, 336, 609 P.2d 321, 322 (1980), overruled on other grounds by Berry v. State, 125 Nev. \_\_\_, 212 P.3d 1085 (2009). At trial, the only evidence that was produced relating to a deadly weapon was appellant’s statement that he had a weapon.

In his petition, appellant claimed: (1) that a defective jury instruction concerning the deadly weapon enhancement undermined the reasonable doubt instruction; (2) that the defective jury instruction caused the jury to improperly view the victim's testimony as true; (3) that the burden of proof shifted to the defense because of the defects in the instructions; (4) that his trial counsel was ineffective for failing to object to the defective jury instruction; and (5) that the striking of the deadly weapon enhancement means that there was insufficient evidence of robbery or kidnapping.

The petition was filed more than two 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. See NRS 34.810(1)(b)(2); NRS 34.810(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. See NRS 34.726(1); NRS 34:810(1)(b); NRS 34.810(3).

To demonstrate good cause to excuse the procedural defects, appellant first claimed that he only learned that the deadly weapon enhancement instruction was defective when this court issued the order in Wright v. State, Docket No. 50067. He claimed that, because he recently learned of the defective instruction, he had good cause to raise claims (1) through (4) which related to that instruction. We disagree. "In 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.” Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994)). “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.’” Id. (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986) (internal quotation marks omitted)).

Claims (1) to (3) challenge the original judgment of conviction and could have been raised in appellant’s direct appeal and appellant failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b); see also Franklin v. State, 110 Nev. 750, 751-52, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Claim (4) could have been raised in a timely petition for a writ of habeas corpus and again, appellant failed to demonstrate good cause for his failure to do so. NRS 34.726(1). That appellant only learned due to the order from this court that there was a defective jury instruction concerning the deadly weapon enhancement does not demonstrate that an impediment external to the defense prevented him from complying with the procedural default rules. Accordingly, appellant’s claims that arose out of the defective jury instruction were reasonably available prior to the filing of the instant petition. We conclude that the district court did not abuse its discretion in determining that appellant failed to demonstrate good cause to raise claims relating to the deadly weapon enhancement in an untimely and successive petition.

Next, appellant claimed that amending the judgment of conviction provided good cause to raise additional claims. Appellant’s only

claim arising out of the amended judgment of conviction was claim (5), that the striking of the deadly weapon enhancement for lack of substantial evidence of use of a deadly weapon during the commission of the offenses meant that there was insufficient evidence to convict him of kidnapping and robbery. A claim challenging the sufficiency of the evidence to support the convictions for kidnapping and robbery could have been raised in a direct appeal from the original judgment of conviction and appellant failed to demonstrate good cause for his failure to do so. NRS 34.810(1)(b); see also Franklin, 110 Nev. at 752, 877 P.2d at 1059, overruled on other grounds by Thomas, 115 Nev. 148, 979 P.2d 222. The amended judgment of conviction does not provide good cause to raise this claim in an untimely and successive post-conviction petition for a writ of habeas corpus. Therefore, the district court did not err in determining that appellant failed to demonstrate good cause to raise this claim.

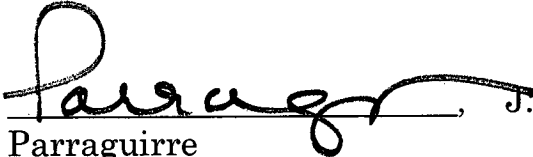
Moreover, as a separate and independent ground for denying claim (5), appellant failed to demonstrate that there was insufficient evidence to convict him of kidnapping and robbery. Possession of a deadly weapon is not an element of the crimes of kidnapping or robbery. NRS 200.310 (kidnapping); NRS 200.380 (robbery). Thus, the striking of the deadly weapon enhancement did not mean that there was insufficient evidence to support the convictions for the underlying crimes of kidnapping and robbery. Further, a review of the record reveals that there was significant evidence of appellant's guilt for both kidnapping and robbery. Therefore, we conclude that this claim was without merit.

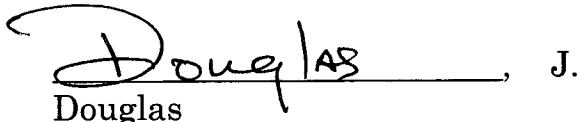
Based upon our review of the documents before this court, we conclude that the district court did not err in denying appellant's petition as procedurally barred. Appellant's petition is subject to the procedural

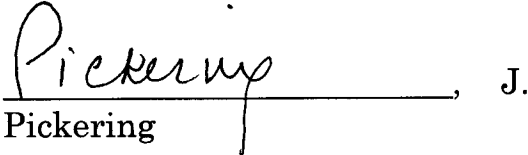
bars in NRS 34.726(1) and NRS 34.810(2). Appellant failed to demonstrate good cause to excuse the procedural defects or that an impediment external to the defense excused the procedural defects. See Hathaway, 119 Nev. at 252, 71 P.3d at 506; Lozada, 110 Nev. at 353, 871 P.2d at 946. Therefore, the district 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.

  
Parraguirre

  
Douglas

  
Pickering

cc: Hon. Jennifer Togliatti, District Judge  
Daryl Stanley Wright  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk