IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIC ANTHONY LITTLE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53101

FILED

JUL 15 2010

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

The district court determined that appellant Eric Anthony Little was deprived of his right to a direct appeal due to effective assistance of counsel and allowed him to raise direct-appeal claims in a post-conviction habeas petition with the assistance of appointed counsel pursuant to Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). The district court ultimately denied the petition, and in this appeal from the district court's order, Little addresses only direct-appeal claims raised pursuant to Lozada.

As an initial matter, we must address an applicable procedural bar because "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory." State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). An appeal-deprivation claim must be raised in a post-conviction petition for a writ of habeas corpus that is timely filed under NRS 34.726. Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998). Little did not raise his

appeal-deprivation claim in a timely filed petition. The judgment of conviction was entered on March 28, 2006. Because no timely direct appeal was taken, a post-conviction petition had to be filed no later than March 28, 2007. NRS 34.726(1). According to the district court docket entries and the other documents before this court, Little did not file a petition within that time period; nothing resembling a petition in compliance with NRS 34.735 was filed until September 9, 2008. Little's petition therefore was procedurally barred under NRS 34.726 absent a demonstration of good cause. NRS 34.726(1); see also Harris, 114 Nev. at 959, 964 P.2d at 787 (appeal-deprivation claim is not good cause under NRS 34.726). Little did not assert good cause for his delay in district court, as required by NRS 34.726(1). Accordingly, the district court should have dismissed the petition as procedurally barred under NRS 34.726. We affirm the district court's order denying the petition on this basis. See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) ("If a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal.").

As a separate and independent ground for affirming the district court's order, we conclude that, even assuming Little could demonstrate good cause to overcome the procedural bar, the direct-appeal claims raised pursuant to Lozada lack merit.[1] The direct-appeal claims that Little raises in this appeal are addressed below.

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[1]In response to an order to show cause, Little implies that his petition was untimely because he believed that trial counsel had filed a direct appeal. In certain circumstances this type of allegation could support a finding that the delay was not Little's fault. See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003). Little does not mention

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First, Little argues that his confession was inadmissible because it was involuntary. Little, however, did not challenge the voluntariness of his confession by filing a pretrial motion to suppress, NRS 174.125(1), or by seeking a hearing or instruction pursuant to Jackson v. Denno, 378 U.S. 368 (1964). Absent such a request, the district court is not required to address the voluntariness of a confession and the issue is not preserved for appellate review. See Wilkins v. State, 96 Nev. 367, 372, 609 P.2d 309, 312 (1980); Guynes v. State, 92 Nev. 693, 695, 558 P.2d 626, 627 (1976). And while this court may address constitutional issues for the first time on appeal in certain circumstances, we "will not do so unless the record is developed sufficiently . . . to provide an adequate basis for review." Wilkins, 96 Nev. at 372, 609 P.2d at 312. Here, we have the transcript of the police interview and the interviewing detective's trial testimony. Because Little relies on only that record and there do not appear to be any facts in dispute, we will address Little's claim. On the basis of the record presented, we conclude that Little's will was not overborne and the confession was voluntary: (1) Little was advised of and

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. . . continued

Hathaway and has not asserted before the district court or this court that he could meet all of the components of a good-cause showing under Hathaway. If sufficient allegations had been made, resolving such a good-cause argument would require an evidentiary hearing. We decline, however, to remand this matter to the district court because, even assuming that Little could demonstrate that the delay was not his fault consistent with Hathaway, his direct-appeal claims lack merit as explained herein.

waived his Miranda[2] rights, (2) Little was 19 years old at the time and had previously been arrested, (3) Little was alert and responsive, (4) the detective did not make improper promises or threats, and (5) the interview lasted approximately one hour.[3] See Rosky v. State, 121 Nev. 184, 193-94, 111 P.3d 690, 696 (2005); Passama v. State, 103 Nev. 212, 214-15, 735 P.2d 321, 323 (1987). We therefore conclude that Little has not demonstrated plain error. See NRS 178.602; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003).

Second, Little argues that the prosecutor improperly shifted the burden of proof to the defense by suggesting during closing argument that Little should have produced certain evidence or testified in his own behalf. See Barron v. State, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989). We view the prosecutor's comment in context, Knight v. State, 116 Nev. 140, 144, 993 P.2d 67, 71 (2000), and we will reverse only upon a showing of plain error because Little did not object to the comment, Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). We conclude that there was no attempt to shift the burden of proof to the defense; rather, the prosecutor was commenting on the state of the evidence as presented to the jury. Accordingly, there was no plain error.

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[2]Miranda v. Arizona, 384 U.S. 436 (1966).

[3]Although Little indicates that he was a high-school dropout, he cites nothing in the record regarding his education. Our review reveals only the assertions in his post-conviction filings below, which indicate that he received his GED in 2004. Assuming the accuracy of these representations, we see nothing in his level of education to suggest that the confession was involuntary.

Finally, Little argues that he is entitled to relief based on cumulative error. Because Little has not demonstrated any error, there is nothing to cumulate. This claim therefore lacks merit.[4]

Having determined that Little is not entitled to relief, we ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. James M. Bixler, District Judge
Justice Law Center
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[4]The cumulative-error argument also lacks merit to the extent that Little relies on unidentified claims raised in the post-conviction proceedings below. He has not explained how the district court erred in denying any claims raised in the post-conviction petition other than the direct-appeal claims addressed in this order. We therefore have limited our cumulative-error review to those claims. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."); NRAP 28(e)(2) ("Briefs or memoranda of law filed in district courts shall not be incorporated by reference in briefs submitted to the Supreme Court.").