

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH WELDON SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53113

FILED

NOV 17 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 in a death penalty case. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Appellant Joseph Weldon Smith murdered his wife, Judith, and her two daughters, Wendy and Kristy, in their home in Las Vegas. Smith also attempted to kill Frank Allen with whom he had entered into a deal to purchase the home in which the murders occurred. Smith was convicted of three counts of first-degree murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon. He was sentenced to death for Wendy's and Kristy's murders. On appeal, this court upheld the convictions but vacated the two death sentences because the instructions regarding depravity of mind rendered that statutory aggravator unconstitutionally vague as applied.¹ Smith v. State, 110 Nev.

¹The court also vacated the deadly weapon enhancement attendant to the attempted murder charge, concluding that a hammer was not a deadly weapon for purposes of sentence enhancement under Zgombic v. State, 106 Nev. 571, 576-77, 798 P.2d 548, 551-52 (1990), superseded by

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1094, 1103-04, 881 P.2d 649, 655 (1994). The matter was remanded for a new penalty hearing. After the second penalty hearing, a jury once again sentenced Smith to death for Kristy's and Wendy's murders. On appeal, this court vacated the death sentence for Kristy's murder and imposed a sentence of life without the possibility of parole due to an improper depravity-of-mind instruction. We affirmed the death sentence for Wendy's murder. Smith v. State, 114 Nev. 33, 953 P.2d 264 (1998).

In this appeal from the denial of his second post-conviction petition for a writ of habeas corpus, Smith contends that the district court erred by (1) denying the petition as procedurally barred and (2) refusing to conduct an evidentiary hearing. He also argues that (3) the petition should be considered on the merits because he is actually innocent of the crimes of which he was convicted. Finally, Smith contends that (4) the district court's order denying his post-conviction petition is deficient.

Procedural bars

Smith contends that the district court erred by denying his post-conviction petition as procedurally barred. Because he filed his petition approximately 10 years after the remittitur issued in his direct appeal, the petition was untimely under NRS 34.726(1), and it was also successive pursuant to NRS 34.810(2). The petition therefore was procedurally barred absent a demonstration of good cause and prejudice.

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statute as stated in Steese v. State, 114 Nev. 479, 499 n.6, 960 P.2d 321, 334 n.6 (1998).

NRS 34.726(1); NRS 34.810(3). And because the State specifically pleaded laches, the petition was subject to dismissal under NRS 34.800(2).

Smith argues that he satisfied the good-cause prong of the procedural default rules but neglects to adequately address prejudice. As good cause to overcome the procedural bars, he advances three arguments: (1) the delay in filing his post-conviction petition was not his “fault” as contemplated by NRS 34.726(1), (2) this court’s inconsistent application of procedural default rules precludes application of those rules to his petition, and (3) this court has ignored its own rules of statutory construction by applying NRS 34.726 to successive petitions. None of Smith’s good-cause arguments have merit.

Fault of petitioner

Smith complains that the delay in filing the petition was not his “fault” within the meaning of NRS 34.726(1) and therefore his petition is not procedurally barred under this provision. We reject any suggestion that NRS 34.726(1)(a) requires that the petitioner himself must act or fail to act to cause the delay. This court has defined NRS 34.726(1) as requiring “a petitioner [to] 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). We conclude that NRS 34.726(1)(a) contemplates that the delay in filing a petition must be caused by a circumstance not within the control of the defense team as a whole, not solely the petitioner.²

²Smith has not argued on appeal that ineffective assistance of post-conviction counsel provided good cause. See Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997). In that respect, he waited approximately 18
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Alleged inconsistent application of procedural default rules

Smith argues that application of the procedural default rules to his petition should be excused because this court has disregarded or inconsistently applied those rules. We have repeatedly rejected this argument, see, e.g., State v. Dist. Ct. (Riker), 121 Nev. 225, 236, 112 P.3d 1070, 1077 (2005); Pellegrini v. State, 117 Nev. 860, 886, 34 P.3d 519, 536 (2001), and Smith articulates no persuasive reason why we should revisit our position in this matter.

Statutory construction

Smith contends that his petition should be exempted from the procedural default rules because in holding that NRS 34.726 applies to successive petitions in Pellegrini, 117 Nev. 860, 34 P.3d 519, this court arbitrarily ignored its own statutory construction precedents to apply a new procedural bar in capital cases. Smith's claim lacks merit.

The rule of statutory construction to which Smith refers concerns looking to the legislative intent in interpreting the language of a statute. In Pellegrini, we explicitly rejected the defendant's contention that the Legislature intended to exempt successive petitions from NRS 34.726, concluding that there was no need to delve into the legislative mind because the plain language of NRS 34.726 indicated that it applied to all petitions filed after the statute's effective date and the statute

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months after this court resolved his appeal concerning the denial of his first habeas petition to file the instant petition, and he offers no explanation for that delay.

provided no exception for successive petitions. 117 Nev. at 869-75, 34 P.3d at 525-29.

In construing a statute, this court ordinarily gives words in a statute their plain meaning, “unless such a reading violates the spirit of the act, and when a statute is clear on its face, courts may not go beyond the statute’s language to consider legislative intent.” Id. at 873-74, 34 P.3d at 528; Speer v. State, 116 Nev. 677, 679, 5 P.3d 1063, 1064 (2000). This court thus will not delve into legislative intent “where a statute is clear and unambiguous.” Pellegrini, 117 Nev. at 874, 34 P.3d at 528; Ex Parte Smith, 33 Nev. 466, 479-80, 111 P. 930, 935 (1910).

Pellegrini did not offend those statutory construction rules by declining to consider legislative intent where the plain language of NRS 34.726(1)(a) refers to all post-conviction petitions without exception. That statute provides in relevant part: “Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year” Nothing in the statute’s language suggests an ambiguity as to which post-conviction petitions it applies such that consideration of legislative intent is necessary to its interpretation. Rather, the language is plain—it applies to all petitions.

Because Smith failed to show any error in Pellegrini’s holding or that applying NRS 34.726 was otherwise improper, we conclude that the district court did not err by denying his petition as time-barred.

Denial of an evidentiary hearing

Smith argues that he was entitled to an evidentiary hearing on his claims of incompetency to stand trial and ineffective assistance of counsel. We disagree.

Because his petition was procedurally barred, Smith was obligated to demonstrate good cause and prejudice before any consideration of his substantive claims could be engaged. Therefore, at most, Smith could secure an evidentiary hearing on his claims of good cause and prejudice if he “assert[ed] specific factual allegations that [were] not belied or repelled by the record and that, if true, would entitle him to relief.” Nika v. State, 124 Nev. 1272, 1300-01, 198 P.3d 839, 858 (2008), cert. denied, 558 U.S. ___, 130 S. Ct. 414 (2009). As explained above, Smith’s good-cause claims lack merit and nothing in those contentions warranted an evidentiary hearing. Accordingly, we conclude that the district court did not err by denying Smith’s request for an evidentiary hearing.

Actual innocence

Smith argues that his claims should be considered on the merits because he is actually innocent of the crimes for which he was convicted. Because he did not raise this claim in his petition below, we need not consider it. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (holding that this court need not consider arguments that were not presented to the district court in the first instance), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).

Nevertheless, Smith argues that this court may review constitutional error sua sponte despite a party’s failure to raise the matter below. While that proposition is generally true, see Brown v. State, 114 Nev. 1118, 1125, 967 P.2d 1126, 1131 (1998), Smith failed to sufficiently explain this claim to afford adequate review and actual innocence involves factual determinations that cannot be made by this court in the first instance. Moreover, actual innocence is not a constitutional error but

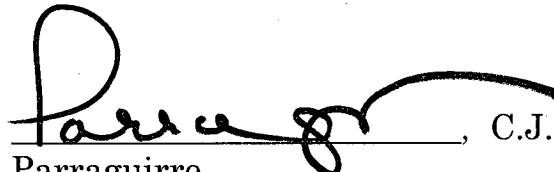
rather a gateway to overcome a procedural default to a claim of constitutional error. See Schlup v. Delo, 513 U.S. 298, 314-15 (1995). Accordingly, we conclude that no relief is warranted in this regard.

Alleged deficiencies in the judgment

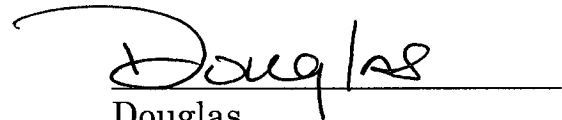
Smith notes two alleged deficiencies in the district court's order denying the petition. Because he raises those matters for the first time in his reply brief, this court need not address them. See NRAP 28(c) (providing that reply brief "must be limited to answering any new matter set forth in the opposing brief"). Nevertheless, we conclude that Smith's contentions warrant no relief.

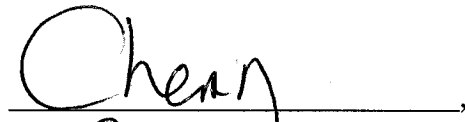
Having considered Smith's claims and concluded that no relief is warranted, we

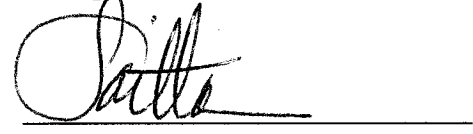
ORDER the judgment of the district court AFFIRMED.

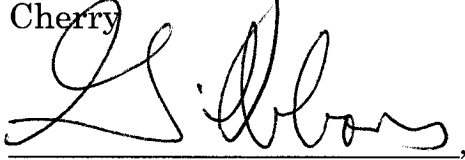

_____, C.J.
Parraguirre

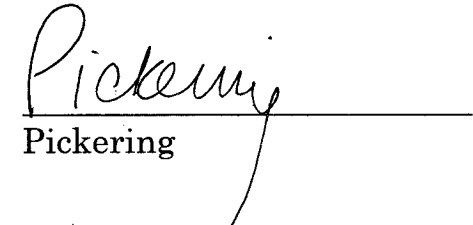

_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons


_____, J.
Pickering

cc: Eighth Judicial District Court, Dept. 8
Eighth District Court Clerk
Attorney General/Las Vegas
Clark County District Attorney
Law Offices of Cynthia Dustin, LLC