

IN THE SUPREME COURT OF THE STATE OF NEVADA

VICTOR MANUEL CERVANTES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53433

FILED

NOV 04 2009

ORDER OF AFFIRMANCE

TRACEE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

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; Elizabeth Goff Gonzalez, Judge.

On May 12, 2003, the district court convicted appellant, pursuant to a guilty plea, of one count of second-degree murder with the use of a deadly weapon, one count of attempted murder with the use of a deadly weapon, one count of discharging a firearm out of a motor vehicle and one count of discharging a firearm at or into a vehicle. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole for the murder count. Determinate terms for the remaining counts were imposed to run concurrently with the life sentences. No direct appeal was taken.

On November 1, 2007, appellant filed a proper person "motion to set aside conviction" in the district court. The State opposed the motion. Due to the nature of the claims, the motion was construed as a post-conviction petition for a writ of habeas corpus. On December 26, 2007, the district court denied appellant's motion. On appeal, this court

affirmed the order of the district court. Cervantes v. State, Docket No. 50877 (Order of Affirmance, July 11, 2008).

On December 12, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition on the grounds that the petition was untimely 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 March 9, 2009, the district court denied the petition. This appeal followed.

In his petition, appellant claimed as follows: (1) the district court did not have subject matter jurisdiction to sentence him because the State did not prove the elements of premeditation and deliberation; (2) his trial counsel was ineffective for failing to conduct adequate pre-trial investigation; (3) his trial counsel was ineffective for failing to file a notice of appeal; (4) his trial counsel was ineffective for failing to argue that the second-degree murder charge was ambiguous due to the district court's misapplication of the premeditation and deliberation elements; (5) his guilty plea was not entered knowingly and intelligently due to errors of counsel; and (6) cumulative error.

The petition was filed more than five years after the judgment of conviction was filed. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Further, appellant's petition constituted an abuse of the writ as claims 1, 2, 4, 5 and 6 were new and different from those claims raised in his previous motion, construed as a 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(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).

In order to demonstrate good cause to excuse his procedural defects, appellant first claimed that he speaks little or no English. Appellant claimed in the prior motion that his limited knowledge of English should provide good cause to excuse his procedural defects and this claim was considered and rejected. The doctrine of law of the case prevents further litigation of this issue and cannot be avoided by a more detailed and precisely focused argument. See Hall v State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). Therefore, the district court did not err in denying this good cause claim.

Second, appellant claimed that he had good cause to excuse the procedural defects because he had limited access to the prison law library due to his participation in the youthful offender program for the year following the filing of the judgment of conviction. He claimed that because he was in the youthful offender program, he did not receive orientation on the legal assistance available in the prison. As established by the United States Supreme Court in Bounds v. Smith, an impediment external to the defense may include a prison's failure to provide "meaningful" access to the courts through the provision of "adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. 817, 828 (1977), limited by Lewis v. Casey, 518 U.S. 343 (1996). In this case, appellant demonstrated no external impediment that prevented him from filing a timely petition. As appellant previously filed a proper person motion, the prison's alleged failure to provide access to the prison law library due to appellant's participation in the youthful offender

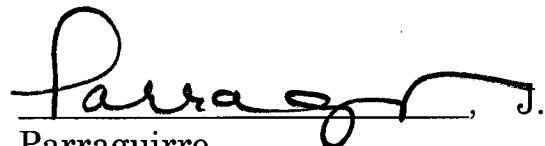
program did not explain the entire five-year delay. Therefore, the district court did not err in denying this good cause claim.

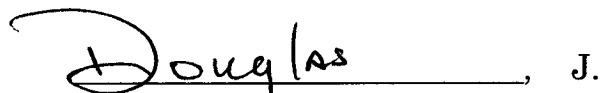
Third, appellant appears to argue that his claim that the district court lacked subject matter jurisdiction to sentence him should provide good cause. Appellant failed to identify why this issue should excuse the delay. Further, even assuming appellant could demonstrate good cause to raise this claim, he failed to demonstrate that this issue had merit. There is nothing in the record to indicate that the district court was without jurisdiction to impose a sentence in this case. See NRS 171.010. Therefore, the district court did not err in denying this good cause claim.

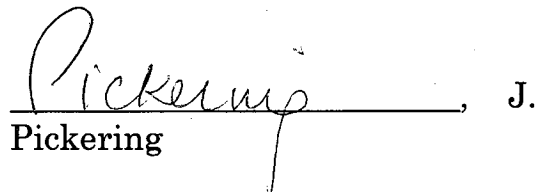
Finally, appellant failed to overcome the presumption of prejudice to the State. NRS 34.800(2). Therefore, the district court did not err in denying the petition as procedurally barred.

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 Lockett 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. Elizabeth Goff Gonzalez, District Judge
Victor Manuel Cervantes
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk