

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN M. AKERSTROM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53485

FILED

NOV 05 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; Douglas W. Herndon, Judge.

On July 11, 2006, the district court convicted appellant, pursuant to a guilty plea, of one count of attempted lewdness with a child under the age of fourteen and one count of attempted sexual assault. The district court sentenced appellant to serve two concurrent terms of 60 to 180 months in the Nevada State Prison. The district court further imposed the special sentence of lifetime supervision. No direct appeal was taken.

On June 4, 2007, appellant filed a post-conviction petition for a writ of habeas corpus in the district court.¹ The State opposed the

¹The petition was submitted by appellant's former trial counsel, Mr. Kirk Kennedy, however, the petition was in actuality filed in proper person and treated as such on appeal. Akerstrom v. State, Docket No.

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petition. On August 28, 2007, the district court denied appellant's petition. This court affirmed the order of the district court on appeal. Akerstrom v. State, Docket No. 50309 (Order of Affirmance, August 25, 2008).

On December 4, 2008, appellant filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition, and appellant filed a response. 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 25, 2009, the district court denied the petition. This appeal followed.

In his petition, appellant challenged the validity of his judgment of conviction. Appellant raised a number of claims challenging the validity of his guilty plea and the effective assistance of counsel in the trial proceedings. Appellant further claimed that counsel failed to file a direct appeal and that his post-conviction counsel was ineffective. Finally, he claimed that the prosecutor committed misconduct and the district court erred in denying pretrial motions, conducting an improper plea canvass, and imposing lifetime supervision.

Appellant filed his petition more than two years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.

... continued

50309 (Order Granting Motion in Part, Denying Motion in Part and Redesignating Appeal, January 17, 2008).

See NRS 34.726(1). The petition was also an abuse of the writ as it raised new and different claims from those litigated in the first post-conviction proceedings. NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(3).

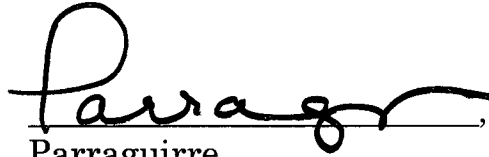
In an attempt to demonstrate good cause, appellant argued that Mr. Kennedy prepared and submitted a subpar petition.

Based upon our review of the record on appeal, we conclude that the district court did not err in denying the petition as procedurally barred. The claims raised in the 2008 petition, including the appeal deprivation claim, were reasonably available at the time he filed his first timely habeas corpus petition. Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003). As noted earlier, Mr. Kennedy, in submitting the petition for appellant, was not acting as post-conviction counsel. Even assuming that the preparation and submission of the petition constituted tacit representation, Mr. Kennedy's representation is not good cause. Ineffective assistance of post-conviction counsel would not be good cause in the instant case because the appointment of counsel in the prior post-conviction proceedings was not statutorily or constitutionally required. Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); McKague v. Warden, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996). In fact, there was no appointment of counsel in the first post-conviction proceedings. Therefore, we affirm the order of the district court denying the petition as time barred.

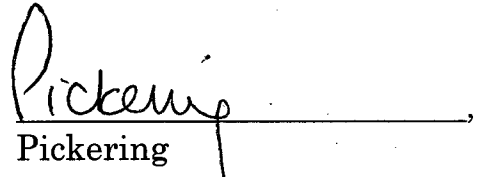
Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that

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.²

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Douglas W. Herndon, District Judge
Brian M. Akerstrom
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

²We have reviewed all documents that appellant has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that appellant has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.