

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT EUGENE ALLEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54068

FILED

SEP 10 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an 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; Donald M. Mosley, Judge.

Appellant filed a post-conviction petition for a writ of habeas corpus on March 6, 2009, more than two years after the remittitur from the direct appeal issued on February 6, 2007. Allen v. State, Docket No. 45970 (Order of Affirmance, January 9, 2007). Thus, the petition was untimely filed. See NRS 34.726(1). Appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice. Id.

To overcome the procedural bar, appellant claimed that he did not receive the entire case file from his appellate counsel until more than one year had passed since the issuance of the remittitur from the direct appeal, and therefore, he could not file a timely petition with sufficiently pleaded claims. Even assuming appellant is accurate in his assertion that his appellate counsel only sent him part of the case file before the one-year

deadline had passed, as appellant filed a proper person petition in federal court on September 26, 2007, within the one-year deadline for filing a habeas petition in Nevada state court, he fails to demonstrate that any lack of action by the district court to ensure he received the entire case file was an impediment external to the defense that prevented him from filing a timely petition in state court. Murray v. Carrier, 477 U.S. 478, 488 (1986); Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003); See generally Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). In addition, appellant states that he received the entire case file from his appellate counsel on July 14, 2008, but he fails to explain the almost seven-month delay since receiving those files until he filed a post-conviction petition in state court on March 6, 2009. Moreover, this court has held that failure of counsel to send a petitioner his case file does not demonstrate cause to excuse the delay and we decline appellant's invitation to revisit this issue. Hood v. State, 111 Nev. 335, 338, 890 P.2d 797, 798 (1995). Further, counsel inadvertence during the post-conviction proceedings does not constitute cause to overcome the procedural bars. Coleman v. Thompson, 501 U.S. 722, 753 (1991) (citing Murray, 477 U.S. at 488.¹ Therefore, the district court did not err in denying the petition as procedurally barred.

¹Further, appellant cannot demonstrate good cause relating to claims concerning the admission of prior bad acts or claims arising from the jury voir dire because he acknowledged that his appellate counsel had sent him documents pertaining to those proceedings on June 7, 2007,
continued on next page . . .

Additionally, the following claims were procedurally barred because appellant could have raised them on direct appeal: (1) the State violated Batson v. Kentucky, 476 U.S. 79 (1986), (2) a venire member was not impartial, and (3) the district court improperly instructed the jury on flight. See NRS 34.810(1)(b). Appellant fails to allege or demonstrate cause for his failure to raise these claims on direct appeal. See id. Therefore, these claims are denied as procedurally barred and appellant is not entitled to relief for these claims.²

Next, appellant argues that the district court erred by failing to stay its order following the district court's denial of the petition in order to further consider appellant's good cause claims. Appellant is required to raise good cause claims on the face of the petition. State v. Haberstroh, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003). No statute requires the

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approximately eight months before the one-year deadline from the remittitur of his direct appeal. Thus, claims arising from those proceedings were reasonably available to be raised in a timely petition. Hathaway, 119 Nev. at 252, 71 P.3d at 506.

²Appellant also argued that no rational juror could have convicted him due to insufficient evidence and the district court erred by admitting evidence of a prior domestic assault against the victim. However, these claims were raised on direct appeal and this court rejected those challenges. The doctrine of law of the case prevents further litigation of the underlying claim 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).

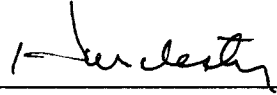
district court to grant a request to stay its order denying a petition for a writ of habeas corpus; a party's remedy is an appeal. NRS 34.575. Under the circumstances regarding appellant's good cause claim concerning the case file, the district court did not abuse its discretion by refusing to stay its order.


Next, appellant argues that the district court erred in denying his petition without allowing appellant to challenge the State's proposed findings of fact and conclusions of law pursuant to Byford v. State, 123 Nev. 67, 69, 156 P.3d 691, 692 (2007), because appellant was not allowed the opportunity to review and respond to the proposed draft.³ Even assuming the district court erred by not allowing appellant to review and respond to the proposed draft, we conclude any error was harmless and appellant failed to demonstrate prejudice. NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"). Appellant failed to demonstrate that any failure to

³To the extent that appellant argues that the district court conducted an ex parte evidentiary hearing, a review of the record reveals that no evidence or arguments were presented at a status hearing; rather, the hearing was limited to the district court setting forth the reasons for denying the petition. Cf. Gebers v. State, 118 Nev. 500, 506 50 P.3d 1092, 1095 (2002) (concluding that defendant's rights were violated when he was not present at hearing where testimony and evidence were presented); see Gallego v. State, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001). Appellant fails to demonstrate that he was prejudiced by his absence, Kirksey v. State, 112 Nev. 980, 1000, 923 P.2d 1102, 1115 (1996), and therefore, appellant fails to demonstrate the district court conducted an improper ex parte evidentiary hearing.

be allowed to review the proposed factual findings adversely affected the outcome of the proceedings or his ability to seek full appellate review. Therefore, we conclude that appellant is not entitled to relief on this claim.⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Donald M. Mosley, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁴Further, Byford is distinguishable from this case. In Byford, the State's draft of the proposed order was premature because the district court had not conducted a hearing and had not made a ruling on a capital murder defendant's claims following a remand from the district court to reconsider those claims. 123 Nev. at 69, 156 P.3d at 692.