

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN TYRONE POWELL,
Appellant,
vs.
WARDEN, E.K. MCDANIEL,
Respondent.

No. 54401

FILED

SEP 10 2010

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

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Appellant filed his petition on January 23, 2009, over nine years after this court's May 11, 1999, issuance of the remittitur from his direct appeal. See Powell v. State, Docket Nos. 30035, 30614 (Order of Remand, April 13, 1999). Appellant's petition was therefore untimely filed. See NRS 34.726(1). Appellant's petition was also successive as well as an abuse of the writ.¹ See NRS 34.810(1)(b), NRS 34.810(2). Thus, appellant's petition was procedurally barred absent a demonstration of good cause and prejudice. NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

Appellant argues that ineffective assistance of appellate counsel provided good cause to excuse his procedural defaults.

¹See Powell v. State, Docket Nos. 30035, 30614 (Order of Remand, April 13, 1999); Powell v. State, Docket No. 43483 (Order of Affirmance, September 21, 2005).

Specifically, he argues that counsel failed to raise the petition's underlying claims on direct appeal. Although ineffective-assistance of counsel may provide good cause to excuse a procedural bar, the ineffective assistance claim must not itself be time-barred. Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Here, appellant provides no explanation as to why he could not have raised his ineffective-assistance claim within one year of the issuance of the remittitur on appeal, and therefore, the ineffective-assistance claim is itself time-barred.²

Appellant also argues that his procedural defaults should be excused because he is actually innocent such that denying consideration of his substantive claims would result in a fundamental miscarriage of justice. Appellant did not demonstrate actual innocence because he failed to show that "it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." Calderon v. Thompson, 523 U.S. 538, 559 (1998) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

²To the extent appellant argues that the ineffective assistance of post-conviction counsel provides good cause, this argument also fails in that appellant has no right to post-conviction counsel and, thus, no right to the effective assistance of such counsel. McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996).

For the foregoing reasons, we conclude that the district court did not err in denying appellant's petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Steven R. Kosach, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk