IN THE SUPREME COURT OF THE STATE OF NEVADA

ELDER ZACARIAS-LOPEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54427

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. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

Appellant filed his petition on March 25, 2009, nearly five years after this court's June 8, 2004, issuance of the remittitur from his direct appeal. See Zacarias-Lopez v. State, Docket No. 40116 (Order of Affirmance, May 11, 2004). Appellant's petition was therefore untimely filed. See NRS 34.726(1). Furthermore, appellant's petition was both successive and an abuse of the writ because he raised claims for the first time in the instant petition that could have been raised in an earlier proceeding.[1] See NRS 34.810(1)(b)(2); NRS 34.810(2). Thus, appellant's petition was procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). To warrant an evidentiary hearing on claims of good cause and prejudice, a

[1]Zacarias-Lopez v. State, Docket No. 44802 (Order of Affirmance, June 14, 2005).

petitioner's claims must be supported by specific factual allegations that, if true and not repelled by the record, would entitle him to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Appellant first argues that he has good cause because the case that forms the basis for his underlying claims—Abrego v. State, 118 Nev. 54, 38 P.3d 868 (2002) (applying Apprendi v. New Jersey, 530 U.S. 466 (2000))—was decided after proceedings began in his case. Appellant failed to demonstrate an impediment external to the defense prevented his timely claim because Abrego was decided four months prior to appellant's May 2002 jury trial such that appellant's claim was available to raise in earlier proceedings. See Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Accordingly, the district court did not err in denying this claim without an evidentiary hearing.

Appellant also argues that because it was counsel who had filed his direct appeal and first petition, he himself was "actually innocent"[2] of causing the delay in raising the claims. While the ineffective assistance of counsel may constitute good cause to excuse a procedural default, the ineffective-assistance claim must not itself be time-barred. Id. Here, because the Abrego arguments were available to raise in earlier proceedings, so were the claims of ineffective assistance of counsel. The

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[2]To the extent that appellant could be said to be raising a claim of actual innocence so as to avoid the procedural bar, appellant's claim would fail as he did not 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).

ineffective-assistance claims are therefore themselves time-barred and thus do not constitute good cause to excuse appellant's procedural defaults.[3] Accordingly, the district court did not err in denying this claim without an evidentiary hearing.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.

Douglas, J.

Pickering, J.

cc: Hon. Jennifer Togliatti, District Judge
Robert E. Glennen III
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[3]Further, we note that even a timely argument regarding ineffective assistance of post-conviction counsel would not have been good cause because appellant had no right to such counsel. Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996).