

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDGAR GUSTAVO RUIZ,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
BILL DONAT,
Respondent.

No. 55810

FILED

JUN 08 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Anderson*
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. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Appellant filed a post-conviction petition for a writ of habeas corpus in the district court on November 28, 2007, more than one year after the dismissal of appellant's direct appeal on March 24, 2006.¹ Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus that was decided on the

¹Appellant's notice of appeal from his judgment of conviction was dismissed for lack of jurisdiction as the notice was untimely filed. Ruiz v. State, Docket No. 45821 (Order Dismissing Appeal, March 24, 2006). Because of delays in processing the direct appeal, this court determined that appellant had good cause to file a post-conviction petition for a writ of habeas corpus within one year from the date of this court's order dismissing the appeal.

merits. See NRS 34.810(2).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). “Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory.” State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). A petitioner has the burden of pleading and proving facts to demonstrate good cause to excuse the delay. State v. Haberstroh, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003).

The district court determined that appellant demonstrated good cause to excuse the delay, but denied appellant’s claims on the merits. Appellant argues that the district court erred in denying his claims of ineffective assistance of counsel. The State argues that the district court erred in finding that appellant had demonstrated good cause and that the petition therefore was procedurally barred. After reviewing the record before this court, we agree with the State.³

²Ruiz v. State, Docket No. 47989 (Order of Affirmance, March 2, 2007).

³Appellant argues that the State waived this issue by failing to raise it after post-conviction counsel filed a supplemental petition and therefore should not be able to raise it on appeal. This claim is patently without merit as the State claimed that the petition was procedurally barred in its responses to both appellant’s proper person petition and the supplemental petition. Further, application of the procedural default rules contained in NRS 34.726 and NRS 34.810 is mandatory. Riker, 121 Nev. at 231, 112 P.3d at 1074.

Although the district court held that the petition was timely because appellant filed it within one year after this court affirmed the denial of his first post-conviction petition, NRS 34.726(1) provides that a petition must be filed within one year after the issuance of the remittitur from the denial of a direct appeal. See Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998). Since the petition was filed more than one year after this court dismissed appellant's direct appeal from the judgment of conviction, it was untimely.

The district court also determined that appellant had good cause to file the untimely and successive petition because (1) appellant filed an appeal after the district court dismissed his first petition rather than seeking leave to amend the petition and (2) appellant's first petition was not considered on the merits. The first conclusion does not support a finding of good cause; it is not an impediment external to the defense that prevented appellant from complying with the procedural default rules. See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). We also disagree with the second conclusion. This court affirmed the dismissal of the first petition because appellant failed to support his claims with specific facts, concluding that appellant had failed to demonstrate that his claims were meritorious. Ruiz v. State, Docket No. 47989 (Order of Affirmance, March 2, 2007). Because the first petition was considered on the merits, it also was subject to the procedural bar in NRS 34.810(2).

As noted by the district court, all of appellant's claims in the instant petition were raised in his first timely petition. Therefore, appellant cannot demonstrate that those claims were not reasonably

available to be raised in a timely petition. Hathaway, 119 Nev. at 252, 71 P.3d at 506. Because all of appellant's claims were reasonably available for appellant's first petition and were raised in that petition, the appellate proceedings on the first petition did not constitute good cause for filing an untimely and successive petition.⁴

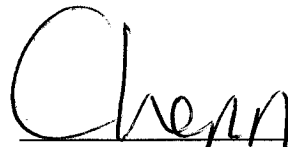
Finally, appellant asserts that failure to consider his claims on the merits would result in a fundamental miscarriage of justice because he is actually innocent. Appellant does not demonstrate actual innocence because he failed to show that "it is more likely than not that no reasonable juror would 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).

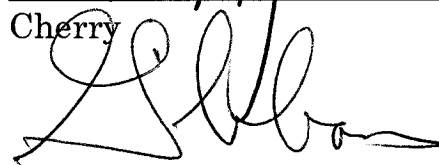
For the foregoing reasons, we conclude that the district court erred in determining that appellant had good cause to overcome the procedural bars and resolving the petition on the merits. Nevertheless, we affirm the court's order denying the petition because the district court reached the correct result. See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d


⁴Appellant appears to argue that acting in proper person should constitute good cause. This does not constitute good cause as it is not an impediment external to the defense. Hathaway, 119 Nev. at 252, 71 P.3d at 506.

338, 341 (1970) (holding that a correct result will not be reversed simply because it is based on the wrong reason). Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁵


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Pickering

cc: Hon. Janet J. Berry, District Judge
Edward T. Reed
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

⁵Appellant also argues that the district court erred in refusing to compel an out-of-state witness to testify at the evidentiary hearing and for refusing to grant a continuance to allow appellant to conduct further interviews in preparation for the evidentiary hearing. As we conclude that the district court erred in considering appellant's claims on the merits, appellant fails to demonstrate the witness was material, Bell v. State, 110 Nev. 1210, 1213-14, 885 P.2d 1311, 1313-14 (1994), and fails to demonstrate that he was prejudiced by the denial of his motion to continue, Rose v. State, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007).