

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER PAUL JERNIGAN,
Appellant,
vs.
THE STATE OF NEVADA AND
WARDEN, ELY STATE PRISON, E.K.
MCDANIEL,
Respondents.

No. 56634

FILED

FEB 09 2011

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.¹ Fifth Judicial District Court, Mineral County; Robert W. Lane, Judge.

Appellant filed his petition on November 12, 2009, over four years after this court's January 18, 2005, issuance of the remittitur from his direct appeal. See Jernigan v. State, Docket No. 41081 (Order Affirming in Part, Reversing in Part and Remanding, December 21, 2004). Appellant's petition was therefore untimely filed. See NRS 34.726(1). Appellant's petition was also successive because he had previously filed a post-conviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised

¹This appeal has been submitted for decision without oral argument, NRAP 34(f)(3), and we conclude that the record is sufficient for our review and briefing is unwarranted. See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

in his previous petition.² See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was therefore procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). To warrant an evidentiary hearing, a 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 argued that he had good cause to excuse the procedural bars because the district court denied his previous petition without allowing him to respond to the State's motion to dismiss. Appellant failed to demonstrate good cause as he had failed to file a timely reply that the district court should have considered. Accordingly, we conclude that the district court did not err in rejecting this argument.

Second, appellant argued that he had good cause to excuse the procedural bars because of the district court's alleged bias before and throughout trial proceedings. Appellant failed to allege or demonstrate good cause as to why he could not have raised this claim on direct appeal or in his previous petition. Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Accordingly, we conclude that the district court did not err in rejecting this argument.

Third, appellant argued that he had good cause to excuse the procedural bars because the district court never ruled on his November 28, 2006, motion for relief from the denial of his first petition. Appellant failed to demonstrate good cause. Appellant filed a notice of appeal of the district court's order only eight days after he filed the motion, thereby

²See Jernigan v. Warden, Docket No. 48534 (Order of Affirmance, February 15, 2008).

depriving the district court of jurisdiction to grant or deny that motion. Hanley v. Zenoff, 81 Nev. 9, 13, 398 P.2d 241, 243 (1965). Moreover, as appellant never submitted a notice of motion or a notice of submission after remittitur issued, the motion was never properly before the district court. DCR 13. Accordingly, we conclude that the district court did not err in rejecting this argument.

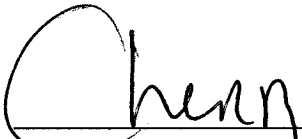
Fourth, appellant appeared to argue that he had good cause to excuse the procedural bars because of a federal court order staying federal proceedings to allow appellant to exhaust his claims in state court. Appellant failed to demonstrate that an impediment external to his defense excused his procedural defects. Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). Filing a procedurally barred petition for exhaustion purposes is not good cause because appellant's claims were reasonably available to be raised in a timely petition. Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Accordingly, we conclude that the district court did not err in rejecting this argument.

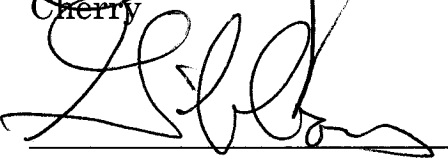
Appellant also argued that he was actually innocent such that denying consideration of his substantive claims would result in a fundamental miscarriage of justice. Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). A claim of actual innocence may allow an otherwise procedurally barred constitutional claim to be considered on the merits, but it must be accompanied by new, reliable evidence, and appellant must "show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Schlup v. Delo, 513 U.S. 298, 315-16, 327 (1995); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Appellant presented no new evidence to the district court in support of his actual-innocence claim. Instead, he merely reviewed evidence that had been presented at trial and speculated as to what other evidence may have suggested. Because


appellant failed to demonstrate actual innocence to overcome his procedural defects, we conclude that the district court did not err in denying his petition.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.³


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Pickering

³The district court initially filed orders “quashing” appellant’s post-conviction petition. Such a petition may not be disposed of via an order to quash as the district court must either grant the relief requested or dismiss the petition. See NRS 34.770(2); NRS 34.830; cf. Mazzan v. State, 109 Nev. 1067, 1073, 863 P.2d 1035, 1038 (1993). However, we note that the district court filed an order on July 6, 2010, complying with the provisions of NRS 34.770 and NRS 34.830, thereby finally disposing of the petition.

We 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.

cc: Hon. Robert W. Lane, District Judge
Christopher Paul Jernigan
Attorney General/Carson City
Mineral County District Attorney
Mineral County Clerk