

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL JONES,

No. 35240

Appellant,

vs.

WARDEN, S.N.C.C., MILES LONG,

Respondent.

FILED

SEP 05 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING

IN PART AND REMANDING

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

Appellant Michael Jones was convicted, pursuant to a jury verdict, of one count each of conspiracy to commit larceny, larceny from the person, and possession of a stolen vehicle. The district court, Judge Jack Lehman, sentenced appellant to consecutive prison terms totaling twenty-one years, the maximum possible sentences for these August 1994 crimes. Appellant was represented throughout the proceedings by the Clark County Public Defender's Office, which filed a notice of appeal on June 9, 1995, the same date that judgment was entered.

While the direct appeal was pending, on June 6, 1996, appellant filed in the district court a proper person post-conviction petition for a writ of habeas corpus ("first petition"). Appellant claimed that his appellate counsel had deprived him of his right to a direct appeal by failing to file an appellate brief and by failing to communicate with appellant and provide to him transcripts and information on perfecting an appeal.

The district court, Judge Michael L. Douglas, who presided over all post-conviction proceedings, held a hearing on the matter. Appellant's counsel informed the court that the Public Defender's Office continued to represent appellant and was pursuing a direct appeal on his behalf. The court determined that because appellant still had legal counsel, his petition was premature. On September 5, 1996, the court denied the petition, concluding that appellant's claim that appellate counsel was ineffective in failing to pursue a direct appeal was belied by the record.

This court dismissed appellant's direct appeal on May 19, 1998.¹ Remittitur issued on June 9, 1998.

On March 30, 1999, appellant, assisted by counsel, filed in the district court a second post-conviction petition for a writ of habeas corpus raising claims of ineffective assistance by both trial and appellate counsel. As cause for raising claims that were not presented earlier, appellant alleged, in relevant part: "The first post-conviction petition for a writ of habeas corpus was denied as premature and was based solely upon Petitioner's mistaken belief that an appeal had not been perfected on his behalf." The State sought dismissal of the petition on the ground of abuse of the writ. The district court conducted a hearing on the matter on June 9, 1999. The court determined that appellant's claims, though not raised in the first petition, were not procedurally barred. The court reasoned that the first petition was premature, not actually decided on the merits, and, essentially, a nullity for the purpose of determining whether the statutory procedural bars for "second or successive"

¹Jones v. State, Docket No. 27449 (Order Dismissing Appeal, May 19, 1998).

petitions applied to subsequent petitions. For reasons unclear from the record, the district court nevertheless ordered appellant to file a new petition with a showing of good cause.

Appellant filed a supplemental petition on June 22, 1999. In the second and supplemental petitions, appellant raised claims that trial counsel was ineffective in failing to: (1) investigate potential testimony from appellant's codefendant and present it at trial; (2) investigate the arresting officer's testimony and background and move for disclosure or inspection of his personnel file; (3) move to suppress identification testimony; (4) move for dismissal based on a violation of the constitutional and statutory rights to a speedy trial; (5) object at trial to hearsay evidence; (6) assure a proper trial record was made; (7) object at trial to prosecutorial misconduct; and (8) object at sentencing to the district court's reliance on impermissible factors, including appellant's refusal to admit guilt, the court's belief that appellant would commit future crimes, and appellant's fatherhood of numerous children. The petitions also raised claims that appellate counsel was ineffective for failing to: (1) communicate with appellant during the direct appeal; (2) raise the claim that appellant's speedy trial rights were violated; (3) raise the claim that various instances of prosecutorial misconduct deprived appellant of a fair trial;² and (4) raise the claim that the district court relied on the same improper factors at sentencing presented

²We note that appellate counsel did raise the claim of prosecutorial misconduct on direct appeal; however, counsel relied solely on one inappropriate comment during rebuttal closing argument, and we concluded that the comment did not warrant reversal. Jones, Docket No. 27449, Order Dismissing Appeal at 1-2.

above in claim number 8. Finally, the petitions raised a claim that relief was warranted based on the cumulative effect of ineffective assistance by trial and appellate counsel.

The State opposed the supplemental petition, arguing that appellant had failed to demonstrate good cause for failing to present his claims earlier and/or that the claims lacked merit.

The district court subsequently determined that appellant's claim that appellate counsel was ineffective for failing to communicate with him did not warrant an evidentiary hearing. After conducting an evidentiary hearing on the remaining claims, the district court denied the petition on the merits. Appellant timely appealed.

Claims of Ineffective Assistance of Trial Counsel

The State contends that appellant's claims of ineffective assistance of trial counsel, which were raised for the first time in 1999 in the second petition, are procedurally barred under the provisions of NRS 34.810.³ We agree and conclude that the district court erred in considering these claims on the merits.

Pursuant to NRS 34.810, absent a showing of good cause and actual prejudice, a court shall dismiss a petition where the conviction was the result of a trial and the grounds for the petition could have been "[r]aised in . . . a prior petition for a writ of habeas corpus or post-conviction

³We reject the State's argument, made for the first time on appeal, that all of appellant's claims are procedurally barred as untimely pursuant to NRS 34.726(1) (stating that where an appeal has been taken, a petition challenging the validity of judgment or sentence must be filed "within 1 year after the supreme court issues its remittitur," absent a showing of cause for delay). The district court did not order appellant to file a "new petition" until the last date for filing a timely petition, and we conclude that under the circumstances, the court was within its discretion in permitting appellant to supplement his timely second petition.

relief."⁴ Additionally, "[a] second or successive petition must be dismissed . . . if new and different grounds are alleged, [and] the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."⁵

Appellant seeks to avoid these procedural bars by arguing they do not apply here because: (1) his first petition was not decided on the merits but was dismissed as "premature"; (2) his claims of ineffective assistance by trial counsel had never been decided on the merits before being raised in the second petition; and (3) good cause exists to excuse raising these claims for the first time in a successive petition because appellate counsel's failure to communicate with appellant caused him to believe the first petition was necessary to protect his direct appeal rights pursuant to Lozada v. State.⁶ These contentions lack merit.

First, despite the district court's subsequent re-characterization of its order denying the first petition as having rested solely on grounds of ripeness, the record shows that the court actually denied the appeal-deprivation claim on

⁴NRS 34.810(1)(b)(2).

⁵NRS 34.810(2).

⁶110 Nev. 349, 871 P.2d 944 (1994) (recognizing proper procedure for raising claim of ineffective assistance of appellate counsel resulting in deprivation of direct appeal right is to bring such claim in timely post-conviction petition for writ of habeas corpus), limitation of holding recognized by Evans v. State, 117 Nev. ___, ___ P.3d ___ (Adv. Op. No. 50, at p.39, July 24, 2001). See also NRS 34.726(1) (stating that where no appeal is taken, and unless there is good cause shown for delay, "a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction").

the merits, determining it was belied by the record.⁷ Moreover, the court erred to the extent it determined that the first petition was premature merely because it was filed at a time when the Public Defender's Office was representing appellant in the pending direct appeal.⁸ Assuming appellant had reason to believe that ineffective assistance by his appellate counsel had jeopardized his right to a direct appeal, bringing this claim in the first petition, which was filed within one year from entry of the judgment of conviction, was a proper effort to preserve his direct appeal claims.⁹ Contrary to appellant's argument before the district court, however, the fact that he brought the first petition solely for the purpose of preserving his right to a direct appeal does not render the petition a nullity for the purpose of determining whether his current claims of ineffective assistance by trial counsel are procedurally barred. The statutory procedural bars are clear as to the legal effect of filing a petition, and make no exception for petitions raising

⁷We recognize that underlying the primary appeal deprivation claim was a supporting allegation that appellate counsel had failed to communicate with appellant, which was not addressed by the district court in its denial of the first petition. As an independent claim of ineffective assistance of counsel, the alleged failure to communicate was arguably subject to dismissal on grounds of ripeness, and, if so, would not be procedurally barred when re-raised in the second petition. See NRS 34.810(2) ("A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits") (emphasis added).

We note, however, that the State does not seek to press the procedural bars at NRS 34.810 as to appellant's claims of ineffective assistance of appellate counsel. Because error is not apparent from our review of the record on appeal, we decline to interfere with the district court's decision to address the merits of these claims.

⁸See generally Varwig v. State, 104 Nev. 40, 752 P.2d 760 (1988) (recognizing that post-conviction claims may be brought while direct appeal is pending).

⁹See Lozada, 110 Nev. 349, 871 P.2d 944; NRS 34.726(1).

only claims that the ineffective assistance of appellate counsel has resulted in some deprivation of the right to a direct appeal.

Second, cause and prejudice aside, whether post-conviction claims have ever been determined on the merits is only at issue under NRS 34.810 where a successive petition re-raises the same claims that were raised in a prior petition.¹⁰ Appellant's claims of ineffective assistance by trial counsel present new and different grounds for relief than those raised in the first petition. Accordingly, these new claims may be procedurally barred even though they have never been determined on the merits.¹¹

Third, appellant does not assert that he was unable to bring his claims of ineffective assistance of trial counsel in his first petition. To overcome the procedural bars, he was required to plead and prove specific facts that demonstrate good cause for failure to present the claims earlier and actual prejudice.¹² In order to show "good cause," appellant was required to demonstrate an impediment external to the defense prevented him from raising his claims in his prior petition.¹³ "Actual prejudice" requires a showing "not merely that the errors [complained of] created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceeding

¹⁰See NRS 34.810(2).

¹¹See NRS 34.810(1)(b) and (2); Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996) (holding that district court properly dismissed claims raised in successive petition that could have been raised in earlier petition, though claims had never been determined on merits).

¹²See NRS 34.810(3).

¹³See Crump v. Warden, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997).

with error of constitutional dimensions.'"¹⁴ Absent a sufficient showing of cause and prejudice, this court will only review appellant's claims where a fundamental miscarriage of justice would otherwise result.¹⁵

Appellant has failed to point to any facts which would support a finding of good cause for failure to raise in his first petition his claims of ineffective assistance by trial counsel. His assertions that he believed the first petition was necessary to protect his right to a direct appeal, and that appellate counsel's failures caused this belief, are inadequate to establish good cause.¹⁶ Appellant's allegations, if true, show only a reason for filing the first petition; the allegations do not demonstrate that appellant was prevented from raising his claims related to trial counsel's performance in that petition. Appellant has also failed to demonstrate that the failure to consider his claims would result in actual prejudice or a fundamental miscarriage of justice. Thus, we conclude that appellant's claims of ineffective assistance by trial counsel are procedurally

¹⁴Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)).

¹⁵See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

¹⁶Cf. Hood v. State, 111 Nev. 335, 337-38, 890 P.2d 797, 798 (1995) (holding that counsel's failure to send defendant's files to him does not constitute good cause to excuse untimely filing); Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989) (rejecting claim that defendant's mistaken belief he appropriately refrained from pursuing state habeas remedies while seeking federal relief constitutes good cause to excuse untimely filing); Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (recognizing that lack of legal knowledge does not constitute good cause for failure to raise claims in prior petition). See also Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998) (stating that mere allegation counsel was ineffective in depriving defendant of direct appeal does not constitute cause to excuse filing of successive petition).

barred pursuant to NRS 34.810, and we affirm the district courts order denying these claims.¹⁷

Claims of ineffective assistance of appellate counsel

Appellant first claims that his appellate counsel's failure to communicate with him during the direct appeal constitutes ineffective assistance per se. He supports this claim with an assertion that, had he known during the direct appeal which attorney from the Public Defender's Office actually represented him in the appeal, he would have objected to that representation. We conclude that the district court properly denied relief on this claim.

To prevail on a claim of ineffective assistance of counsel, a defendant must establish: (1) that counsel's performance was deficient, i.e., it fell below an objective standard of reasonableness, and (2) that the deficient performance prejudiced the defense, i.e., there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.¹⁸ "A reasonable probability is a probability sufficient to undermine confidence in the outcome."¹⁹

Here, even assuming appellate counsel failed to sufficiently communicate with appellant and thereby also deprived him of the opportunity to object to representation by counsel, appellant has failed to allege sufficient facts demonstrating that an objection to counsel would have been

¹⁷See Franco v. State, 109 Nev. 1229, 1241, 866 P.2d 247, 255 (1993) (recognizing that this court will affirm correct result of trial court's ruling even on different grounds).

¹⁸Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 689, 694 (1984)).

¹⁹Id. at 988, 923 P.2d at 1107 (quoting Strickland, 466 U.S. at 694).

successful let alone that any failure to communicate affected the outcome of his direct appeal.²⁰ Thus, this claim fails for lack of prejudice.

Appellant also contends that appellate counsel was ineffective in failing to raise several issues on direct appeal.

Effective assistance of appellate counsel does not mean that counsel must raise every non-frivolous issue.²¹ To establish prejudice based on the deficient performance of appellate counsel in failing to raise a claim, "the defendant must show that the omitted issue would have a reasonable probability of success on appeal."²² Only one of the issues claimed to have been unreasonably omitted from appellant's direct appeal warrants discussion here: whether the district court's sentencing determination was adversely affected by the court's improper consideration of the number of children fathered by appellant. We conclude that appellate counsel was ineffective in failing to raise this issue.²³

²⁰See McNelson v. State, 115 Nev. 396, 411-12, 990 P.2d 1263, 1273 (1999) (recognizing appellate counsel's failure to communicate can constitute deficient performance, but granting no relief because appellant did not specify any omitted issues he would have instructed counsel to raise).

²¹Kirksey, 112 Nev. at 998, 923 P.2d at 1113.

²²Id., 923 P.2d at 1114.

²³We have considered appellant's remaining claims of ineffective assistance of appellate counsel, and we conclude that the district court properly denied relief. Specifically, we conclude that appellant has failed to demonstrate that he was prejudiced by any deficient performance of appellate counsel in failing to raise the claims that: (1) appellant's speedy trial rights were violated; (2) prosecutorial misconduct deprived him of a fair trial; and (3) in imposing sentence, the district court improperly relied on appellant's refusal to admit guilt and an unsubstantiated belief appellant would commit future crimes. We further conclude that appellant has not demonstrated he is entitled to relief due to any cumulative effect of ineffective assistance by appellate counsel.

Sentencing courts are generally free to consider a wide variety of information "for the purpose of gaining a fuller assessment of the defendant's 'life, health, habits, conduct, and mental and moral propensities.'"²⁴ Nonetheless, the right to procreate is fundamental and constitutionally protected from infringement.²⁵ Therefore, where the crime for which a defendant stands convicted is unrelated to his parental status or obligations, it is constitutional error to base a sentencing determination on the number of children fathered by him or on the risk that he will father more children if left at liberty.²⁶

Here, the pre-sentence investigation ("PSI") report prepared by the Division of Parole and Probation reflects that at the age of twenty-four years appellant had a history of repeatedly engaging in criminal activity. Further, he had never been married but had fathered five children by four different women. Though under court order to pay support for one of these children, he was nine months in arrears at the time the PSI report was prepared.

At sentencing, appellant asked the court not to take him away from his children. The court responded, "Those five

²⁴Denson v. State, 112 Nev. 489, 494, 915 P.2d 284, 287 (1996) (quoting Williams v. New York, 337 U.S. 241, 245 (1949)); see also Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

²⁵Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

²⁶Compare United States v. Trzaska, 859 F.2d 1118, 1119, 1121 (2d Cir. 1988) (vacating sentence for receipt of firearms in part because sentencing court stated "that appellant had 'blighted' the lives of several women, and that he had fathered numerous children over the years" and had "to be removed from society to eliminate the danger that he poses to women and the danger to society he poses in fathering numerous children"), with State v. Oakley, 629 N.W.2d 200 (Wis. 2001) (holding court may impose probation condition which infringes on fundamental right to procreate where defendant had been convicted of multiple counts of intentionally refusing to support children).

kids you haven't been supporting? . . . Those five kids you brought into the world for no reason whatsoever. . . . Those five kids who probably have your genes and are probably going to be criminals just like you." The court continued throughout the sentencing hearing to refer to appellant's fatherhood, stating:

There are hundreds of people who have been abused like you were. They didn't do the things you do. They don't bring five poor little kids into this world and then do nothing about them.

. . . .

Kids who probably have your poor genes and are probably going to have a criminal life because of the genes that you put into this world. I want to - if for no other reason I want to keep you from having any more kids. Five kids at age 24 when you shouldn't have one. I'm appalled with you.

(Emphasis added.) Immediately before pronouncing sentence, the court added:

So - and we're going to have more children. At age 24 he's got five kids, none of which he supports. And now he's bringing them up for a reason. My Lord. I do not understand that but then I think his mind works in strange ways and it's in ways that create a danger to society as a whole.

(Emphasis added.) The court then imposed the maximum possible sentences for appellant's crimes.

In Martinez v. State, we recognized the importance of ensuring that sentencing proceedings not only do justice but reflect the appearance of justice.²⁷ There, the sentencing court's comments regarding appellants' foreign nationality were more than passing references and created the appearance that this improper consideration adversely affected the sentencing determination.²⁸ On appeal, we held that because we could not conclusively determine that the district court did

²⁷114 Nev. 735, 738, 961 P.2d 143, 145 (1998).

²⁸Id., 961 P.2d at 145-46.

not base its determination on the improper consideration, the sentences could not stand.²⁹

Similar error infected the sentencing proceeding in this case. Although there is sufficient evidence to support the district court's sentencing decision,³⁰ the court's comments were more than passing references to appellant's fatherhood. These comments could reasonably be interpreted to indicate that the court improperly imposed sentence to punish appellant for fathering what the court deemed an excessive number of children or to prevent appellant from fathering more children. We note that the Division of Parole and Probation investigated the crimes and appellant's background and recommended only concurrent prison terms of a maximum of seven years. Further, the record shows that appellant's codefendant, who was convicted of larceny from the person pursuant to a negotiated guilty plea and who personally committed the purse theft underlying appellant's convictions for conspiracy and larceny, received a mere five-year sentence. Under the circumstances, we cannot conclusively determine that the district court did not base its sentencing decision on improper considerations. Thus, the sentencing proceeding did not reflect the appearance of justice.

²⁹Id., 961 P.2d at 146; see also Jackson v. State, 772 A.2d 273, 280-82 (Md. 2001) (noting importance of appearance of justice and reversing lower court's decision with instructions to vacate sentence where sentencing judge's comments could give rise to an inference that inappropriate factors were considered in imposing sentence).

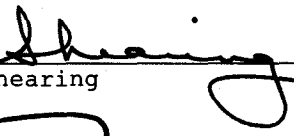
³⁰We reject the State's assertion, however, that the district court, in imposing sentence here, could properly punish appellant for being in violation of a child support order at the time of sentencing. See Denson, 112 Nev. at 494, 915 P.2d at 287 (reversing sentence where court's comments indicated that sentence was improperly intended to punish defendant for uncharged crimes).


We also conclude that this error is plain and affected appellant's substantial rights. Therefore, our review of a claim based on this error on direct appeal would not have been precluded by trial counsel's failure to lodge an appropriate objection.³¹ Appellate counsel performed deficiently in failing to raise the issue, and because the omitted claim is meritorious, appellant was prejudiced by counsel's deficient performance.

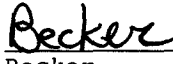
We reverse the portion of the district court's order denying relief as to this claim, and we remand this matter to the district court for resentencing before a different district court judge other than the original sentencing judge.³²

As to all other claims, we affirm the district court's denial of appellant's post-conviction petition for a writ of habeas corpus.

It is so ORDERED.


_____, J.
Shearing


_____, J.
Rose


_____, J.
Becker

cc: Hon. Michael L. Douglas, District Judge
Attorney General
Clark County District Attorney
JoNell Thomas
Clark County Clerk

³¹See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); Miller v. State, 113 Nev. 722, 724, 941 P.2d 456, 457-58 (1997).

³²See Martinez, 114 Nev. at 738, 961 P.2d at 146 (recognizing that where this court cannot determine that district court did not rely on improper matters at sentencing, remand for resentencing before a different judge is necessary).