

IN THE SUPREME COURT OF THE STATE OF NEVADA

CRISS LONNIE ROGERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58131

FILED

OCT 08 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Appellant filed his petition on May 20, 2009, more than four years after this court issued the remittitur from his direct appeal on April 29, 2005.¹ Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously litigated a post-conviction petition for a writ of habeas corpus.² See NRS 34.810(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).

On appeal, appellant argues that the district court erred in finding that his petition was successive because his first post-conviction petition was not decided on the merits. This claim is clearly belied by the

¹Rogers v. State, Docket No. 42895 (Order of Affirmance, April 4, 2005).

²Rogers v. State, Docket No. 47290 (Order of Affirmance, November 29, 2006).

record. In denying his first post-conviction petition, the district court noted that it could deny the petition solely on the basis that appellant failed to respond to the State's motion to dismiss. However, the district court then went on to address appellant's claims and dismiss them as procedurally barred or lacking in merit. On appeal from the dismissal of appellant's first petition, this court affirmed because appellant's substantive claims were without merit. Thus, the prior determination was on the merits, and the district court did not err in determining that appellant's second petition was successive.

Next, appellant argues that the district court erred in finding that he did not demonstrate good cause to excuse the procedural defects. He asserts that good cause exists because the delay was caused by post-conviction counsel's failure to respond to the State's motion to dismiss, which led to the summary dismissal of his first post-conviction petition. First, contrary to appellant's claim, the district court did not dismiss the prior petition based solely on post-conviction counsel's failure to respond. Second, as appellant had no statutory right to post-conviction counsel, the ineffective assistance of post-conviction counsel does not provide good cause to raise a claim in a successive and untimely petition. McKague v. Warden, 112 Nev. 159, 165 n.5, 912 P.2d 255, 258 n.5 (1996). In addition, regardless of the validity of a claim of ineffective post-conviction counsel, appellant provided no explanation for why he waited over two years after the resolution of his first petition to file this second petition. See Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003) (concluding that an ineffective-assistance claim cannot serve as cause where the claim itself is procedurally defaulted). Therefore, we conclude that the district court did not err in determining that appellant failed to demonstrate good cause to excuse his procedural defects.

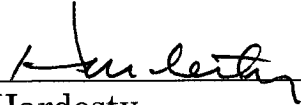
Appellant also argues that the district court erred in determining that his sentence-enhancement claim was barred by the doctrine of the law of the case, and in finding that he raised a substantive claim of ineffective assistance of post-conviction counsel. Because the district court correctly found that the petition was procedurally barred, any determination by the district court as to the substantive claims in the petition was unnecessary and did not affect the dismissal of the petition. Thus, because appellant failed to demonstrate good cause to excuse the procedural bar, we decline to consider his arguments regarding the law of the case and the substantive claims.

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

ORDER the judgment of the district court AFFIRMED.


_____, J.
Saitta


_____, J.
Pickering


_____, J.
Hardesty

cc: Hon. Connie J. Steinheimer, District Judge
Glynn B. Cartledge
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk