

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDRE DUPREE BOSTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58216

FILED

FEB 03 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Anger*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

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 Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

In 1988, appellant, a juvenile at the time he committed his offenses, was convicted of one count of burglary, one count of lewdness with a minor with the use of a deadly weapon, one count of assault with a deadly weapon, one count of battery with the intent to commit a crime with the use of a deadly weapon, one count of first-degree kidnapping with the use of a deadly weapon, six counts of sexual assault with the use of a deadly weapon, one count of robbery with the use of a deadly weapon, and one count of attempting to dissuade a victim from reporting a crime with the use of a deadly weapon. The district court sentenced appellant to

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).

serve fourteen consecutive terms of life with the possibility of parole and consecutive terms totaling 92 years. This court dismissed the direct appeal. Boston v. State, Docket No. 19607 (Order Dismissing Appeal, October 24, 1989). The remittitur issued on November 14, 1989.

On December 21, 1988, appellant, while incarcerated in a California correctional facility, filed an original petition for a writ of habeas corpus in this court. This court denied the petition, noting that the Nevada Constitution did not authorize this court or the district court to issue a writ of habeas corpus on behalf of someone not actually held in custody in Nevada. Boston v. Attorney General, Docket No. 19625 (Order Denying Petition for a Writ of Habeas Corpus, December 27, 1988).

On October 22, 1990, appellant filed a petition for post-conviction relief pursuant to NRS 177.315. The district court denied the petition without conducting an evidentiary hearing. On appeal, this court entered an order of remand for the purpose of conducting an evidentiary hearing on appellant's claim that his counsel was ineffective for failing to investigate a defense of insanity. Boston v. State, Docket No. 21871 (Order of Remand, September 30, 1991). On remand, the district court was not able to conduct an evidentiary hearing in appellant's presence. Rather, the district court caused the evidentiary hearing to be videotaped, and provided appellant an opportunity to view the videotape and submit an affidavit regarding the issues that he wanted presented.² The district court again denied the petition. Appellant's appeal from this order was dismissed for lack of jurisdiction as the notice of appeal was untimely.

²Appellant was represented by counsel in the post-conviction proceedings.

Boston v. State, Docket No. 26034 (Order Dismissing Appeal, October 7, 1994).

On January 5, 2011, appellant filed a proper person post-conviction petition for a writ of habeas corpus.³ In his petition, appellant claimed that his trial counsel was ineffective for failing to investigate mitigating factors for sentencing and that his speedy trial rights were violated by the four-year delay in bringing him to trial.⁴ Appellant also claimed that the sentence structure amounted to cruel and unusual punishment because he received a sentence that was the functional equivalent of a life-without-parole sentence. Appellant relied, in part, on the recent decision in Graham v. Florida, 560 U.S. ___, 130 S. Ct. 2011 (2010), holding that the Constitution prohibits a sentence of life without parole for a juvenile offender who did not commit homicide.

In an attempt to demonstrate good cause for the petition as a whole, appellant argued that in 1988 this court informed him that he could not pursue habeas corpus relief while incarcerated in another state and that this excused his procedural defects. Further, it appears that appellant was relying upon the Graham decision as good cause for those claims relating to his sentence structure because those claims were not

³The petition was untimely filed pursuant to NRS 34.726(1) and a successive petition pursuant to NRS 34.810(1)(b)(2) and NRS 34.810(2).

⁴Appellant also claimed that the detainer Nevada placed on him during his period of incarceration in California caused him to lose opportunities for rehabilitation and affected his security level. Such claims challenge the conditions of confinement and are not permissible in a post-conviction petition for a writ of habeas corpus. See Bowen v. Warden, 100 Nev. 489, 686 P.2d 250 (1984).

available previously. See Bejarano v. State, 122 Nev. 1066, 1072, 146 P.3d 265, 270 (2006) (recognizing that good cause may be established where the legal basis for a claim was not reasonably available).

The State filed a motion to dismiss the petition, arguing that the petition was procedurally barred and barred by laches.⁵ The district court rejected appellant's argument relating to the 1988 order because the district court found that the record contained no evidence of such an order. The district court did not address appellant's argument that Graham provided good cause to litigate his claims relating to the sentence structure. Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate that the 1988 order provided good cause for the late and successive petition. However, we conclude that the district court erred in denying the petition without appointing counsel for the claims relating to Graham.

The district court incorrectly found that the 1988 order did not exist; a copy of the order is included in the record. Nevertheless, the district court did not err in determining that the 1988 order did not excuse the procedural defects in this case. While the statements in the 1988 order may explain the delay in timing because of the language employed regarding custody and habeas relief, the 1988 order did not provide good cause for filing a petition raising claims litigated in the 1990 petition for

⁵We note that there may be a discrepancy regarding the date the State mailed a copy of the motion to dismiss. Appellant's response to the motion to dismiss was received on the date set for hearing of the motion. For the reasons discussed below, any discrepancy did not cause prejudice in the instant case.

post-conviction relief on the merits or raising new claims that could have been raised in the 1992 petition for post-conviction relief. 1985 Nev. Stat., ch. 435, § 10, at 1232 (NRS 34.810(1)(b), (2), (3)). Thus, we affirm that portion of the district court's order rejecting a good cause argument based upon the 1988 order. See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding that a correct result will not be reversed simply because it is based on the wrong reason).

The district court did not specifically address the good cause argument related to Graham.⁶ The applicability and scope of the decision in Graham—whether Graham applies only to a sentence of life without parole or whether Graham applies to a lengthy sentence structure that is the functional equivalent of life without parole—is complex and novel. Appellant is serving a severe sentence.⁷ Appellant requested the appointment of counsel in the prayer for relief in his petition and appellant has been previously determined to be indigent. Under these circumstances, the failure to appoint post-conviction counsel prevented a meaningful litigation of the Graham good cause argument. NRS 34.750(1). Thus, we reverse the district court's denial of this portion of appellant's petition and remand this matter for the appointment of counsel to assist appellant in the post-conviction proceedings. Accord

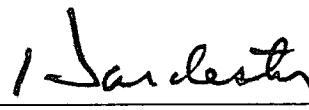
⁶We further note that the district court did not provide any specific discussion of the applicability of NRS 34.800(2) in light of Graham.

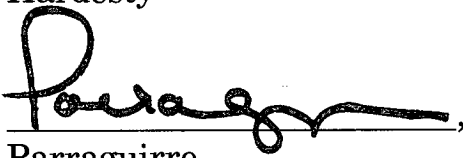
⁷In the instant case, it appears that appellant would have to serve a minimum of approximately 100 years before he will be eligible for parole. 1977 Nev. Stat., ch. 598, § 1, at 1626 (NRS 200.366(2)(b)); 1973 Nev. Stat., ch. 798, § 6, at 1804-05 (NRS 200.320(2)); 1981 Nev. Stat., ch. 780, § 1, at 2050 (NRS 193.165); NRS 209.446(6); NRS 213.120(1).

Rogers v. State, 127 Nev. ___, ___ P.3d ___ (Adv. Op. No. 88, December 29, 2011). Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.⁸


_____, J.
Douglas


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Elissa F. Cadish, District Judge
Andre Dupree Boston
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁸We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.