

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES A. PHELPS,

No. 35655

Appellant,

vs.

WARDEN, NEVADA STATE PRISON, JOHN
IGNACIO,

Respondent.

FILED

FEB 09 2001

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

ORDER OF AFFIRMANCE

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

On May 8, 1981, the district court convicted appellant, pursuant to a jury verdict, of one count each of sexual assault and attempted sexual assault, and two counts of lewdness with a child under the age of fourteen years. The district court sentenced appellant to prison for a term of life with the possibility of parole for the sexual assault and concurrent terms totaling twenty years for the remaining counts. This court dismissed appellant's direct appeal, concluding that his assignments of error lacked merit.¹

Since then, appellant has filed numerous post-conviction motions and petitions, including habeas petitions in 1984, 1987, 1991, 1993, 1994, 1995, and 1996. The district

¹Phelps v. State, Docket No. 13501 (Order Dismissing Appeal, December 20, 1983).

court denied these petitions, and this court rejected appellant's subsequent appeals.²

On March 25, 1999, appellant filed the instant post-conviction petition for a writ of habeas corpus in the district court.³ The district court appointed counsel to represent appellant in the proceedings. Appointed counsel filed a supplemental petition on July 28, 1999. The State filed a motion to dismiss the petition. After conducting a hearing to determine whether appellant could demonstrate good cause and prejudice to excuse the applicable procedural bars, the district court dismissed the petition. This appeal followed.

Appellant argues that the district court erred in granting the motion to dismiss on the ground that appellant had failed to demonstrate good cause. He argues that the following constitute good cause: (1) ineffective assistance of trial counsel; (2) ineffective assistance of prior post-conviction counsel; and (3) the failure of state courts to provide a full and fair hearing on his prior post-conviction petitions. Appellant further argues that failure to consider his petition on the merits will result in a miscarriage of justice because he

²Phelps v. Director, Docket No. 15794 (Order Dismissing Appeal, July 20, 1984); Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988); Phelps v. Director, Docket No. 23465 (Order Dismissing Appeal, July 29, 1993); Phelps v. State, 111 Nev. 1021, 900 P.2d 344 (1995); Phelps v. State, Docket Nos. 26295 and 27677 (Order Dismissing Appeals, May 19, 1998); Phelps v. State, Docket No. 27895 (Order Dismissing Appeal, October 5, 1998); Phelps v. State, Docket No. 29324 (Order Dismissing Appeal, March 29, 1999).

³Appellant actually filed a Writ of Error Coram Nobis. Because the writ challenged the judgment of conviction, the district court properly treated it as a post-conviction petitioner for a writ of habeas corpus. See NRS 34.724(2)(b).

is actually innocent. We conclude that the district court did not err in dismissing the petition.

Appellant's petition was filed more than fifteen years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.⁴ Moreover, appellant's petition was successive because he had previously filed numerous habeas petitions.⁵ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁶ "To establish good cause to excuse a procedural default, a defendant must demonstrate that some impediment external to the defense prevented him from complying with the procedural rule that has been violated."⁷

Based on our review of the record, we conclude that appellant failed to demonstrate good cause to excuse his procedural defaults. First, allegations that trial counsel provided ineffective assistance do not constitute good cause.⁸ Second, appellant has failed to demonstrate that in connection with a particular prior petition he was entitled to post-conviction counsel and that that counsel provided ineffective assistance.⁹ We also note that appellant failed to raise either

⁴See NRS 34.726(1).

⁵See NRS 34.810(1)(b)(2); NRS 34.810(2).

⁶See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

⁷Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994).

⁸See Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998).

⁹See Crump v. Warden, 113 Nev. 293, 302-04, 934 P.2d 247, 252-54 (1997) (holding that petitioner may rely on allegations that post-conviction counsel provided ineffective assistance as good cause to excuse procedural default only where statute mandated appointment of post-conviction counsel).

of these arguments below; he cannot change his theory on appeal.¹⁰ Third, appellant has not demonstrated that he has ever been improperly denied a full and fair hearing on his procedurally defaulted claims. Finally, we note that below, appellant focused on his various psychological and physical disabilities as good cause to excuse his procedural default. We have rejected these arguments on prior occasions.¹¹ Because appellant failed to demonstrate good cause to excuse his procedural defaults, we conclude that the district court did not err in dismissing the petition. We therefore

ORDER the judgment of the district court AFFIRMED.

Young J.
Young
Rose J.
Rose
Becker J.
Becker

cc: Hon. Connie J. Steinheimer, District Judge
Attorney General
Washoe County District Attorney
Karla K. Butko
Washoe County Clerk

¹⁰See Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995).

¹¹See, e.g., Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988).