

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY LOPEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35790

FILED

FEB 04 2003

ORDER OF AFFIRMANCE

CLERK OF SUPREME COURT
J. Richard
CLERK

This is an appeal of a district court order denying Appellant Jerry Lopez' (Lopez) petition for a writ of habeas corpus.

Lopez, convicted of murder and sentenced to life imprisonment, sought a writ of habeas corpus alleging ineffective assistance of counsel during his trial and on direct appeal. In his petition for a writ of habeas corpus, Lopez failed to provide specific facts, requested appointment of post-conviction counsel, and stated his intent to amend or supplement the petition. The district court denied his petition and this appeal followed.

Lopez claims, due to his indigency and inability to understand the law, that he is entitled to appointment of counsel. He alleges that the trial court erred in failing to apply and articulate the analysis outlined in NRS 34.750 in considering his petition. Moreover, he claims that he is entitled, as a matter of law, to amend his petition and that the district court's failure to grant leave to amend violates due process and equal protection for proper person petitioners, since appointed counsel are granted such leave by statute in NRS 34.750(3). We disagree.

While acknowledging that appointment of post-conviction counsel is discretionary, Lopez contends that NRS 34.750 requires that the court consider several enumerated factors in exercising that

discretion. Further, Lopez asserts that unless the court explicitly indicates that it considered these factors, it must be presumed that the court abused its discretion in failing to appoint counsel.

The State, however, contends that the provisions of NRS 34.750 were not triggered because the petition was summarily dismissed. NRS 34.750(1) clearly states that the court may appoint counsel to represent a petitioner in post-conviction proceedings only if the “petition is not dismissed summarily.”

Therefore, our initial inquiry centers on whether Lopez’ petition was summarily dismissed. “Summary dismissal of a petition is warranted only if it ‘plainly appears from the face of the petition’ that the petitioner is not entitled to relief; otherwise, the district court ‘shall order the respondent to file an answer’”¹ Here, the district court ordered the respondent to file an answer. Thus, Lopez is correct in his assertion that the petition was not summarily dismissed.

Having determined that there was no summary dismissal, the next level of inquiry focuses on whether Lopez has a right to post-conviction representation. This court previously held in McKague v. Warden² that a petitioner “has no right to effective assistance of counsel,

¹Phelps v. Director, Nevada Department of Prisons, 104 Nev. 656, 658, 764 P.2d 1303, 1305 (1988) (quoting NRS 34.740(2)). NRS 34.740(2) has been replaced by NRS 34.770(2), which provides that “[i]f the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing; see also NRS 34.810 (specifying additional reasons for dismissal of a petition).

²112 Nev. 159, 912 P.2d 255 (1996); see also Pennsylvania v. Finley, 481 U.S. 551 (1987) (stating that there is no right to counsel in state post-conviction relief proceedings).

let alone any constitutional or statutory right to counsel at all, in his post-conviction proceedings.”³

NRS 34.750(1) states:

1. A petition may allege that the petitioner is unable to pay the costs of the proceedings or to employ counsel. If the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily, the court may appoint counsel to represent the petitioner. In making its determination, the court may consider, among other things, the severity of the consequences facing the petitioner and whether:
 - (a) The issues presented are difficult;
 - (b) The petitioner is unable to comprehend the proceedings; or
 - (c) Counsel is necessary to proceed with discovery.

Lopez maintains that the court was required to consider the factors enumerated in the statute. Further, Lopez offers that since the court made no explicit reference to exercising its discretion to consider these factors, it must be presumed that the court abused its discretion.

“It is well settled in Nevada that words in a statute should be given their plain meaning unless this violates the spirit of the act.”⁴ Thus,

³Id. at 164. (citing Thompson v. District Court, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984); Robert E. v. Justice Court, 99 Nev. 443, 664 P.2d 957 (1983)).

⁴McKay v. Bd. of Supervisors, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986) (citing Application of Filippini, 66 Nev. 17, 24, 202 P.2d 535, 538 (1949)).

“[w]here a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent.”⁵ In NRS 34.750(1), the statute repeatedly uses the word “may” rather than “shall”, making it clear that appointment of counsel in post-conviction proceedings is discretionary. Moreover, the statute does not mandate that the court perform this analysis. We disagree with Lopez' contention that the court was required to analyze the enumerated factors in NRS 34.750(1) and formally outline its analysis in its disposition.

Lopez further argues that abuse of discretion must be presumed if the court does not adequately articulate its analysis. To the contrary, this court has long held that such presumptions favor the trial court, not the appellant.⁶ The burden is on the appellant to affirmatively demonstrate that the district court erred.⁷ Thus, Lopez' argument is unpersuasive.

Lopez also contends that the trial court erred in denying his petition without providing him with an opportunity to file amended or supplemental pleadings. In support, Lopez argues that NRS 34.750 provides an absolute right to file supplemental pleadings. Additionally, he claims that he was entitled to amend his pleadings pursuant to Rule 15 of the Nevada Rules of Civil Procedure.

⁵Id.

⁶Schwartz v. Estate of Greenspun, 110 Nev. 1042, 1051, 881 P.2d 638, 644 (1994).

⁷Charmicor, Inc. v. Bradshaw Finance Co., 92 Nev. 310, 313, 550 P.2d 413, 415 (1976).

NRS 34.750(3) provides that “[a]fter appointment by the court, counsel for the petitioner may file and serve supplemental pleadings, exhibits, transcripts and documents” Lopez argues that it would violate traditional notions of due process and equal protection to deny a proper person petitioner the same rights afforded to an appointed counsel. This argument is unpersuasive. This court has previously held that courts should refrain from reaching beyond the language of a statute in its interpretation when the statute’s meaning is clear.⁸ Here, the legislature specified that a statutory right to supplemental pleadings extended only to appointed counsel. Assuming without deciding that NRCP 15 applies to proceedings pursuant to NRS 34.720 to NRS 34.830,⁹ in instances involving non-appointed counsel or proper person petitioners, the court has discretion to accept amended or supplemental pleadings under Rule 15.¹⁰ Lopez relies on Stephens v. Southern Nev. Music Co.¹¹ to support the argument that Rule 15 demands that leave to amend a petition should be freely given.¹² This cursory reliance on Stephens fails to fully examine the subject of pleading amendment. This court in Stephens also held that:

This does not, however, mean that a trial judge may not, in a proper case, deny a motion to

⁸McKay, 102 Nev. at 648.

⁹See NRS 34.780(1)(the Nevada Rules of Civil Procedure apply to post-conviction habeas proceedings to the extent they are not inconsistent with the statutory scheme); see also Klein v. Warden, 118 Nev. ___, 43 P.3d 1029 (2002).

¹⁰NRCP 15(a).

¹¹89 Nev. 104, 507 P.2d 138 (1973).

¹²Id. at 105-06.

amend. If that were the intent, leave of court would not be required. A motion for leave to amend is addressed to the sound discretion of the trial court and its action in denying the motion should not be held to be error unless that discretion has been abused.”¹³

Therefore, a petitioner’s right to amend his pleading is not absolute – it is subject to the discretion of the trial court.

Examination of the record is useful in determining whether the trial court abused its discretion with regard to amending or supplementing the pleading. The State contends that the petition consisted solely of “bare” and “naked” allegations that were not supported by specific facts. Instructions 18 and 23 in the form specified in NRS 34.735 clearly articulate that specific facts must be stated.¹⁴ In item 18, Lopez asserted that ineffective assistance of counsel was the basis for his petition. He supplied no facts in support of this assertion. In item 23, he replied to both requests for factual support with “I AM INDIGENT AND DO NOT UNDERSTAND THE LAW AND NEED COUNSEL APPOINTED TO HELP ME COMPLETE THIS PETITION AND FILE A SUPPLEMENTAL PETITION.” Lopez does not dispute the absence of specific facts in his petition. Instead, he argues that the declaration of

¹³Id. at 105 (citing Leggett v. Montgomery Ward & Co., 178 F.2d 436, 439 (10th Cir. 1949); Nelson v. Sierra Construction Corp., 77 Nev. 334, 343, 364 P.2d 402, 406 (1961)). Cf. Nevada Bank of Commerce v. Edgewater, Inc., 84 Nev. 651, 653, 446 P.2d 990, 991 (1968).

¹⁴Instruction 18 of the petition form states, “You must relate specific facts in response to this question.” Instruction 23 states “Summarize briefly the facts supporting each ground.” Both sections (a) and (b) of Instruction 23 also include “Supporting FACTS (Tell your story briefly without citing cases or law.):”

intent to amend should have been honored before the court requested a responsive pleading from the State.

Additionally, Lopez never actually presented the court with an amended or supplemental pleading. Lopez coupled his request to amend with his request for appointment of counsel. Thus, the court never had an opportunity to independently consider the issue of leave to amend.

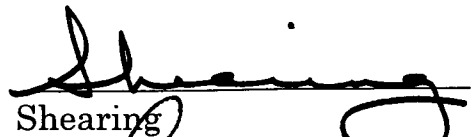
In Stephens, this court held that appellant's failure to renew a motion to amend or enlarge her pleadings in the wake of the trial court's denial of a previous motion was dilatory.¹⁵ Thus, the court held that no impairment of justice occurred as a result of denial of the appellant's motion for leave to amend.¹⁶ Here, Lopez was similarly dilatory in waiting until the last possible day to request counsel and by omitting any factual support in his petition on the expectation that counsel would be appointed. Additionally, he was dilatory in failing to submit an amended pleading or supplement to the court. As in Stephens, justice is not impaired by denial of Lopez' request to amend his petition.

¹⁵Stephens, 89 Nev. at 106.

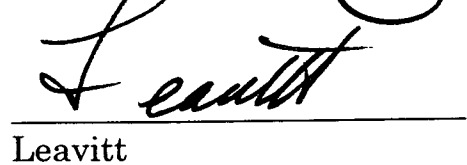
¹⁶Id.

Because Lopez did not attempt to submit additional pleadings or supplements, and because the right to amend a petition is discretionary, not absolute, we conclude that the trial court did not err in denying Lopez's motion for leave to amend. Accordingly, we


ORDER the judgment of the district court AFFIRMED.

 J.

Shering

 J.

Leavitt

 J.

Becker

cc: Hon. Ronald D. Parraguirre, District Judge
Richard F. Cornell
Spaulding Cox & Schaeffer, LLP
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk