

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DENNIS ROY GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70041

FILED

SEP 20 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angela*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus.¹ Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Appellant Dennis Roy Garcia filed his petition on January 8, 2016. Garcia's petition constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.² See

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

²Garcia filed a postconviction petition for a writ of habeas corpus in the district court on November 16, 2015, in which he sought presentence credits. See *Griffin v. State*, 122 Nev. 737, 744, 137, P.3d 1165, 1169-70 (2006) (explaining that a claim for presentence credits is a challenge to the validity of a judgment of conviction, not a challenge to the computation for time served, and must be filed in compliance with the procedural bars set forth in NRS chapter 34). The district court granted Garcia relief and awarded him 369 days of presentence credits.

NRS 34.810(2). Garcia's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.810(3). "Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory." *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).

In his petition below, Garcia did not attempt to provide good cause. Accordingly, Garcia did not meet his burden to overcome the procedural bar. See *State v. Haberstroh*, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003).

To determine if Garcia can establish actual prejudice sufficient to overcome the procedural bar, we must consider his underlying claims to ascertain whether any of his alleged claims of error "worked to his actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions." *Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993). For the reasons discussed below, we also conclude Garcia failed to establish actual prejudice.

Garcia's underlying claims involved ineffective assistance of his counsel. To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). Both components of the

inquiry must be shown. *Strickland v. Washington*, 466 U.S. 668, 697 (1984).

First, Garcia argues his counsel was ineffective for failing to assert that Garcia was improperly detained for more than 72 hours before being notified of the charges against him. Garcia failed to demonstrate his counsel's performance was deficient or resulting prejudice. The record in this case indicates Garcia was initially detained in a different county for a violation of lifetime supervision. Garcia makes no factual allegations regarding when he was taken into custody for the Nye County charges, and makes only a bare claim regarding this issue. In addition, Garcia does not attempt to demonstrate prejudice stemming from any delay in notifying him of the charges against him. *See Elvik v. State*, 114 Nev. 883, 895, 965 P.2d 281, 289 (1998) ("Failure to bring a defendant before a magistrate without unnecessary delay does not warrant reversal absent a showing of prejudice to a defendant's constitutional rights."). A bare claim, such as this one, is insufficient to demonstrate a petitioner is entitled to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). Therefore, Garcia is not entitled to relief for this claim.

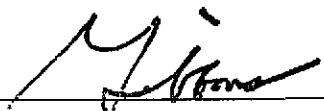
Second, Garcia argues his counsel was ineffective for failing to assert that he was barred from prosecution for these charges due to the statute of limitations. Garcia failed to demonstrate either deficiency or prejudice for this claim. Garcia committed offenses constituting the sexual abuse of a child and, at the time Garcia committed the offenses, the earliest the statute of limitations could have run was when the child victim reached 21 years of age. *See* 2005 Nev. Stat., ch. 331, § 15, at 1209

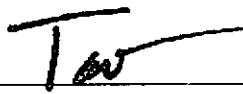
(former version of NRS 171.095(1)(b)(1)). The record demonstrates the victim in this matter was 18 when the offenses were charged. Accordingly, Garcia fails to demonstrate objectively reasonable counsel would have argued the statute of limitations barred prosecution of these offenses or a reasonable probability of a different outcome had counsel so asserted. Therefore, Garcia is not entitled to relief for this claim.

Third, Garcia argues his counsel was ineffective for failing to assert that the State did not provide documents regarding the collection and testing of DNA evidence in discovery. Garcia alleges the State did not disclose forms regarding authorizing the testing of the victim's DNA sample and a signed form from the person who collected her DNA sample. Garcia failed to demonstrate his counsel's performance was deficient or resulting prejudice. Garcia raised this issue in a presentence motion to withdraw his guilty plea and the district court concluded it lacked merit. Garcia fails to demonstrate objectively reasonable counsel would have raised additional arguments regarding the disclosure of documents regarding the DNA testing. In addition, the record reveals the DNA testing established that Garcia was the biological grandfather of the victim and the victim informed the authorities that Garcia and her mother informed her that Garcia was her grandfather. Under these circumstances, Garcia did not demonstrate a reasonable probability he would have refused to plead guilty and would have insisted on going to trial had counsel made further efforts to obtain the DNA testing documentation. Therefore, Garcia is not entitled to relief for this claim.

Because Garcia's claims would not have entitled him to relief, he fails to demonstrate that he would be actually prejudiced by denial of his petition as procedurally barred. Therefore, we conclude Garcia fails to overcome the procedural bar, and we affirm the dismissal of his petition. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Robert W. Lane, District Judge
Dennis Roy Garcia
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk