


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENNETH WILLIAM CARDENAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70576

FILED

MAR 22 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Kenneth William Cardenas appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Cardenas argues the district court erred in denying his petition as procedurally barred. Cardenas filed his petition on November 16, 2015, more than three years after entry of the judgment of conviction on August 24, 2012.¹ Thus, Cardenas' petition was untimely filed. *See* NRS 34.726(1). Cardenas' petition was procedurally barred absent a demonstration of good cause—cause for the delay and undue prejudice. *See id.*

First, Cardenas argued ineffective assistance of postconviction counsel provided cause for the delay. However, ineffective assistance of postconviction counsel was not good cause in the instant case because the appointment of counsel was not statutorily or constitutionally required. *See Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 871-72 (2014);

¹Cardenas did not pursue a direct appeal.

Crump v. Warden, 113 Nev. 293, 303, 934 P.2d 247, 253 (1997); *McKague v. Warden*, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996).

Second, Cardenas argues he filed a motion for credit against sentence and amended judgment of conviction within the one-year timely filing period, and the district court should have construed that motion to have been a timely petition. Cardenas did not raise this good-cause claim in his petition before the district court. Therefore, this good-cause claim is not properly raised on appeal and we decline to consider it in the first instance. See *McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

The district court also concluded Cardenas did not demonstrate undue prejudice sufficient to overcome the procedural time bar. See *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 94-95 (2012). To establish prejudice sufficient to overcome the procedural time bar, Cardenas must demonstrate his underlying 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) (internal quotation marks omitted). For the reasons discussed below, we conclude Cardenas failed to establish undue prejudice and therefore, the district court properly denied the petition as procedurally barred.

Cardenas’ underlying claims alleged ineffective assistance of 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, 987-88, 923 P.2d 1102, 1107 (1996). Both components of the inquiry must be shown. *Strickland v. Washington*, 466 U.S. 668, 697 (1984).

First, Cardenas claimed his counsel was ineffective for failing to permit him to review evidence obtained in discovery. Cardenas asserted he needed to fully review this information in order to make an informed decision regarding his guilty plea. Cardenas failed to demonstrate his counsel's performance was deficient or resulting prejudice. In the written plea agreement, Cardenas acknowledged he had discussed the charges and any possible defenses with his counsel and counsel had answered all of his questions regarding the agreement. Cardenas further asserted at the plea canvass that his counsel had answered all of his questions. In addition, at the plea canvass, counsel advised the district court the key evidence in this matter was contained on a recording and that he and the defendant had spent over two hours reviewing that evidence. Under these circumstances, Cardenas failed to demonstrate his counsel acted in an objectively unreasonable manner or a reasonable probability he would have refused to plead guilty and insisted on proceeding to trial had he further reviewed the evidence against him. Therefore, the district court did not err in denying this claim.

Second, Cardenas claimed his counsel was ineffective for failing to retain an investigator. Cardenas failed to demonstrate counsel's performance was deficient or resulting prejudice. Cardenas did not identify any evidence counsel could have obtained had counsel retained the services of an investigator. Accordingly, he did not demonstrate

counsel could have uncovered favorable evidence through reasonably diligent investigation or a reasonable probability he would have refused to plead guilty and insisted on proceeding to trial had counsel retained an investigator. *See Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Therefore, the district court did not err in denying this claim.

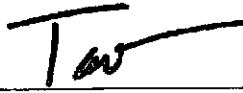
Third, Cardenas claimed his counsel was ineffective for failing to present mitigation evidence at the sentencing hearing. Cardenas failed to demonstrate his counsel's performance was deficient or resulting prejudice. Cardenas did not identify any mitigation evidence counsel should have presented. A bare claim, such as this one, is insufficient to demonstrate a petitioner is entitled to relief. *See Hargrove v. State*, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Fourth, Cardenas claimed his counsel was ineffective for failing to communicate with him. Cardenas failed to demonstrate his counsel's performance was deficient or resulting prejudice. As discussed previously, Cardenas acknowledged in the written plea agreement and at the plea canvass that he had discussed the case with counsel and counsel had answered all of his questions. In addition, Cardenas did not explain how further communication would have altered his decision to accept a plea offer and enter a guilty plea, particularly considering Cardenas faced two counts of sexual assault of a child under the age of 14 had he proceeded to trial. Under these circumstances, Cardenas failed to demonstrate his counsel acted in an objectively unreasonable manner or a reasonable probability he would have refused to plead guilty and would have insisted on proceeding to trial had counsel communicated further with him. Therefore, the district court did not err in denying this claim.

Accordingly, we conclude the district court properly concluded Cardenas failed to demonstrate cause for the delay and undue prejudice sufficient to overcome the procedural bars. Because the district court properly concluded the petition was procedurally barred and without good cause, the district court did not err in declining to conduct an evidentiary hearing. *See Rubio v. State*, 124 Nev. 1032, 1046 & n.53, 194 P.3d 1224, 1233-34 & n.53 (2008). Therefore, the district court properly denied the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Robert W. Lane, District Judge
David H. Neely, III
Attorney General/Carson City
Nye County District Attorney
Nye County Clerk