

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
DIEGO EDUARDO KUSAKA,
Respondent.

No. 70778

FILED

MAY 18 2017

ELIZABETH A. BYRN
CLERK OF THE COURT
BY *Malcolm*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

The State of Nevada appeals from an order of the district court granting Diego Eduardo Kusaka's March 4, 2016, postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge; Eighth Judicial District Court, Clark County; James M. Bixler, Senior Judge.¹

The State argues the district court erred in finding Kusaka demonstrated good cause and actual prejudice sufficient to overcome a procedural bar.² Kusaka's petition was successive because he had

¹Judge Togliatti conducted the hearing regarding Kusaka's good-cause claims, issued a minute order concerning the good-cause claims, and signed the written order granting the petition. Senior Judge Bixler conducted the evidentiary hearing regarding Kusaka's ineffective-assistance-of-counsel claim and orally granted that claim.

²Kusaka asserts this court lacks jurisdiction to consider this appeal because NRS 34.575(2) only permits the State to appeal from a decision concerning a postconviction petition for a writ of habeas corpus when a

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previously filed a postconviction petition for a writ of habeas corpus which was decided on the merits, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.³ See NRS 34.810(2). Kusaka'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). "We give deference to the district court's factual findings regarding good cause, but we will review the court's application of the law to those facts de novo." *State v. Huebler*, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012).

In Kusaka's first postconviction petition filed on October 6, 2015, Kusaka asserted his counsel was ineffective for failing to pursue a

... continued

"district court grants the writ and orders the discharge or a change in custody of the petitioner." Kusaka asserts the district court has not discharged Kusaka or ordered Kusaka's custody to be changed, and therefore, the State's appeal is not properly before this court. However, the district court granted the writ and vacated Kusaka's judgment of conviction. Vacating Kusaka's judgment of conviction demonstrates that he was no longer in custody pursuant to his conviction, and therefore, the district court ordered a change in Kusaka's custody. Accordingly, this court has jurisdiction to consider this appeal pursuant to NRS 34.575(2).

³Kusaka filed his first petition in the district court on October 6, 2015. Kusaka did not appeal from the district court's denial of that petition.

direct appeal in order to obtain credit for time Kusaka spent on house arrest. The district court conducted a hearing regarding the petition on January 29, 2016, and Kusaka attended the hearing. According to the district court's order, at the hearing Kusaka informed the district court he had come to learn that he was not entitled to credit for time spent on house arrest and wished to withdraw the petition.⁴ The district court then explained to Kusaka his petition would be denied in its entirety with prejudice and Kusaka could not refile the petition. On February 25, 2016, the district court entered a written order denying Kusaka's appeal deprivation claim on its merits, specifically stating the petition was denied with prejudice.⁵

On March 4, 2016, Kusaka filed a second petition, asserting his counsel was ineffective for failing to properly explain to Kusaka the immigration consequences stemming from his guilty plea. The State opposed the petition, asserting it was procedurally barred pursuant to NRS 34.810(2). The district court heard argument concerning the procedural bar and issued a minute order finding good cause for a claim alleging Kusaka's counsel had failed to properly explain the immigration

⁴A transcript of the January 29, 2016, hearing was not included in the record before this court.

⁵To the extent Kusaka was dissatisfied with the district court's disposition of his first petition, his remedy was to appeal the denial of his first petition. See NRS 34.575(1).

consequences Kusaka faced by entry of his guilty plea.⁶ Specifically, the district court found its denial of Kusaka's prior petition was improper because it should have allowed Kusaka to withdraw his petition without prejudice so as to permit Kusaka to file an additional petition,⁷ Kusaka did not have notice the court would rule on the merits of the previous petition prior to Kusaka's appearance in the courtroom, and Kusaka may not have understood the denial of that petition would have limited his ability to

⁶The State argues the district court did not properly find good-cause because it failed to explain its good-cause finding in its order granting relief to Kusaka, but rather briefly referred to its prior good-cause conclusion. The State further asserts it is not proper to consider the findings contained in the district court's minute order because that order is not a final, appealable order. However, the district court's earlier good-cause finding is an intermediate decision which is properly considered in this appeal. *See* NRS 177.045.

⁷We note NRS chapter 34 does not allow for a district court to dispose of a petition by denying it without prejudice. *See* NRS 34.830(2). Further, even if the district court could have denied the petition without prejudice, it is not clear Kusaka would have been free to pursue an additional petition had the district court granted the motion because it appears any additional petition could have been procedurally barred pursuant to NRS 34.810(2) as an abuse of the writ. Given that any subsequent petition would be subject to the procedural bars, rather than granting Kusaka's motion to withdraw his petition, a better option may have been to allow Kusaka an opportunity to amend or supplement the existing petition to raise any additional claims. *See* NRS 34.750(5); *State v. Powell*, 122 Nev. 751, 758, 138 P.3d 453, 458 (2006) (explaining NRS 34.750(5) grants the district court "broad authority to order supplemental pleadings in post-conviction habeas cases." (quotation marks omitted)).

raise additional claims of ineffective assistance of counsel in a later petition.

Our review of the record before this court demonstrates the district court erred in determining Kusaka had good cause. “In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules.” *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). “An impediment external to the defense may be demonstrated by a showing ‘that the factual or legal basis for a claim was not reasonably available’” to be raised in compliance with the procedural bars. *Id.*

The district court’s good-cause findings refer to the court’s actions and statements at the hearing concerning Kusaka’s first petition, and the court’s ultimate decision regarding disposition of Kusaka’s first petition. However, the district court’s actions subsequent to the filing of Kusaka’s first petition do not demonstrate an impediment external to the defense which prevented Kusaka from complying with the procedural bars. *See Hathaway*, 119 Nev. at 252, 71 P.3d at 506. Kusaka’s claim regarding immigration consequences was available to him when he filed his first petition, and by the time the district court conducted the hearing and issued its decision regarding Kusaka’s first petition, Kusaka had already failed to raise this claim. Kusaka had the burden to demonstrate a legal excuse explaining his failure to raise claims which were not presented in his first petition. *See NRS 34.810(3)*. This Kusaka did not do. And the district court’s good-cause findings do not to explain why

Kusaka did not raise his immigration claim in his first petition. Accordingly, we conclude the district court erred in finding good cause to overcome the procedural bar and granting the petition.

Kusaka also raised additional good-cause claims in the proceedings before the district court, but our review of the record reveals the district court properly did not find these claims amounted to good cause to overcome the procedural bar.

In his petition, Kusaka first asserted he had good cause because he was not advised pursuant to *Faretta v. California*, 422 U.S. 806 (1975) of the dangers of self-representation with respect to his prior petition. *Faretta* explains a criminal defendant waives his right to counsel, and for that reason he must knowingly and intelligently relinquish the benefits associated with that right. *Id.* at 835. However, Kusaka had no right to postconviction counsel, *see Brown v. McDaniel*, 130 Nev. ___, ___, 331 P.3d 867, 870 (2014), and because Kusaka did not have a right to postconviction counsel, he did not demonstrate he should have been advised of the risks of proceeding without counsel. Therefore, this claim did not provide good cause for this second petition.

Second, Kusaka appeared to assert he had good cause because he was entitled to the effective assistance of postconviction counsel as explained in *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309 (2012). However, the Nevada Supreme Court has held that *Martinez* does not apply to Nevada's statutory postconviction procedures. *See Brown*, 130 Nev. at ___, 331 P.3d at 871-72. Thus, claims stemming from the decision in *Martinez* would not provide good cause for this second petition.

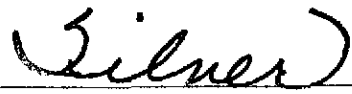
Third, Kusaka appeared to assert in his reply filed in support of his petition that he had good cause because the initiation of deportation proceedings caused him to be aware of his counsel's ineffectiveness. "In order to constitute adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted." *Hathaway*, 119 Nev. at 252, 71 P.3d at 506. Kusaka's ineffective-assistance-of-counsel claim was itself procedurally barred because it was raised in a second or successive petition. Any claims stemming from counsel's pre-plea advice to Kusaka regarding immigration consequences was reasonably available to be raised in Kusaka's first petition. Kusaka's failure to realize the significance of that advice or to discover it was erroneous did not constitute an impediment external to the defense that prevented him from raising this claim in his first petition. *See Brown*, 130 Nev. at ___, 331 P.3d at 870; *see also Phelps v. Dir., Nev. Dep't of Prisons*, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding petitioner's claim of organic brain damage, borderline mental retardation and reliance on assistance of inmate law clerk unschooled in the law did not constitute good cause for the filing of a successive postconviction petition). Therefore, this claim did not provide good cause for this second petition.

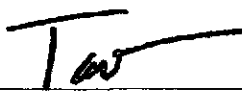
Finally, Kusaka asserts he would suffer from a fundamental miscarriage of justice if his immigration-consequences claim is not considered on the merits. Kusaka did not assert he suffered from a fundamental miscarriage in the district court. Kusaka fails to demonstrate cause for his failure to raise this claim before the district court, and therefore, we decline to consider it on appeal in the first

instance. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999).

We conclude Kusaka failed to demonstrate good cause and the district court erred in granting Kusaka's petition. Because Kusaka had the burden to demonstrate both good cause and actual prejudice sufficient to overcome the procedural bar and we have concluded he failed to demonstrate good cause, we decline to consider his claim of actual prejudice. *See* NRS 34.810(3). Therefore, we reverse the district court's decision and remand for the district court to enter findings of fact and conclusions of law denying the petition as procedurally barred consistent with this order. Accordingly, we

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


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

⁸Because we conclude the petition was procedurally barred, we decline to address the State's remaining claim regarding whether the district court erred by finding Kusaka's counsel was ineffective.

cc: Hon. Jennifer P. Togliatti, District Judge
Hon. James M. Bixler, Senior Judge
Attorney General/Carson City
Clark County District Attorney
Potter Law Offices
Eighth District Court Clerk