

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT LEE BUTLER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36684

FILED

OCT 31 2001

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

ORDER OF AFFIRMANCE

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

On September 13, 1995, appellant was convicted, pursuant to a guilty plea, of one count of burglary. The district court sentenced appellant to a prison term of 1 to 10 years to run consecutive to a two-year prison term appellant was serving for felony escape. Appellant did not file a direct appeal.

On October 27, 1995, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the Second Judicial District Court. On December 6, 1995, the district court denied appellant's petition. Appellant appealed that decision. While that appeal was pending, on July 3, 1996, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the Sixth Judicial District Court. On August 13, 1996, the district court denied appellant's petition. Appellant also appealed that decision. While the prior two appeals were pending, on April 16, 1997, appellant filed another proper person post-conviction petition for a writ of habeas corpus in the Second Judicial District Court. On May 15, 1997, the district court denied the petition. Appellant appealed that decision. This court consolidated and dismissed appellant's three appeals.¹

On October 20, 1997, appellant filed a proper person post-conviction petition for a writ of habeas corpus and a motion to correct

¹Butler v. State, Docket Nos. 27928, 29427, and 30531 (Order Dismissing Appeals, March 10, 1999).

illegal sentence. On October 30, 1997, appellant filed another proper person post-conviction petition for a writ of habeas corpus. On November 20, 1997, the district court appointed counsel to represent appellant. On February 17, 1998, the district court ordered that consideration of appellant's petitions be held in abeyance until this court resolved the appeals on appellant's prior petitions.

On April 19, 1999, appellant filed a proper person petition for a writ of mandamus in the district court. The district court dismissed appellant's petition. Appellant appealed that decision. On July 25, 2000, appellant filed his sixth proper person post-conviction petition for a writ of habeas corpus. The district court denied appellant's petition. Appellant appealed that decision. On August 18, 2000, appellant filed another proper person post-conviction petition for a writ of habeas corpus in the district court. The district court denied the petition. Appellant again appealed. This court consolidated and dismissed those appeals.²

This court has also denied numerous proper person petitions for extraordinary relief that appellant has filed in this court.³

On March 2, 2000, appellant filed a motion to resubmit the 1997 petitions that had been held in abeyance. On May 24, 2000, the district court denied appellant's motion to resubmit the petitions and further dismissed the petitions, finding that the claims presented were successive, constituted an abuse of the writ, and were repelled by the record. Appellant filed the instant appeal.

Absent a showing of good cause and actual prejudice, "[a] second or successive petition must be dismissed . . . if new and different grounds are alleged, [and] the judge or justice finds that the failure of the

²Butler v. State, Docket Nos. 34713, 36543, and 36963 (Order of Affirmance, July 31, 2001).

³See, e.g., Butler v. Parole Board, Docket No. 30179 (Order Denying Petition, May 22, 1997); Butler v. Second Judicial District Court, Docket No. 30615 (Order Denying Petition, October 30, 1997); Butler v. Second Judicial District Court, Docket No. 30617 (Order Denying Petition, October 30, 1997); Butler v. Second Judicial District Court, Docket No. 31249 (Order Denying Petition, December 24, 1997); Butler v. Washoe County District Attorney, Docket No. 31874 (Order Denying Petition, March 25, 1998); Butler v. Washoe County, Docket No. 32105 (Order Denying Petition, May 22, 1998); Butler v. Warden, Docket No. 32979 (Order Denying Petition, September 25, 1998); Butler v. Warden, Docket No. 35952 (Order Denying Petition, May 10, 2000).

petitioner to assert those grounds in a prior petition constituted an abuse of the writ.”⁴ In order to show “good cause,” appellant was required to demonstrate that an impediment external to the defense prevented him from raising his claims in his prior petitions.⁵ “Actual prejudice” requires a showing “not merely that the errors [complained of] . . . created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions.”⁶

In the instant case, appellant alleges that the district court erred in denying his petition because he has established good cause and actual prejudice to excuse his procedural defaults. Particularly, appellant claims that he had good cause for his untimely and successive claim because the district court’s failure to appoint counsel to represent him in his 1995 post-conviction petitions was an impediment external to the defense that prevented him from raising his claims. We disagree.

The district court did not err in finding that appellant failed to show good cause to overcome his procedural defaults. The district court’s refusal to appoint counsel in the 1995 post-conviction proceeding does not constitute good cause because appellant had no right to counsel, much less effective assistance of counsel in that proceeding.⁷

Even assuming that appellant demonstrated good cause, he cannot demonstrate actual prejudice because his substantive claim for relief lacks merit. Appellant alleges that the district court’s error in failing to appoint him counsel resulted in actual prejudice because, had counsel been appointed, his conviction would have been reversed since his plea canvass was defective. In particular, appellant alleges that his plea canvass was defective because he was misinformed that he was eligible for probation. We disagree.

The district court did not err in finding that appellant failed to show prejudice because appellant’s claim that his plea canvass was

⁴NRS 34.810(2).

⁵Crump v. Warden, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997).

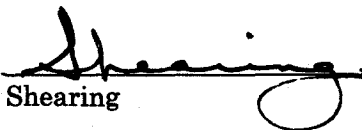
⁶Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)).

⁷See NRS 34.750; McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996).

defective is repelled by the record. Although appellant claims that his plea canvass was defective because he was misinformed that he was eligible for probation, this claim is belied by the fact that appellant was accurately informed that his offense was probational. Appellant was eligible for probation despite his prior conviction for burglary because the State did not meet its burden to proffer evidence of the prior burglary conviction.⁸ Accordingly, we conclude that the district court did not err in finding that appellant has failed to demonstrate good cause and prejudice to excuse his procedural defaults.

Having considered appellant's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.


Shearing J.


Rose J.


Becker J.

cc: Hon. Steven P. Elliott, District Judge
Attorney General
Washoe County District Attorney
Stephen G. Young
Washoe County Clerk

⁸See Hudson v. Warden, 117 Nev. ___, 22 P.3d 1154 (2001) (holding that the State has the burden to proffer evidence of a prior conviction when the State seeks to use the prior conviction to enhance a sentence); Lewis v. State, 109 Nev. 1013, 862 P.2d 1194 (1993); see also NRS 205.060(2) (provides for enhancement of sentence for a burglary offense, namely, ineligibility for probation, if a defendant "has previously been convicted of burglary or another crime involving the forcible entry or invasion of a dwelling").