

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN STEVEN OLAUSEN,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
JOHN IGNACIO,
Respondent.

No. 36918

FILED

DEC 10 2002

ORDER OF AFFIRMANCE

JANETTE A. BLOOM
CLERK OF SUPREME COURT
BY *J. Ruben*
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court dismissing appellant John Steven Olausen's post-conviction petition for a writ of habeas corpus.

On December 14, 1979, Olausen was convicted, pursuant to a guilty plea, of first-degree murder, robbery with the use of a deadly weapon, and kidnapping with the use of a deadly weapon; a three-judge panel sentenced him to death. This court affirmed the judgment of conviction and sentence.¹ In 1989, this court granted Olausen post-conviction relief based on ineffective assistance of trial counsel at sentencing; his sentence of death was vacated and the case was remanded to the district court for another penalty hearing.² Upon remand, a three-judge panel sentenced Olausen in December 1989 to life in prison without

¹See Wilson v. State, 99 Nev. 362, 664 P.2d 328 (1983), aff'd on rehearing, 101 Nev. 452, 705 P.2d 151 (1985). Codefendant Edward Thomas Wilson pleaded guilty and was convicted of the same counts; he also received a sentence of death. Codefendants David Lani and Fred Stites pleaded guilty to the murder and were sentenced to life in prison without the possibility of parole. See id. at 366 & n.2, 664 P.2d at 330 & n.2.

²See Wilson v. State, 105 Nev. 110, 771 P.2d 583 (1989).

the possibility of parole. Seven years later, in 1996, Olausen filed an untimely proper person notice of appeal from the judgment of conviction, and a motion in this court for permission to file a belated appeal. This court dismissed Olausen's appeal.³

On March 10, 1997, Olausen filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Olausen, and counsel filed a supplemental habeas petition.⁴ After the appointment of counsel, Olausen also filed a proper person supplemental brief in support of his petition requesting his immediate release from custody. The State opposed the petition and filed a "motion to dismiss and/or request for a more definite statement." On September 17, 1998, the district court conducted an evidentiary hearing, and on December 16, 1998, entered an order dismissing Olausen's petition. Olausen was unable to demonstrate that his first post-conviction counsel, Annabelle Whiting-Hall, was ineffective for allegedly failing to advise him about his right to appeal from the 1989 sentence of life without the possibility of parole. Whiting-Hall credibly testified that she advised him of his right to appeal, but that Olausen believed his chances of finding further relief were better with the Pardons Board than in pursuing an appeal. The district court, therefore, concluded that Olausen failed to overcome the procedural bar to excuse the untimeliness of his petition.

On January 7, 1999, the district court granted the State's request for a more definite statement. The district court requested further

³See Olausen v. State, Docket No. 28669 (Order Dismissing Appeals, August 14, 1996). The remittitur issued on September 23, 1996.

⁴The district court appointed Marc Picker to represent Olausen.

briefing by the parties on the issues “undisturbed” by the order dismissing the petition. In its order, the district court expressly required Olausen to satisfy the mandate of Hargrove v. State,⁵ and “therefore identify the names of witnesses who will support the stated theory for relief, including his theory of cause and prejudice, and provide a brief description of their testimony.”

On January 13, 1999, Olausen filed a notice of appeal from the order dismissing his petition.⁶ On January 14, 1999, however, the district court entered an order purporting to rescind its prior order denying Olausen’s petition. The district court explained that the order denying Olausen’s petition in its entirety had been “inadvertently” entered prior to the adjudication of all of the issues. At a later hearing, on August 27, 1999, the district court further explained that it had originally represented to Olausen, prior to entering its original order of dismissal, that the court would permit a hearing and additional argument before finally resolving the matter; the district court’s intention was reflected in its order of January 7, 1999, requesting additional briefing.

Pursuant to the district court’s instructions, on April 22, 1999, Olausen filed a first amended petition addressing the issues not disposed of in the previous order dismissing his petition. The State filed both an opposition to the petition, and a motion to dismiss the petition as successive and an abuse of writ. On April 5, 2000, at a scheduled hearing, Olausen appeared with newly retained private counsel, Kenneth J. McKenna, who sought to substitute in as Olausen’s new counsel in the place of appointed counsel, Marc Picker. McKenna stated to the court that

⁵100 Nev. 498, 686 P.2d 222 (1984).

⁶The appeal was docketed in this court as Docket No. 33645.

he would be sufficiently prepared to proceed in 60 days. The district court granted the substitution of counsel and continued the hearing on the State's motion to dismiss. During a telephonic status conference on June 2, 2000, Olausen moved for a stay of the proceedings in the district court while his appeal before this court in Docket No. 33645 was pending. The district court denied the motion for a stay, and scheduled the evidentiary hearing on the motion to dismiss for September 22, 2000.

Meanwhile, more than three months later and only ten days before the hearing on the motion to dismiss in the district court, Olausen filed an emergency motion in this court requesting a stay of further proceedings in the district court. Olausen contended that the district court was divested of jurisdiction to conduct further proceedings on his petition when he filed the notice of appeal on January 13, 1999.⁷ The State opposed the motion. This court denied Olausen's request for a stay and remanded the entire case back to the district court for further proceedings on Olausen's petition, concluding that the district court had valid reasons for rescinding and modifying its order, and that "requiring the district court to certify its inclination to this court under these circumstances would only serve to further delay a final resolution of this matter."⁸

⁷See generally Robertson v. State, 109 Nev. 1086, 1089, 863 P.2d 1040, 1042 (1993), overruled on other grounds by Krauss v. State, 116 Nev. 307, 998 P.2d 163 (2000) (holding that "[a] timely notice of appeal divests the district court of jurisdiction to act and vests jurisdiction in this court").

⁸Olausen v. Warden, Docket No. 33645 (Order of Remand, September 21, 2000); cf. Huneycutt v. Huneycutt, 94 Nev. 79, 575 P.2d 585 (1978) (holding that if a district court wishes to modify an order from which an appeal has been taken, and after which jurisdiction has vested in

continued on next page . . .

On September 22, 2000, Olausen appeared in court with counsel for the evidentiary hearing on the motion to dismiss. Counsel, however, refused to put on evidence, explaining that he was confused about which issues were to be addressed at the hearing, and stating that he was unprepared to proceed and present witnesses. Instead, counsel asked the district court for another continuance and the opportunity to file additional pleadings. Counsel first asked for a continuance to February of 2001, and second for a continuance of 60 days, in order "to put on evidence in regard to the issue of Annabelle Hall." Both requests were denied.⁹ The district court noted that she assumed counsel would be prepared, and stated:

So this is, it's clear to the Court, at least, that in the April appearance by you and the June appearance by you, there was no confusion. And you never asked for clarification. You never asked for any indication of what was happening.

So it's very difficult for the Court at this stage in the proceeding, some five months later after you first were in, to be comfortable with additional continuances. There has to be an end to the road here.

The district court proceeded to schedule a status conference for one week later. The district court instructed counsel to prepare and forward a notice of witnesses for the hearing on the motion to dismiss, and further explained to counsel for clarification:

... continued

this court, the district court must certify to this court its inclination and request a remand).

⁹We note that not only was Olausen present and able to testify, but his former post-conviction counsel, Annabelle Whiting-Hall, was also present at the State's request.

Of the initial 13 causes of action, the Court has reached conclusions of law with regard to the failure to present defendant's incarceration on death row as a mitigating factor and the failure to advise Petitioner's rights of appeal.

The other issues you have to establish and meet your burden, Mr. McKenna, before we even get to the merits. We are still hearing a motion to dismiss. However, I'm going to put you on notice now that if the motion to dismiss is denied in any respect, you should be ready to proceed on that day on the issues, on the merits. If it's granted, of course, there would be no need to proceed further.

(Emphasis added.) Olausen filed his notice of witnesses on September 27, 2000.

During the telephonic conference on September 28, 2000, the State argued that the petition should be dismissed because the witness list provided by Olausen was not relevant to the State's motion to dismiss, and could not prove the required cause and prejudice to overcome the procedural bar. Rather, the names submitted by counsel could only testify to the alleged ineffectiveness of Olausen's original trial counsel. The district court agreed and noted that "[t]here is nothing in this witness list that you have now faxed to the chambers that reflects a defense of the motion to dismiss." Counsel conceded that he did not address the motion to dismiss in his notice of witnesses and asked the district court for a continuance. The court continued the hearing for 45 minutes. When the hearing resumed, counsel for Olausen made the following statement:

As to the motion to dismiss, we have no witnesses that we wish to call in regard to your making that decision. So we would ask you to just base it on the pleadings, the opposition, the other documents in this case, decide the motion to dismiss without any additional testimonial evidence on our part.

After counsel further failed to even make an offer of proof, the district court granted the State's motion to dismiss. In its order of October 12, 2000, the district court concluded that Olausen failed to demonstrate good cause and prejudice sufficient to overcome the procedural bars. This timely appeal followed.

Olausen contends that the district court erred in dismissing the petition because his first post-conviction counsel was ineffective: (1) for raising issues pertaining only to the penalty phase, and not to the guilt phase; and (2) for depriving him of a direct appeal from the amended judgment of conviction after his resentencing. Olausen argues that, pursuant to Crump v. Warden¹⁰ and Lozada v. State,¹¹ the ineffectiveness of his statutorily-mandated and appointed post-conviction counsel provided good cause to excuse the untimeliness and successiveness of the instant petition.¹² We disagree.

Olausen filed his petition approximately seven years after his resentencing and the filing of the amended judgment of conviction. Thus, Olausen's petition was untimely filed.¹³ Moreover, to the extent that it

¹⁰113 Nev. 293, 934 P.2d 247 (1997).

¹¹110 Nev. 349, 871 P.2d 944 (1994).

¹²Olausen raised several additional claims in his petitions below which he has apparently abandoned on appeal. On appeal, Olausen also argues that the district court erred by requiring him to respond to the State's motion to dismiss before considering the merits of his petition. This contention is without merit, see NRS 34.810(3). Moreover, Olausen did not object below to the district court's request.

¹³See NRS 34.726(1); see also Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133 (1998) (holding that the one-year time period in NRS 34.726(1) runs from issuance of remittitur from a timely direct appeal to this court).

challenged the original guilt phase proceedings, Olausen's petition was successive because he had previously filed a petition for a writ of habeas corpus.¹⁴ Olausen's petition was procedurally barred absent a demonstration of good cause and prejudice.¹⁵ "[G]ood cause necessary to overcome a procedural bar must be some impediment external to the defense."¹⁶ Generally, a lower court's determination regarding the existence of good cause will not be disturbed absent an abuse of discretion.¹⁷

We conclude that the district court did not err in determining that Olausen failed to overcome the procedural bars to his petition. Olausen was given numerous opportunities below to demonstrate that he received ineffective assistance of counsel, and each time he failed to articulate specific factual allegations or present evidence sufficient to justify his claims.¹⁸ Moreover, Olausen presented no evidence to demonstrate that good cause existed to excuse the untimeliness of his petition, and on appeal, he has failed to challenge the district court's findings of no good cause. And finally, this court has stated that "an allegation that trial counsel was ineffective in failing to inform a claimant of the right to appeal from the judgment of conviction . . . does not constitute good cause to excuse the untimely filing of a petition pursuant

¹⁴See NRS 34.810(2).

¹⁵See NRS 34.726(1); NRS 34.810(3).

¹⁶Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998); see also Murray v. Carrier, 477 U.S. 478, 488 (1986).


¹⁷See Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989).


¹⁸See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

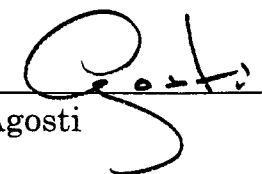
to NRS 34.726.”¹⁹ Therefore, we conclude that Olausen has failed to demonstrate good cause and prejudice sufficient to overcome the procedural bars to his petition.

Having considered Olausen’s contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.²⁰

 _____, C.J.
Young

 _____, J.
Rose

 _____, J.
Agosti

cc: Hon. Connie J. Steinheimer, District Judge
Kenneth J. McKenna
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

¹⁹Harris, 114 Nev. at 959, 964 P.2d at 787; see also Lozada, 110 Nev. at 358, n.5, 871 P.2d at 949, n.5.

²⁰Although Olausen has not been granted permission to file documents in this matter in proper person, see NRAP 46(b), we have received and considered Olausen’s numerous proper person documents and conclude that the relief requested is not warranted. We also deny counsel’s motion for leave to file Olausen’s amended proper person opening brief. We grant Kenneth J. McKenna’s motion for permission to withdraw as counsel for Olausen.