

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARSHALL JOSEPH ANTHONY,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
DON HELLING,
Respondent.

No. 38845

FILED

MAY 15 2002

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

ORDER OF AFFIRMANCE

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

On July 16, 1999, the district court convicted appellant, pursuant to a guilty plea, of two counts of burglary. The district court sentenced appellant to serve two consecutive terms of forty-eight to one hundred and twenty months in the Nevada State Prison. Appellant did not file a direct appeal.

On February 28, 2000, appellant filed a proper person motion to correct an illegal sentence in the district court. The State opposed the motion. On April 20, 2000, the district court denied the motion. This court dismissed appellant's subsequent appeal.¹

¹Anthony v. State, Docket No. 36104 (Order of Affirmance, October 9, 2001).

On June 21, 2000, appellant filed a proper person post-conviction petition for a writ of habeas corpus raising three claims of ineffective assistance of counsel in the district court. The district court appointed counsel to represent appellant during the post-conviction proceedings. The State filed a motion to dismiss, arguing that the second claim of ineffective assistance of counsel should be dismissed and that an evidentiary hearing should be conducted on the other two claims. Appellant's post-conviction counsel filed a response. In that response, appellant abandoned his request to withdraw his plea based on ineffective assistance of counsel and instead requested a new sentencing hearing. On September 26, 2000, the district court entered an order dismissing one ground in appellant's petition and denying appellant's request for a new sentencing hearing. This court dismissed appellant's subsequent appeal as prematurely filed because the district court's order did not resolve the other two claims in appellant's petition.² On March 27, 2001, the district court dismissed appellant's petition in its entirety pursuant to a stipulation by the parties to dismiss the remaining claims. This court affirmed the district court's order dismissing the petition.³

²Anthony v. Warden, Docket No. 36941 (Order Dismissing Appeal, January 16, 2001).

³Anthony v. State, Docket No. 37657 (Order of Affirmance, May 29, 2001).

On July 6, 2001, appellant filed a second proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed an answer to the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On November 14, 2001, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition approximately two years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.⁴ Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.⁵ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁶

In an attempt to excuse his procedural defects, appellant claimed that he received ineffective assistance of post-conviction counsel. Specifically, he claimed his post-conviction counsel erroneously stipulated to and abandoned the first and third claims raised in appellant's first habeas corpus petition. Appellant claimed that he was never afforded an

⁴See NRS 34.726(1); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-1134 (1998) (holding that the one year period for filing a post-conviction habeas corpus petition begins to run from the issuance of the remittitur from a timely direct appeal or from entry of the judgment of conviction if no direct appeal is taken.).

⁵See NRS 34.810(2).

⁶See NRS 34.726(1); NRS 34.810(3).

opportunity to review post-conviction counsel's response before it was filed in the district court and that he did not agree with counsel not to pursue an evidentiary hearing on claims one and three. We conclude that the district court did not err in determining that appellant had failed to demonstrate adequate cause. Appellant did not have the right to counsel at the time he filed his first petition, and therefore he did not have the right to the effective assistance of counsel in that proceeding.⁷ "[H]ence, 'good cause' cannot be shown based on an ineffectiveness of post-conviction counsel claim."⁸

Next, appellant claimed that he had good cause because he received ineffective assistance of counsel at trial and at sentencing. We conclude that the district court did not err in determining that appellant failed to demonstrate adequate cause.⁹ Appellant failed to demonstrate how the ineffective assistance of counsel at trial and at sentencing prevented him from pursuing his claims in his first timely habeas corpus petition.

Finally, he claimed that he had good cause because the district court erroneously dismissed his petition without conducting an evidentiary hearing on two of his claims. We conclude that the district

⁷McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996).

⁸Id. at 165, 912 P.2d at 258.

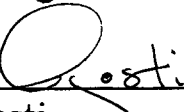
⁹Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

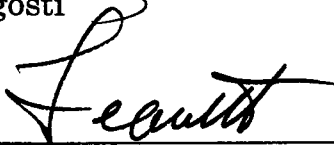
court did not err in determining that appellant failed to demonstrate adequate cause.¹⁰ The district court dismissed the petition without conducting an evidentiary hearing pursuant to a stipulation by the parties.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.¹¹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹²


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

¹⁰Lozada, 110 Nev. 349, 871 P.2d 944.

¹¹Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹²We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

cc: Hon. Janet J. Berry, District Judge
Attorney General/Carson City
Washoe County District Attorney
Marshall Joseph Anthony
Washoe District Court Clerk