

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH KRUSE,  
Appellant,  
vs.  
WARDEN, ELY STATE PRISON, E.K.  
MCDANIEL,  
Respondent.

No. 39736

FILED

JUN 20 2003

JUANETTE M. BLOOM  
CLERK OF SUPREME COURT  
CLERK

ORDER OF AFFIRMANCE

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

On September 26, 1989, the district court convicted appellant, pursuant to a jury verdict, of one count of attempted murder with the use of a deadly weapon, one count of being an accessory to a felony, and one count of being an ex-felon in possession of a firearm. The district court sentenced appellant to serve terms totaling thirty-six years in the Nevada State Prison. This court dismissed appellant's appeal from his judgment of conviction.<sup>1</sup> The remittitur issued on November 13, 1990.

Subsequently, appellant filed a proper person petition for post-conviction relief in the district court. After appointing counsel and

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<sup>1</sup>Kruse v. State, Docket No. 20667 (Order Dismissing Appeal, October 24, 1990).

conducting an evidentiary hearing, the district court denied appellant's petition. This court dismissed appellant's subsequent appeal.<sup>2</sup>

On February 28, 1994, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court denied appellant's petition. This court dismissed appellant's subsequent appeal.<sup>3</sup>

On January 24, 1995, appellant filed a proper person motion to vacate judgment in the district court. The district court denied appellant's motion. This court dismissed appellant's subsequent appeal.<sup>4</sup>

On June 29, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State filed a motion to dismiss the petition. Appellant filed an opposition. 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 May 21, 2002, the district court dismissed appellant's petition. This appeal followed.

Appellant filed his petition more than ten and one-half years after this court issued the remittitur from his direct appeal. Thus,

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<sup>2</sup>Kruse v. State, Docket No. 23642 (Order Dismissing Appeal, September 29, 1993).

<sup>3</sup>Kruse v. State, Docket No. 25799 (Order Dismissing Appeal, December 5, 1997).

<sup>4</sup>Kruse v. State, Docket No. 26784 (Order Dismissing Appeal, March 27, 1998).

appellant's petition was untimely filed.<sup>5</sup> Moreover, appellant's petition was successive because he had previously filed a petition for post-conviction relief, a post-conviction petition for a writ of habeas corpus and a motion to vacate judgment.<sup>6</sup> Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>7</sup>

In an attempt to excuse his procedural defects, appellant alleged that: (1) his trial counsel was sent to prison shortly after appellant's conviction and was not available for an evidentiary hearing until counsel's release in 1992, (2) he was stabbed in prison, (3) he was denied access to counsel, the law library and legal resources during the time he was in lockdown until 1994, (4) the same attorney represented him in both his direct appeal and his first petition for post-conviction relief, (5) he received misinformation relating to post-conviction remedies from his post-conviction counsel and the post-conviction forms available at the prison, and (6) he spent time in federal court litigating a federal habeas corpus petition. Appellant further argued that the deadly weapon enhancement violated due process and the United States Supreme Court's holding in Apprendi v. New Jersey.<sup>8</sup> Finally, appellant claimed that he was actually innocent.

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<sup>5</sup>See NRS 34.726(1).

<sup>6</sup>See NRS 34.810(1)(b)(2); NRS 34.810(2).

<sup>7</sup>See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

<sup>8</sup>530 U.S. 466 (2000).

Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate adequate cause to excuse his procedural defects.<sup>9</sup> Further, the decision in Apprendi does not apply retroactively to appellant and therefore, the decision in Apprendi does not constitute good cause to excuse the procedural defects.<sup>10</sup> Finally, appellant failed to demonstrate a

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<sup>9</sup>See Murray v. Carrier, 477 U.S. 478, 488 (1986) (holding that good cause may be established if the petitioner demonstrates that the factual or legal basis for the claim was not reasonably available prior to the filing of the procedurally defaulted petition); McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996) (holding that an ineffective assistance of post-counsel claim is not good cause absent a statutory or constitutional right to post-conviction counsel); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994) (holding that good cause must be an impediment external to the defense); Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989) (holding that prosecution of a federal habeas corpus petition is not good cause); Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that a petitioner's limited intelligence or poor assistance in framing issues is not good cause).

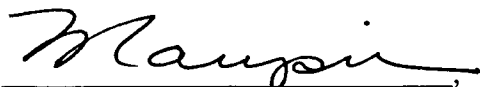
<sup>10</sup>Colwell v. State, 118 Nev. \_\_\_, \_\_\_, 59 P.3d 463, 469-72 (2002) (discussing retroactive application of new rules of criminal procedure in collateral proceedings); see also Rees v. Hill, 286 F.3d 1103, 1104 (9th Cir. 2002) (holding that because the decision in Apprendi does not apply retroactively to cases on initial collateral review it does not meet the requirements for filing a second federal petition for habeas relief); United States v. Sanchez-Cervantes, 282 F.3d 664, 669-71 (9th Cir. 2002) (holding that the new rule of criminal procedure announced in Apprendi does not apply retroactively on initial collateral review), cert. denied, 123 S.Ct. 48 (2002).

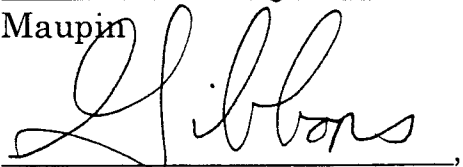
fundamental miscarriage of justice would result from a failure to consider his petition.<sup>11</sup>

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and

ORDER the judgment of the district court AFFIRMED.<sup>12</sup>

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Peter I. Breen, District Judge  
Kenneth Kruse  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>11</sup>See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

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