IN THE SUPREME COURT OF THE STATE OF NEVADA

WES JOSEPH PERTGEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40049

FILED

DEC 16 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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

On January 28, 1987, the district court convicted Pertgen, pursuant to a jury verdict, of one count each of first-degree murder with use of a deadly weapon, first-degree kidnapping with use of a deadly weapon, sexual assault with use of a deadly weapon, attempted murder with use of a deadly weapon, and possession of a firearm by an ex-felon. Pertgen was sentenced to death for the murder count, and also to four consecutive life prison terms without the possibility of parole, two consecutive 20-year prison terms, and a consecutive 6-year prison term. Pertgen appealed, and this court affirmed the judgment of conviction and sentence.[1]

On September 6, 1989, Pertgen, with the assistance of counsel, filed a post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. After conducting an evidentiary hearing, the district court denied Pertgen's petition. Pertgen appealed. This court affirmed the district court order as to claims involving the guilt

[1]Pertgen v. State, 105 Nev. 282, 774 P.2d 429 (1989).

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phase. However, this court reversed the district court order as to claims involving the penalty phase and, on May 31, 1994, remanded Pertgen's case to the district court with instructions to conduct a new penalty hearing.[2] Pertgen then filed a petition for rehearing, which this court denied.[3]

On September 28, 1995, Pertgen, with the assistance of counsel, filed a post-conviction motion for a new trial. The State opposed the motion. After conducting a hearing, the district court denied the motion. Pertgen appealed, and this court dismissed the appeal.[4] Pertgen filed a petition for rehearing, which this court denied.[5]

On remand, after numerous continuances and the appointment of several different attorneys, on October 16, 2000, Pertgen entered a written stipulation with the State. Pursuant to the stipulation, in exchange for the State's promise to withdraw its notice of intent to seek the death penalty, Pertgen waived his right to a new penalty hearing before a jury and agreed to be sentenced by the judge. The sentencing hearing occurred on March 19, 2001. On April 12, 2001, the district court

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[2]Pertgen v. State, 110 Nev. 554, 875 P.2d 361 (1994) (concluding that Pertgen received ineffective assistance of counsel because his trial and appellate counsel failed to challenge two aggravating factors -- "depravity of mind" and "torture," which were unconstitutionally vague), abrogated by Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001).

[3]Pertgen v. State, Docket No. 21141 (Order Denying Rehearing, July 22, 1994).

[4]Pertgen v. State, Docket No. 27993 (Order Dismissing Appeal, December 20, 1996).

[5]Pertgen v. State, Docket No. 27993 (Order Denying Rehearing, November 10, 1997).

entered an amended judgment of conviction, resentencing Pertgen on the murder count to two consecutive prison terms of life without the possibility of parole.

On March 21, 2002, Pertgen filed a proper person post-conviction petition for a writ of habeas corpus. In the petition, Pertgen raised numerous allegations of ineffective assistance of counsel. The State opposed the petition, and Pertgen filed a reply to the State's opposition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to appoint counsel to represent Pertgen or to conduct an evidentiary hearing. On August 2, 2002, the district court denied Pertgen's petition, ruling that it was procedurally barred. Pertgen filed the instant appeal.[6] We conclude the district court did not err in ruling that Pertgen failed to overcome his procedural default.[7]

Pertgen's claims of ineffective assistance of counsel involving the guilt phase were successive because, in 1989, he had previously filed a post-conviction petition for a writ of habeas corpus raising those same

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[6]Pertgen also filed several proper person motions in the district court, including a motion for an evidentiary hearing, motion to appoint an investigator and for excess investigative fees, motion for an order allowing juror interviews, motion for counsel, and motion for an extension of time to supplement the petition and several motions for discovery. The district court denied Pertgen's motions. To the extent that Pertgen appeals the district court's denial of those motions, we conclude that Pertgen has failed to show that the district court erred.

[7]Although we note that a claim of ineffective assistance of counsel involving the resentencing would not have been procedurally barred, we conclude that Pertgen has failed to show that his counsel was ineffective with regard to the resentencing. See Strickland v. Washington, 466 U.S. 668 (1984).

claims.[8] Further, because the State specifically pleaded laches, Pertgen was required to overcome the presumption of prejudice to the State.[9] Finally, Pertgen's claims of ineffective assistance of counsel involving the guilt phase were barred by the doctrine of the law of the case because this court has previously considered and rejected the merits of Pertgen's claims of ineffective assistance of counsel at the guilt phase when it affirmed in part the district court order denying Pertgen's 1989 post-conviction habeas petition.[10] Similarly, Pertgen's claims of ineffective assistance of counsel involving the original penalty phase of his trial are moot because Pertgen was granted a new penalty phase. Accordingly, Pertgen's petition was procedurally barred absent a demonstration of good cause and prejudice.[11]

In an attempt to excuse his procedural defects, Pertgen argued that his trial counsel, appellate counsel, and post-conviction counsel were ineffective.[12] The district court properly concluded that Pertgen's claims raised in the petition were procedurally barred because his allegations of ineffective assistance of counsel are not an impediment external to the defense sufficient to overcome a procedural default.[13] Moreover, Pertgen

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[8]See NRS 34.810(1)(b)(2); NRS 34.810(2).

[9]See NRS 34.800(2).

[10]See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

[11]See NRS 34.810(1)(b)(2); NRS 34.810(3).

[12]To the extent that Pertgen argues that his claims of ineffective assistance of counsel should be considered on the merits based on newly discovered evidence of his insanity at the time of trial, we reject that contention. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[13]See Hathaway v. State, 119 Nev. ___, ___, 71 P.3d 503, 506 (2003) ("in order [for a claim of ineffective assistance of counsel] to constitute

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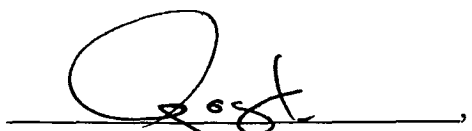
has failed to overcome the presumption of prejudice to the State. Based upon our review of the record on appeal, we conclude that Pertgen failed to demonstrate good cause and prejudice to excuse his procedural default.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Pertgen is not entitled to relief and that briefing and oral argument are unwarranted.[14] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Agosti

_____, J.
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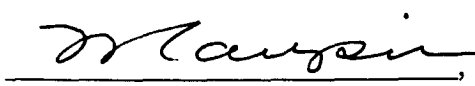

_____, J.
Maupin

cc: Hon. Lee A. Gates, District Judge
Wes Joseph Pertgen
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted"); 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).

[14]See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).