

IN THE SUPREME COURT OF THE STATE OF NEVADA

ESTEBAN HERNANDEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40117

**FILED**

JUN 25 2003

ORDER OF AFFIRMANCE

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

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 October 12, 1999, the district court convicted appellant, pursuant to a guilty plea, of first degree murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole. No direct appeal was taken.

On November 12, 1999, appellant, through counsel, filed a post-conviction petition for a writ of habeas corpus in the district court. On December 29, 1999, the district court denied appellant's petition. This court affirmed the order of the district court.<sup>1</sup>

On March 21, 2000, while his appeal was pending from the order denying his petition, appellant filed a proper person post-conviction

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<sup>1</sup>Hernandez v. State, Docket No. 35462 (Order of Affirmance, November 21, 2000).

petition for a writ of habeas corpus in the district court. Counsel who represented appellant in the 1999 petition filed an amended petition. The State opposed the petition. On October 16, 2000, the district court denied appellant's petition. This court affirmed the order of the district court.<sup>2</sup>

On June 10, 2002, appellant filed in proper person a third post-conviction petition for a writ of habeas corpus in the district court. The State opposed 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 August 29, 2002, the district court dismissed appellant's petition. This appeal followed.

Appellant filed his petition approximately two and one-half years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.<sup>3</sup> Moreover, appellant's petition was successive because he had previously filed two post-conviction petitions for writs of habeas corpus.<sup>4</sup> Thus, appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.<sup>5</sup>

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<sup>2</sup>Hernandez v. State, Docket No. 36916 (Order of Affirmance, November 15, 2001).

<sup>3</sup>See NRS 34.726(1).

<sup>4</sup>See NRS 34.810(2). Appellant's petition raised nearly identical claims to those already raised in the prior proceedings. The merits of the claims raised in appellant's first petition were addressed in the prior proceedings. To the extent that appellant raised any new claims not previously addressed on the merits in the prior proceedings, these claims are an abuse of the writ.

<sup>5</sup>See NRS 34.726(1); NRS 34.810(3).

In an attempt to excuse his procedural defects, appellant argued that he received ineffective assistance of counsel in the prior proceedings. Appellant further claimed that he was deprived of a direct appeal without his consent. 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. 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.<sup>6</sup> "[H]ence, 'good cause' cannot be shown based on an ineffectiveness of post-conviction counsel claim."<sup>7</sup> An allegation that appellant was deprived of a direct appeal is not good cause to excuse the procedural defects.<sup>8</sup> Therefore, we conclude that the district court did not err in denying appellant's requests for the appointment of counsel and for an evidentiary hearing, and we affirm the order of the district court.

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<sup>6</sup>See NRS 34.750; McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996); see also Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997).


<sup>7</sup>McKague, 112 Nev. at 165, 912 P.2d at 258.

<sup>8</sup>See Harris v. Warden, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998). Appellant failed to demonstrate that his appeal deprivation claim was not reasonably available to him in the prior proceedings. See Pellegrini v. State, 117 Nev. 860, 886-87, 34 P.3d 519, 537 (2001); see also Murray v. Carrier, 477 U.S. 478, 488 (1986).

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.<sup>9</sup> Accordingly, we  
ORDER the judgment of the district court AFFIRMED.

 J.  
Shearing

 J.  
Leavitt

 J.  
Becker

cc: Hon. Joseph T. Bonaventure, District Judge  
Esteban Hernandez  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>9</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).