

IN THE SUPREME COURT OF THE STATE OF NEVADA

PEDRO OVANDO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40815

FILED

NOV 07 2003

ORDER OF AFFIRMANCE

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

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 5, 1990, the district court convicted appellant, pursuant to a jury trial, of one count of attempted murder with the use of a deadly weapon. The district court sentenced appellant to serve two consecutive terms of twenty years in the Nevada State Prison. This court dismissed appellant's appeal from his judgment of conviction.¹ The remittitur issued on January 15, 1991.

On August 28, 1998, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. On September 15, 1998, the district court denied the petition. This court affirmed the order of the district court on appeal.²

¹Ovando v. State, Docket No. 21303 (Order Dismissing Appeal, December 27, 1990).

²Ovando v. State, Docket No. 34297 (Order of Affirmance, February 22, 2001).

On October 22, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. 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 January 16, 2003, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition more than eleven years after this court issued the remittitur from his direct appeal. Thus, appellant's petition was untimely filed.³ Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus.⁴ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁵ A petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.⁶

In an attempt to excuse his procedural defects, appellant argued that he was not aware of state post-conviction proceedings until after he was appointed an attorney in federal court. Appellant argued that he was not informed that he should raise all available claims in his first habeas corpus petition and that his federal habeas corpus attorney, who assisted him in preparing his state habeas corpus petition, did not review his files to ascertain the potential claims in his first habeas corpus

³NRS 34.726(1).

⁴NRS 34.810(1)(b)(2); NRS 34.810(2).

⁵NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3).

⁶Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

petition. Appellant further claimed that he was ignorant of law and procedures, he was unable to speak English, and he lacked trained legal assistance. Appellant claimed that he was actually innocent of the offense of attempted murder with the use of a deadly weapon.

Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's petition. Appellant failed to demonstrate adequate cause to excuse his procedural defects.⁷ Appellant's first habeas corpus petition was untimely, and thus, any errors relating to the first habeas corpus petition did not explain the entirety of appellant's eleven year delay. Appellant's claim that he received deficient assistance in preparing his first habeas corpus petition is not good cause to excuse his procedural defects.⁸ Likewise, a petitioner's limited intelligence and poor assistance from inmate law clerks does not rise to the level of good cause.⁹ Finally, appellant failed to demonstrate that failure to consider his petition would result in a fundamental miscarriage of justice because appellant's claim of actual innocence was not supported by the record. Appellant's claim of innocence was no more than a rehashing of the testimony presented to the jury during his trial. It was for the jury to determine the weight and credibility to give conflicting testimony.¹⁰ Therefore, we affirm the order of the district court denying appellant's petition as procedurally barred.

⁷See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).


⁸See Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997); McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996).


⁹See Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988).


¹⁰See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

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.
Rose


_____, J.
Leavitt


_____, J.
Maupin

cc: Hon. Donald M. Mosley, District Judge
Pedro Ovando
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹¹See Lockett 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.