

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARL OTIS SULLIVAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42185

FILED

MAR 05 2004

ORDER OF AFFIRMANCE

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

This is an appeal from a district court order denying appellant Carl Otis Sullivan's post-conviction petition for a writ of habeas corpus.

On February 13, 1998, Sullivan was convicted, pursuant to a guilty plea, of one count each of robbery with the use of a deadly weapon (count I), burglary (count II), and possession of stolen property (count III). The district court sentenced Sullivan to serve a prison term of 33 to 156 months for count I, a consecutive prison term of 22 to 96 months for count II, and a consecutive prison term of 22 to 96 months for count III. Sullivan filed a direct appeal and this court affirmed the judgment of conviction, but remanded the case for the limited purpose of correcting the judgment of conviction to vacate the deadly weapon enhancement.¹ On January 3, 2000, the district court entered a corrected judgment of conviction. The remittitur issued on January 10, 2000.

On May 10, 2001, Sullivan filed a proper person post-conviction petition for a writ of habeas corpus. The State moved to dismiss the petition, and the district court appointed counsel to represent Sullivan. Counsel for Sullivan filed an opposition to the motion to dismiss

¹Sullivan v. State, 115 Nev. 383, 990 P.2d 1258 (1999).

and a supplement to the petition. Thereafter, the parties realized that the district court had no jurisdiction to enter the corrected judgment of conviction on January 3, 2000, since the remittitur in the direct appeal had not yet issued. Consequently, on December 11, 2001, the district court entered an order vacating the corrected judgment and a new amended judgment of conviction. Notably, the parties then stipulated that Sullivan's petition should be treated as timely because it was filed within one year of the amended judgment. After conducting an evidentiary hearing on the merits of Sullivan's claims of ineffective assistance of counsel, the district court denied the petition. Sullivan filed the instant appeal.

In this case, the parties apparently stipulated to disregard the statutory procedural default rules believing that the entry of the amended judgment of conviction restarted the one-year time period set forth in NRS 34.726. We cannot give effect to the parties' stipulation. This court has stated "that a stipulation by the parties cannot empower a court to disregard the mandatory procedural default rules."² The stipulation is therefore invalid.

Additionally, we conclude that, despite the entry of the amended judgment of conviction, Sullivan's petition was untimely because it was filed approximately fourteen months after this court issued the remittitur in the direct appeal.³ Although the original judgment of

²State v. Haberstroh, 119 Nev. ___, ___, 69 P.3d 676, 681 (2003); see also Pellegrini v. State, 117 Nev. 860, 886 & n.116, 34 P.3d 519, 536 & n.116 (2001) (disallowing the discretionary application of a procedural bar).

³See NRS 34.726(1).

conviction was amended, the time period set forth in NRS 34.726(1) does not restart for all conceivable claims merely because a judgment of conviction is amended. Rather, claims that could have been previously raised are untimely and, therefore, subject to the procedural default rules.⁴ Here, Sullivan's claims involving trial and appellate counsel's effectiveness and the validity of his guilty plea could have been previously raised in a petition filed by January 10, 2001, within one year after this court issued the remittitur in the direct appeal. Accordingly, Sullivan's petition was procedurally barred absent a showing of good cause for the delay and prejudice.

As good cause for the delay, Sullivan alleged that his attorney did not send him a copy of the remittitur or the corrected judgment and, also, did not inform him that he had one year from the issuance of the remittitur in the direct appeal to seek post-conviction relief. We conclude that Sullivan failed to establish good cause to overcome the procedural default because he failed to allege an impediment external to the defense.⁵ Accordingly, Sullivan's petition is procedurally barred, and we explicitly conclude that the petition should have been denied on that basis.⁶

⁴See *id.*; see generally Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998) (recognizing that the purpose of the statutory time limit set forth in NRS 34.726(1) is to prevent a petitioner from abusing the post-conviction remedies by filing habeas petitions in perpetuity).

⁵See Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995) (holding that trial counsel's failure to turn over case files to a petitioner is not good cause to overcome a procedural default); Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994).

⁶See generally Harris v. Reed, 489 U.S. 255, 263 (1989) (holding that procedural default does not bar federal review of claim on the merits

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We note, however, that the district court correctly determined that Sullivan's petition lacked merit, and we affirm the district court's ruling on that separate, independent ground.⁷ On appeal, Sullivan claims that the district court erred in denying his petition because his trial counsel was ineffective for failing to: (1) investigate Sullivan's diminished capacity or voluntary intoxication at the time of the charged crimes; (2) object to prejudicial victim impact testimony at sentencing; and (3) present mitigating evidence and evidence on restitution at sentencing. Additionally, Sullivan contends that trial and appellate counsel were ineffective for failing to object to the criminal charges as redundant.⁸ Finally, Sullivan contends that his guilty plea was not knowing and voluntary because his trial counsel promised him concurrent sentences.

Our review of the record on appeal indicates that Sullivan's guilty plea was knowing and voluntary. Sullivan signed a written plea agreement and was thoroughly canvassed on the sentencing consequences

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unless state court rendering judgment relied "clearly and expressly" on procedural bar) (citation omitted).

⁷Id. at 264 n.10 (holding that as long as the state court explicitly invokes a state procedural bar, "a state court need not fear reaching the merits of a federal claim in an alternative holding").

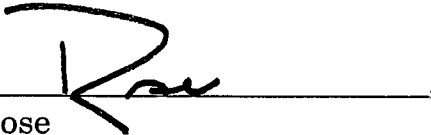
⁸Sullivan contends that the burglary, possession of stolen property, and robbery charges "arose out of one incident, with the same items of personal property at issue." We note, however, that the robbery count involved the theft of the victim's luxury vehicle, the stolen property count involved the theft of the victim's personal items, including "three mink coats, a camera, a compact disc player, a video cassette recorder and miscellaneous jewelry," and the burglary count involved the felonious entry into the victim's home. The three charges did not involve a single offense and therefore were not redundant. See Bedard v. State, 118 Nev. 410, 48 P.3d 46 (2002).

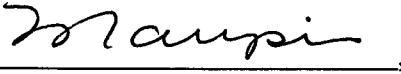
of the guilty plea. Moreover, after hearing testimony from both Sullivan and trial counsel at the post-conviction hearing, the district found that Sullivan was not prejudiced by his trial counsel's allegedly deficient investigation or allegedly deficient performance at sentencing. We conclude that Sullivan has failed to show that the district court's factual findings are not supported by substantial evidence or that the district court erred as a matter of law.⁹

Having considered Sullivan's contentions and concluded that the lack merit, we

ORDER the judgment of the district court AFFIRMED.¹⁰


Shearing, C.J.


Rose, J.


Maupin, J.

⁹See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

¹⁰We have reviewed all documents that Sullivan has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that Sullivan has attempted to present claims or facts in those submissions which were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. James W. Hardesty, District Judge
Jill I. Greiner
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk