

IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL HOWARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42593

FILED

DEC 01 2004

ORDER OF AFFIRMANCE

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

This is an appeal from an order of the district court denying appellant Samuel Howard's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

In 1983, the district court convicted Howard, pursuant to a jury verdict, of murder and two counts of robbery with a deadly weapon. The jury subsequently sentenced Howard to death. On December 15, 1986, this court affirmed Howard's conviction and his death sentence.¹ The remittitur issued on February 12, 1988.

On October 28, 1987, Howard filed his first petition for post-conviction relief with the district court, alleging ineffective assistance of counsel. The district court conducted an evidentiary hearing, found that Howard's counsel acted effectively, and denied Howard's petition. This court affirmed the district court's decision.² The remittitur issued on February 14, 1991.

On May 24, 1988, Howard petitioned for a writ of habeas corpus in federal district court. After determining that Howard had not

¹Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986).

²Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990).

exhausted his remedies in state courts, the federal district court dismissed Howard's petition without prejudice.

On December 16, 1991, Howard filed his second petition for post-conviction relief with the district court. He entitled this petition "Amended Petition for Post-Conviction Relief" and stated that it was being brought pursuant to an order of the federal district court. On July 7, 1992, the district court denied Howard's petition after determining that his claims had either been decided in prior proceedings or waived as a matter of law. On March 19, 1993, this court dismissed Howard's appeal.³ The remittitur issued on October 28, 1993.

On May 1, 1991, Howard again petitioned for a writ of habeas corpus in federal district court. The record before this court indicates that Howard's petition was amended at least twice over the course of several years and that the federal district court stayed its consideration of Howard's petition pending exhaustion of his remedies in state courts.

On December 20, 2002, Howard filed a petition for habeas relief, his third post-conviction petition, with the district court; however, he did not verify it until April 3, 2003. On October 23, 2003, the district court dismissed Howard's habeas petition on procedural grounds, finding that: (1) the petition was successive because it failed to allege grounds for relief which were not and could not have been raised on direct appeal, (2) the petition was time-barred because it was filed more than nine years after this court issued its last remittitur, (3) the petition was barred by laches, (4) Howard failed to show good cause and actual prejudice to

³Howard v. State, Docket No. 23386 (Order Dismissing Appeal, March 19, 1993).

excuse his procedural defaults, and (5) Howard was not entitled to an evidentiary hearing.

In his appeal, Howard focuses on the procedural bars to his petition. He does not challenge the district court's determination that his petition was also barred by laches under NRS 34.800 and the equitable doctrine of laches.⁴ The procedural rules pertinent to this case are as follows. NRS 34.726(1) provides in part that absent a showing of good cause for delay, a petition challenging the validity of a judgment or sentence must be filed within one year after this court issues its remittitur on direct appeal.⁵ Good cause requires the petitioner to demonstrate that the delay was not his fault and that dismissal of the petition will unduly prejudice him.⁶

NRS 34.810(2) provides that a second or successive petition must be dismissed if "it fails to allege new or different grounds for relief and . . . the prior determination was on the merits or, if new and different grounds are alleged, . . . the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."⁷ A petitioner

⁴We note that the district court erred in concluding that the petition was barred by the equitable doctrine of laches. This doctrine does not apply to petitions brought under NRS Chapter 34. Clem v. State, 119 Nev. 615, 620 n.22, 81 P.3d 521, 525 n.22 (2003).

⁵In this case, because NRS 34.726 was enacted after Howard was convicted, the one-year deadline extended from January 1, 1993, the effective date of NRS 34.726. See Pellegrini v. State, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001).

⁶NRS 34.726(1).

⁷See also NRS 34.810(1)(b).

can avoid dismissal if he meets the burden of pleading and proving specific facts that demonstrate good cause for his failure to present a claim before, or for presenting a claim again, and actual prejudice.⁸ To show good cause, a petitioner must demonstrate that an impediment external to the defense prevented him from complying with procedural default rules.⁹ Actual prejudice requires a petitioner to demonstrate "not merely that the errors of trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions."¹⁰ Absent a showing of good cause to excuse procedural default, this court will consider claims only if the petitioner demonstrates that failure to consider them will result in a fundamental miscarriage of justice.¹¹

Finally, NRS 34.800(1) provides that a court may dismiss a petition if delay in its filing either prejudices the State "in responding to the petition, unless the petitioner shows that the petition is based upon grounds of which he could not have had knowledge by the exercise of reasonable diligence" before the prejudice arose, or prejudices the State "in its ability to conduct a retrial of the petitioner, unless the petitioner demonstrates that a fundamental miscarriage of justice has occurred." If long enough, delay leads to a presumption of prejudice: "A period

⁸NRS 34.810(3).

⁹See Crump v. Warden, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997).

¹⁰Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)).

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

exceeding 5 years between . . . a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction creates a rebuttable presumption of prejudice to the state."¹²

Howard first contends that NRS 34.726 does not apply because the State failed to show that the delay in filing the petition was his fault. He further claims that the record was barren of any evidence from which the district court could conclude that the delay in filing the petition was his fault. However, it is the petitioner who has the burden to demonstrate to the satisfaction of the district court that the delay was not his fault and that he will be unduly prejudiced.¹³ Howard failed to meet his burden. Therefore, the district court did not err in dismissing his petition on this ground.

Second, Howard contends that during the litigation of his first post-conviction petition, the district court failed to administer the admonishment required under former NRS 177.380(3).¹⁴ He also claims that during the litigation of his second petition he did not see the amended petition, his counsel did not verify the petition, and the district court again failed to give the NRS 177.380(3) admonishment. For these reasons, Howard suggests that the delay in filing his current petition was not his

¹²NRS 34.800(2).

¹³NRS 34.726(1).

¹⁴See 1987 Nev. Stat., ch. 539, § 34(3), at 1228-29 (providing that, in a death penalty case, "[t]he court shall inform the petitioner and his counsel that all claims which challenge the conviction or imposition of the sentence must be joined in a single petition and that any matter not
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fault. We note that in his first petition Howard stated that he was "aware that all claims which challenge the conviction or imposition of sentence must be joined in a single petition and that any matter not included in the petition will not be considered in a subsequent proceeding." We conclude that Howard was not prejudiced by the district court's failure to give the admonishment required by NRS 177.380(3) and that Howard's claims of not seeing or verifying the amended petition do not demonstrate adequate cause to excuse his delay in filing this petition.¹⁵ Therefore, the district court did not err in dismissing his petition on this ground.

Third, Howard contends that the delay in filing his current petition resulted from the failure of his previous attorneys to properly litigate his first and second post-conviction petitions and therefore the delay was not his fault. Howard filed his first and second petitions at a time when he had no statutory right to post-conviction counsel.¹⁶ We have previously held that "[w]here there is no right to counsel there can be no deprivation of effective assistance of counsel and hence, 'good cause' cannot be shown based on an ineffectiveness of post-conviction counsel."¹⁷

... continued

included in the petition will not be considered in a subsequent proceeding").

¹⁵See Pellegrini, 117 Nev. at 886, 34 P.3d at 537 ("To show 'good cause,' a petitioner must demonstrate that an impediment external to the defense prevented him from raising his claims earlier.").

¹⁶See 1987 Nev. Stat., ch. 539, § 42 at 1230 (providing that a district court may appoint counsel for an indigent petitioner); NRS 218.530.

¹⁷Pellegrini, 117 Nev. at 887-88, 34 P.3d at 537-38 (quoting McKague v. Warden, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996)).

Therefore, the district court did not err in dismissing his petition on this ground.

Fourth, Howard contends that the failure to include claims in his first or second post-conviction petitions predates the enactment of NRS 34.726 and therefore NRS 34.726 does not bar consideration of his third petition. The provisions of NRS 34.726 apply to all petitions filed on or after January 1, 1993, which challenge the validity of a judgment or sentence.¹⁸ In Pellegrini v. State, we noted that "[t]he legislature cannot extinguish an existing cause of action by enacting a new limitation period without first providing a reasonable time after the effective date of the new limitation period in which to initiate the action."¹⁹ We held "that for purposes of determining the timeliness of these successive petitions pursuant to NRS 34.726, assuming the laches bar does not apply, it is both reasonable and fair to allow petitioners one year from the effective date of the amendment to file any successive habeas petitions."²⁰ Howard's petition was not timely filed under this narrow exception to the requirements of NRS 34.726. Therefore, the district court did not err in dismissing his petition on this ground.

Fifth, Howard contends that prior to this court's decision in Pellegrini there was no authority to suggest NRS 34.726 applied to successive petitions. He claims that this lack of authority means that there was insufficient notice to satisfy the due process requirements of the federal constitution. And he argues that applying NRS 34.726 to petitions

¹⁸Id. at 874, 34 P.3d at 529.

¹⁹Id. (quoting Brown v. Angelone, 150 F.3d 370, 373 (4th Cir. 1998)).

²⁰Id. at 874-75, 34 P.3d at 529.

that were filed before Pellegrini was decided violates due process. However, the plain meaning of the words in NRS 34.726 provided Howard with adequate notice of the procedural requirement that post-conviction petitions must be timely filed. Therefore, the district court did not err in dismissing his petition on this ground.

Sixth, Howard contends that Pellegrini violates due process and equal protection because it ignored principles of statutory construction, resulting in the unanticipated creation and retroactive application of a new default rule. Howard claims that a statute should be interpreted consistent with legislative intent even if the plain language appears to contradict the interpretation. In Pellegrini we applied the proper principles of statutory construction, and we did not create a new default rule.²¹ Therefore, the district court did not err in dismissing his petition on this ground.

Seventh, Howard contends that he was denied due process and equal protection of law because Nevada's procedural bars have been applied inconsistently and do not provide adequate notice of when they will be applied or excused. We disagree. "[W]e have been consistent in requiring good cause and actual prejudice to overcome the statutory procedural bars,"²² and the requirements for overcoming the procedural

²¹Id. at 873-74, 34 P.3d at 528-29 (observing that "words in a statute will generally be given their plain meaning, unless such a reading violates the spirit of the act, and when a statute is clear on its face, courts may not go beyond the statute's language to consider legislative intent," and concluding that "the plain language of . . . [NRS 34.726] indicates that it applies to all petitions filed after its effective date of January 1, 1993").

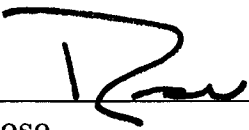
²²Id. at 886, 34 P.3d at 536.

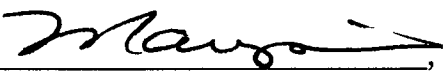
bars are plainly presented in NRS 34.726(1) and NRS 34.810(3). Therefore, Howard had adequate notice of when procedural bars apply, and the district court did not err in dismissing his petition on this ground.

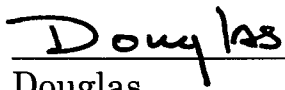
Finally, Howard contends that he was entitled to an evidentiary hearing because he raised claims under the due process and equal protection clauses of the Fourteenth Amendment. Howard was not entitled to an evidentiary hearing because he failed to allege a sufficient basis to overcome the procedural bars of NRS 34.726, NRS 34.800, and NRS 34.810.²³ Therefore, the district court did not err in dismissing his petition without a hearing.

Having concluded that Howard failed to demonstrate that the district court erred in denying his post-conviction petition for a writ of habeas corpus, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

²³See NRS 34.770(2).

cc: Hon. Jackie Glass, District Judge
Patricia Erickson
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
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