

IN THE SUPREME COURT OF THE STATE OF NEVADA

KURT SEBEARN WALLERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45947

FILED

DEC 21 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
J. Rehder
CLERK

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Third Judicial District Court, Lyon County; Archie E. Blake, Judge.

On July 26, 1994, the district court convicted appellant, pursuant to a guilty plea, of one count of a sexual assault on a minor under the age of fourteen. Additionally, the district court convicted appellant, pursuant to an Alford plea,¹ of a second count of sexual assault on a minor under the age of fourteen. The district court sentenced appellant to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole. This court dismissed appellant's untimely appeal from his judgment of conviction and sentence for lack of jurisdiction.²

On April 5, 1996, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to assist appellant in the post-conviction

¹North Carolina v. Alford, 400 U.S. 25 (1970).

²Waller v. State, Docket No. 26224 (Order Dismissing Appeal, May 26, 1995).

proceedings. On January 31, 1997, after conducting an evidentiary hearing, the district court denied the petition. This court dismissed appellant's subsequent appeal.³

On June 6, 2005, appellant filed a second 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 August 26, 2005, the district court denied appellant's petition. This appeal followed.

Appellant filed his petition almost eleven years after entry of the judgment of conviction. Thus, appellant's petition was untimely filed.⁴ Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus and that petition was considered and decided on the merits.⁵ Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice.⁶ A petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice.⁷

In an attempt to excuse his procedural defects, appellant argued that his claims were not raised previously because he was deprived of a direct appeal and because his post-conviction counsel failed to raise

³Wallers v. State, Docket No. 29532 (Order Dismissing Appeal, March 17, 2000).

⁴See NRS 34.726(1).

⁵See NRS 34.810(2).

⁶See NRS 34.726(1); NRS 34.810(3).

⁷Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

these claims in the first petition. Appellant further claimed that he did know how to raise these claims from 1994 through 2005. Appellant hinted that he also received poor assistance from an inmate law clerk in drafting his first petition. Finally, appellant claimed that he was actually innocent of the second count of sexual assault on a minor under the age of fourteen.

Based upon our review of the record on appeal, we conclude that the district court did not err in denying appellant's petition as procedurally barred. Appellant failed to demonstrate that an impediment external to the defense excused his procedural defects.⁸ Appellant's appeal deprivation claim did not constitute good cause because it was reasonably available to him during the one-year period for filing a timely habeas corpus petition.⁹ Because appellant was not entitled to the appointment of post-conviction counsel, a claim of ineffective assistance of post-conviction counsel cannot excuse the procedural defects in this petition.¹⁰ Poor assistance from an inmate law clerk will likewise not excuse the procedural defects.¹¹ Finally, appellant failed to demonstrate that failure to consider his petition would result in a fundamental miscarriage of justice because appellant failed to demonstrate that he was

⁸See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

⁹See Hathaway v. State, 119 Nev. 248, 71 P.3d 503 (2003); Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998).

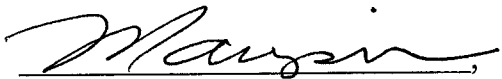
¹⁰See Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997); McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996).


¹¹See Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988).


actually innocent of the offenses.¹² Therefore, we conclude that the district court did not err in denying appellant's petition.

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.¹³ Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹⁴


_____, J.
Maupin


_____, J.
Gibbons


_____, J.
Hardesty

¹²See Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001); Mazzan, 112 Nev. at 842, 921 P.2d at 922; see also Bousley v. United States, 523 U.S. 614 (1998) (recognizing that actual innocence in a case involving a guilty plea requires that the petitioner demonstrate that he is actually innocent of more serious charges foregone by the State in the course of plea bargaining).

¹³See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

¹⁴We have reviewed all documents that appellant 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 appellant 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. Archie E. Blake, District Judge
Kurt Sebearn Wallers
Attorney General George Chanos/Carson City
Lyon County District Attorney
Lyon County Clerk