

IN THE SUPREME COURT OF THE STATE OF NEVADA

SCOTT LEROY NICHOLS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54012

FILED

NOV 08 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

Appellant filed his petition on August 28, 2008, more than seven years after issuance of the remittitur on direct appeal on March 6, 2001. Nichols v. State. Docket No. 35050 (Order of Affirmance, February 7, 2001). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Moreover, appellant's petition was successive because he had previously filed a post-conviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition.¹ See NRS 34.810(1)(b)(2); NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(3). Further, because the State specifically

¹Nichols v. State, Docket No. 42102 (Order of Affirmance, September 14, 2004).

pleaded laches, appellant was required to overcome the presumption of prejudice to the State. See NRS 34.800(2). “Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory.” State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).

“In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules.” Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (citing Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994)). “An impediment external to the defense may be demonstrated by a showing ‘that the factual or legal basis for a claim was not reasonably available to counsel, or that ‘some interference by officials,’ made compliance impracticable.” Id. (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). Prejudice can be shown by demonstrating that the errors worked to a petitioner’s actual and substantial disadvantage. Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 716 (1993).

Appellant first argues that he has good cause to excuse the procedural bars to his lesser-included-offense jury instruction claim due to new law announced in Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006). While new law may explain a delay in complying with the procedural default rules, the new claim must be raised in a timely fashion from the entry of the new law. Hathaway, 119 Nev. at 252-53, 71 P.3d at 506. Appellant’s petition was filed approximately two years after this court issued its decision in Rosas on December 21, 2006. Appellant does not provide an explanation for the two-year delay in seeking relief under that decision. Accordingly, appellant fails to demonstrate good cause to overcome the procedural bars because he did not raise this claim within a

reasonable time after Rosas was decided. Id. Therefore, appellant fails to demonstrate good cause to excuse the delay, which alone is sufficient to deny this claim as procedurally barred.

Appellant also fails to demonstrate actual prejudice. Overwhelming evidence of appellant's guilt of trafficking in a controlled substance was presented at trial.² Given the jury's verdict, the jury necessarily found that the elements of trafficking in a controlled substance were proven beyond a reasonable doubt. 1997 Nev. Stat., ch. 256, § 5, at 905; see also Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981) (stating that it is for the jury to determine the weight and credibility to give conflicting testimony). As there was overwhelming evidence of his guilt, appellant fails to demonstrate as a matter of law that the failure to instruct the jury on possession of a controlled substance as a lesser-included-offense was prejudicial. Hogan, 109 Nev. at 959-60, 860 P.2d at 716. Because appellant fails to demonstrate prejudice, he fails to overcome the procedural bars for this claim. Therefore, the district court did not err in denying this claim.³

²The evidence includes: appellant purchased large amounts of over-the-counter medications containing ephedrine and pseudoephedrine, drug paraphernalia was discovered in his vehicle; his hotel room contained a large quantity of methamphetamine, cocaine, and items used in the making and distribution of methamphetamine; his driver's license was discovered near methamphetamine in the hotel room; and items bearing appellant's name were discovered near the drug paraphernalia found in the vehicle.

³We note that the district court denied this claim as barred by the doctrine of law of the case, see Hall v State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975), rather than based on the procedural bars from NRS 34.726(1), NRS 34.810(1)(b)(2), NRS 34.810(2), and NRS 34.800(2). To the
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Next, appellant argues that he has good cause to excuse the delay in raising his claim of a conflict of interest with his trial counsel because the district court told him at the sentencing hearing that his claims of ineffective assistance of trial counsel needed to be raised in a post-conviction petition for a writ of habeas corpus. As the factual basis for this claim arose during the sentencing hearing in 1999, this claim was reasonably available to be raised in a timely post-conviction petition for a writ of habeas corpus. Hathaway, 119 Nev. at 252-53, 71 P.3d at 506. Appellant provides no explanation for the delay in raising this claim and fails to explain any reason why he could not have raised this claim in his first petition. NRS 34.810(1)(b)(3); NRS 34.810(2). Further, appellant failed to demonstrate actual prejudice because he failed to demonstrate that an actual conflict of interest adversely affected his counsel's performance. Strickland v. Washington, 466 U.S. 668, 692 (1984) (citing Cuyler v. Sullivan, 446 U.S. 335, 348 (1980)); Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992). Therefore, the district court did not err in denying this claim as procedurally barred.

Appellant also argues the district court erred by excluding a written statement from appellant's codefendant at trial and the district court erred by rejecting appellant's proposed instruction relating to the

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extent the district court did not deny this claim pursuant to those procedural bars, we conclude that the district court erred in doing so, but reached the correct result in denying this claim. We therefore affirm the decision of the district court to deny relief. See generally Kraemer v. Kraemer, 79 Nev. 287, 291, 382 P.2d 394, 396 (1963) (noting that a correct result will not be reversed simply because it is based on the wrong reason).

weighing of methamphetamine. Appellant does not make any arguments of good cause to excuse the delay in raising these additional claims. Therefore, we conclude that appellant fails to demonstrate that the district court erred in denying these claims as procedurally barred.

Finally, appellant failed to overcome the presumption of prejudice to the State. NRS 34.800(2). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Andrew J. Puccinelli, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Attorney General/Las Vegas
Elko County District Attorney
Elko County Clerk