

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT LINZY BELLON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 57223

FILED

APR 11 2012

TRAGIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *A. Vignone*  
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. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Appellant filed his petition on February 20, 2009, one year and one day after the issuance of the remittitur on direct appeal on February 19, 2008. Bellon v. State, Docket No. 47798 (Order of Affirmance, October 17, 2007). Thus, appellant's petition was untimely filed. See NRS 34.726(1). Appellant's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice. See id.

Untimeliness

On appeal, appellant argues that the district court erred in determining that his petition was late. He argues that the remittitur issued on February 25, 2008, because that is when it was file-stamped in this court. We note that appellant did not raise this claim below. Below, appellant argued that his petition was not late because the remittitur was issued on February 20, 2008. Both of appellant's interpretations of the

remittitur date were incorrect. The remittitur was issued on February 19, 2008, the date that the clerk of this court signed and issued the remittitur.<sup>1</sup> See Gonzales v. State, 118 Nev. 590, 593, 53 P.3d 901, 902 (2002). Therefore, the district court did not err in determining that the petition was filed late.

Good cause

Below, the district court concluded that although the petition was procedurally barred, appellant demonstrated good cause because appellant's case file was "voluminous." We disagree. Appellant fails to demonstrate that the large case file was an impediment external to the defense or that the claims were not reasonably available prior to the one-year time bar. Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). Therefore, appellant fails to demonstrate good cause to overcome the procedural bars.

Undue prejudice

Even assuming, without deciding, there was cause for the delay, appellant failed to demonstrate that he would be unduly prejudiced by the denial of his petition as procedurally barred because his claims

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<sup>1</sup>We note that 2008 was a leap year, giving appellant 366 days in which to file his petition. See Gonzales v. State, 118 Nev. 590, 593 n.7, 53 P.3d 901, 903 n.7 (2002). Three hundred sixty-six days from the issuance of the remittitur was February 19, 2009. Therefore, the petition was filed one day late.

lacked merit.<sup>2</sup> See Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 716 (1993).

Appellant first claims that trial counsel was “per se” ineffective for arguing that appellant acted in self-defense. Appellant fails to demonstrate that he was prejudiced. He fails to demonstrate that there was a reasonable probability of a different outcome at trial had counsel not made a self-defense argument because the evidence of appellant’s guilt and his premeditation was substantial and strong.<sup>3</sup> Bellon v. State, Docket No. 47798 (Order of Affirmance, October 17, 2007).

Appellant also appears to argue that trial counsel was ineffective for failing to argue that the two witnesses in the car either framed appellant for the crime or got him intoxicated so that he would commit the crime. Specifically, he claims that the two witnesses and the victim were members of rival gangs, and this is why the two witnesses orchestrated the killing. Appellant fails to demonstrate prejudice because the evidence of appellant’s guilt and his premeditation was substantial and strong. Id. Further, the record indicates that prior to trial, trial

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<sup>2</sup>Although the district court erred in determining there was good cause to overcome the procedural bars and reaching the claims on the merits, we nevertheless affirm the district court’s decision for the reasons discussed in this order. See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding that a correct result will not be reversed simply because it is based on the wrong reason).

<sup>3</sup>The only alternative defenses that appellant offers that trial counsel should have pursued instead of self-defense were that the other two witnesses orchestrated the killing or that he was involuntarily intoxicated. These claims are discussed in the paragraph below.

counsel asked the district court whether eliciting the gang affiliations of the two witnesses would open the door to evidence regarding appellant's gang affiliation. The district court indicated it would open the door for the State to introduce appellant's gang affiliation, and trial counsel decided not to proceed with that line of evidence. This was a reasonable tactical decision. See Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1998) ("Tactical decisions [of counsel] are virtually unchallengeable absent extraordinary circumstances.").

Next, appellant claims that trial counsel was ineffective for failing to challenge the evidence regarding the Rolex watch that the victim was wearing when he was shot. Appellant fails to demonstrate he was prejudiced because he fails to demonstrate a reasonable probability of a different outcome had counsel questioned the victim's mother regarding the receipt for the watch and whether the watch was a fake. As stated above, the evidence of guilt was substantial. Further, even assuming the watch was a fake, the taking of the watch still constituted a robbery. See NRS 200.380.

Next, appellant claims that trial counsel was ineffective for failing to challenge the trial court's finding that one of the State's witnesses was unavailable for trial. This claim is belied by the record. Trial counsel filed an opposition to the State's motion and made arguments to the district court that the State did not demonstrate that the witness was unavailable. To the extent that appellant claims that trial counsel should have argued that the witness was unavailable only because the State reneged on a deal with the witness, appellant failed to demonstrate that there was a deal or that the State reneged on it.

Appellant also raises several claims in the “fact” section of his brief. He claims that trial counsel was ineffective for failing to investigate the relationship between the victim and one of the witnesses, failing to present evidence that another person in the car had a gun, failing to explore why the victim was upset with a person named “Trim,” failing to request discovery regarding the witnesses’ potential gang affiliation, failing to investigate whether the second shot could have come from the person sitting in the passenger seat, and failing to investigate whether the gun that appellant used in the murder had previously been confiscated by police. Appellant fails to demonstrate prejudice because the evidence of appellant’s guilt and his premeditation was substantial and strong. Bellon v. State, Docket No. 47798 (Order of Affirmance, October 17, 2007).

Appellant also argued that the district court erred in denying several of his claims pursuant to NRS 34.810(1)(b) because appellant should have raised them on direct appeal. Appellant claims that the district court erred because these claims were raised within the “paradigm” of ineffective assistance of counsel. While the district court did deny these claims as barred by NRS 34.810(1)(b), the district court then analyzed the claims to determine whether trial and appellate counsel were ineffective for failing to object at trial or for failing to raise these claims on appeal. Therefore, the district court correctly analyzed these claims below. Appellant failed to provide any cogent argument that the district court erred by determining that trial and appellate counsel were not ineffective. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

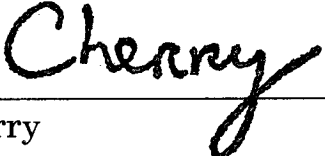
Finally, appellant raised numerous claims in his petition below that he did not specifically raise on appeal. These claims include

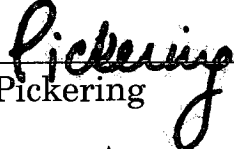
that trial counsel was ineffective for failing to hire an investigator, failing to object to the use of a high school photo of one of the witnesses, failing to bring up prior inconsistent statements of a witness, failing to challenge the State's photo line-up, failing to discredit a witness regarding a deal made with the State, failing to file a notice or objection regarding appellant's personal case file going missing, failing to impeach witnesses with the fact they were providing alcohol to a minor or that they were taking him to a strip club, failing to challenge appellant's certification as an adult, failing to challenge the interview tape made by Louisiana detectives, failing to dispel the State's allegation that the pistol in a photo was the murder weapon, failing to argue that appellant fled because the other people in the car were gang members, making errors during jury selection, failing to have the jury polled, failing to object to prosecutorial misconduct during closing arguments, failing to object to the flight instruction, failing to effectively cross-examine a witness regarding the violent tendencies of the victim, failing to effectively challenge the district court's ruling regarding a witness' testimony about the violent tendencies of the victim, failing to argue that the State opened the door to bring in bad character evidence of the victim, failing to challenge and enforce the exclusionary rule, failing to challenge the chain of custody of the weapon, and failing to object to a witness' testimony at sentencing. He also argued that appellate counsel was ineffective for failing to argue on appeal that the evidentiary value of the photo with the gun was more prejudicial than probative, failing to raise prosecutorial misconduct, failing to raise claims in a way that would allow appellant to seek federal relief, failing to raise the juror selection errors, and failing to raise the exclusionary rule claim.

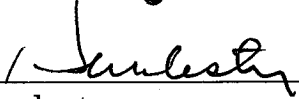
Further, he claimed the district court erred in admitting the photos of the gun and that, on direct appeal, this court erred in finding certain facts. Appellant attempted to incorporate these claims by reference, which is not permissible under this court's rules, NRAP 28(e)(2), and he failed to present any cogent argument on appeal regarding these claims. Id. Therefore, we decline to address them. See Maresca, 103 Nev. at 673, 748 P.2d at 6.

For the reasons discussed above, appellant fails to demonstrate prejudice to overcome the procedural bars, and the district court did not err in denying the petition as procedurally time barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Hardesty

cc: Hon. Jennifer P. Togliatti, Chief District Judge  
Michael H. Schwarz  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk