IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK ROGERS A/K/A MARK JOSEPH HEYDUK A/K/A TEEPEE FOX,
Appellant,
vs.
WARDEN, ELY STATE PRISON, E.K. MCDANIEL AND DIRECTOR, NEVADA DEPARTMENT OF PRISONS, ROBERT BAYER,
Respondents.

No. 36137

FILED
MAY 13 2002
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF 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. In 1981 appellant Mark Rogers was convicted of three counts of first-degree murder and two other felonies and sentenced to death.[1]

In February 1986, Rogers in proper person filed his first state petition for post-conviction relief, under NRS Chapter 177. As mandated by former NRS 177.345(1),[2] the district court appointed counsel for Rogers, and counsel filed a supplemental petition. After an evidentiary hearing on the petitions, the court denied them. Rogers appealed, and this court dismissed the appeal in June 1987.

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[1]Rogers v. State, 101 Nev. 457, 705 P.2d 664 (1985).

[2]In 1986, NRS 177.345(1) provided that an indigent petitioner for post-conviction relief was entitled to appointed counsel. Crump v. Warden, 113 Nev. 293, 297 n.2, 934 P.2d 247, 249 n.2 (1997).

02-08318

In October 1987, Rogers filed a federal petition for a writ of habeas corpus. Almost two years later the federal court granted Rogers's motion to stay proceedings to give him an opportunity to exhaust his unexhausted claims in state court. In October 1990, Rogers filed his second state post-conviction petition, seeking a writ of habeas corpus. Appointed counsel filed a supplement to the petition. The district court denied the petition. Rogers appealed, and in June 1993, this court dismissed the appeal.

In December 1993, Rogers filed his second federal habeas petition. The petition was amended and supplemented the next year. In 1997, he voluntarily dismissed the petition to return to state court, again to exhaust unexhausted claims. Rogers then filed his third state post-conviction petition, initiating the instant habeas proceedings. In July 1999, the district court entered an order dismissing the majority of Rogers's claims. After further briefing, the court entered an order dismissing the remaining claims in April 2000. We agree with the district court that Rogers's claims are untimely and procedurally barred.

Rogers's habeas petition was filed more than one year after this court issued its remittitur on direct appeal. Therefore, absent a showing of good cause for this delay, the entire petition is untimely.[3] In regard to any new claims he raises, Rogers must show cause for not raising them in earlier proceedings.[4] However, Rogers does not seriously address the issue of untimeliness and procedural default. On occasion he asserts that his earlier counsel were ineffective in failing to raise issues,

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[3]See NRS 34.726(1).

[4]NRS 34.810(2).

apparently assuming that this constitutes cause for his untimely filing, for raising new claims, and even for reraising claims presented earlier. This assumption is incorrect.

Ineffective assistance of counsel can in some cases constitute cause to overcome procedural default.[5] However, in post-conviction proceedings there is no right to effective assistance of counsel under either the Sixth Amendment or the Nevada Constitution.[6] A post-conviction petitioner has a right to effective assistance of counsel only when a statute requires appointment of counsel for the petitioner.[7] When appointment of counsel is discretionary, the petitioner has no right to effective assistance by that counsel.[8]

Rogers was entitled to effective assistance of counsel in his first post-conviction petition in 1986 because at that time NRS 177.345(1) required the appointment of counsel for indigent petitioners for post-conviction relief.[9] But he was not entitled to effective assistance of counsel for his second post-conviction petition filed in 1990. Although he was represented by the State Public Defender, no statute required the appointment of counsel. Rather, such appointment was discretionary

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[5]See Crump, 113 Nev. at 304, 934 P.2d at 253 (citing Coleman v. Thompson, 501 U.S. 722, 753-54 (1991)).

[6]McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 257-58 (1996).

[7]Id. at 165 n.5, 912 P.2d at 258 n.5; Crump, 113 Nev. at 303, 934 P.2d at 253.

[8]Bejarano v. Warden, 112 Nev. 1466, 1470 & n.1, 929 P.2d 922, 925 & n.1 (1996).

[9]See Crump, 113 Nev. at 297 n.2, 934 P.2d at 249 n.2.

under NRS 34.750(1), which provides that a court "may appoint counsel" for an indigent habeas petitioner.[10] Because this is Rogers's third post-conviction petition, he must show cause for not raising any new claims in his second post-conviction petition as well as for not timely filing the third petition.[11] Any claims that counsel were ineffective during his trial, direct appeal, or first post-conviction proceeding should have been raised in his second post-conviction petition. Any claim that his second post-conviction counsel was ineffective does not constitute cause because Rogers was not entitled to effective assistance by that counsel, who was a discretionary appointment.

Additionally, Rogers demonstrates no cause for reraising claims already decided by this court in earlier proceedings. Under the doctrines of abuse of the writ and the law of the case, we will not reconsider such claims.[12]

Absent a showing of good cause to overcome procedural default, this court will consider claims only if the petitioner demonstrates that failure to consider them will result in a fundamental miscarriage of

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[10]Rogers is sentenced to death, but appointment of counsel for a habeas petitioner sentenced to death is mandatory under NRS 34.820(1)(a) only if "the petition is the first one challenging the validity of the petitioner's conviction or sentence."

[11]In referring to Rogers's second and third post-conviction petitions, we do not include his federal petitions.

[12]See NRS 34.810(2); Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

justice.[13] Although Rogers does not raise this issue, we have considered his petition in light of this standard. We conclude that none of his claims establishes a fundamental miscarriage of justice. Thus, we conclude that all of the claims presented in Rogers's petition are procedurally barred, and we affirm the district court's order on this independent ground.[14]

Two claims warrant some additional discussion, however. First, Rogers contends that the district court did not allow his trial counsel to ask prospective jurors whether they would automatically impose the death penalty on someone convicted of first-degree murder and that five jurors who were ultimately empaneled believed that conviction for first-degree murder called for mandatory imposition of death. The record belies this claim.

Rogers is correct that a district court should excuse for cause any prospective juror who would always impose a sentence of death on a defendant convicted of first-degree murder.[15] Here, the district court expressly granted defense counsel's request to question jurors on this topic, and during voir dire of the five jurors in question, defense counsel explored this topic and passed all five for cause. Neither the district court nor the State recognized that the facts belied this claim. Nevertheless,

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[13]See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996); see also Pellegrini v. State, 117 Nev. ___, ___, 34 P.3d 519, 537 (2001).

[14]See Harris v. Reed, 489 U.S. 255, 261-62 (1989) (discussing necessity of a plain statement indicating that the state court actually relied on a procedural bar as an independent basis for disposition of the case).

[15]See Morgan v. Illinois, 504 U.S. 719 (1992).

this court will affirm the district court if it reached the correct result for different reasons.[16]

Second, Rogers challenges the sufficiency of the evidence for the aggravating circumstance that he had been previously convicted of a felony involving the use or threat of violence to another person. At trial, the prosecution argued that Rogers had two prior felony convictions in Ohio for aggravated assault, and on direct appeal this court referred to his prior felony "convictions."[17] Rogers claims that this was erroneous because he had only one prior conviction for aggravated assault occurring in 1976. Although he was also charged with two counts of felonious assault in 1977 and pled guilty to one count of aggravated assault, he later failed to appear and was never sentenced on the reduced charge. Thus he contends that no conviction ever resulted because a valid conviction requires that a sentence be imposed. He cites NRS 176.105, which requires that a judgment of conviction set forth among other things the sentence. The district court concluded that only the 1976 conviction had been entered but that evidence of the 1977 offense was nevertheless admissible, so trial counsel's failure to challenge the evidence was of no consequence. Also, the 1976 conviction alone was sufficient basis for the aggravator. We agree with the district court's reasoning, but there is a more basic reason why Rogers's claim has no merit.

Imposition of a sentence is not required for a conviction under NRS 200.033(2). Neither the district court nor the parties addressed this statute, which provides that "a person shall be deemed to have been

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[16]Rosenstein v. Steele, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987).

[17]Rogers, 101 Nev. at 466, 470, 705 P.2d at 670, 673.

convicted at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury." We conclude that the trial court makes a pronouncement of guilt once it accepts a defendant's guilty plea as valid. This is the point in the proceedings which is equivalent to a jury's rendering of a guilty verdict. Thus, under NRS 200.033(2) a valid conviction existed for Rogers's 1977 offense. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Michael P. Gibbons, District Judge
Mary Beth Gardner
Attorney General/Carson City
Pershing County District Attorney
Pershing County Clerk