

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEITH WILLIAM SULLIVAN,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

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RESPONDENT'S ANSWERING BRIEF

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_____ /

RESPONDENT'S ANSWERING BRIEF

I. **ROUTING STATEMENT**

This appeal arises from a district court order dismissing Appellant Keith William Sullivan's ("Sullivan") post-conviction petition for a writ of habeas corpus. Record on Appeal ("ROA") Volume 27, pp. 3442-3448. Sullivan was convicted by a jury of Grand Larceny of Auto, \$3,500 or Greater, and Burglary, Second Offense, both Category B felonies. ROA 22 2656-7. Sullivan's charges were bifurcated, and he was also convicted of Grand Larceny, a category C felony, based upon a guilty plea. ROA 23 2914-5. Because this is a postconviction appeal involving a challenge to a judgment of conviction or sentence for offenses that are not category A felonies, it is presumptively assigned to the Court of Appeal pursuant to NRAP 17(b)(3).

II. JURISDICTIONAL STATEMENT

Sullivan appeals from the district court's Second Omnibus Order entered on July 12, 2022, in which the district court dismissed Sullivan's postconviction petition for a writ of habeas corpus. ROA 27 3442-8.

Sullivan timely filed his Notice of Appeal from the court's order on August 1, 2022. ROA 29 3554-5. This Court has jurisdiction to consider this appeal based upon NRS 34.575(1).

III. STATEMENT OF THE ISSUES

- A. Did the district court erroneously apply the doctrine of the law of the case to dismiss Sullivan's postconviction habeas petition?

IV. STATEMENT OF THE CASE

Sullivan was convicted by a jury of three felonies - Grand Larceny of Auto, Valued at \$3,500.00 or More; Burglary; and Possession of Stolen Vehicle, Valued at \$3,500.00 or More. ROA 8 1031-3. He also pled guilty and was convicted of Grand Larceny. ROA 23 2914-5.

Sullivan appealed from his conviction, arguing that it was legally impossible for him to commit burglary of a vehicle that he had stolen five days previously because he had constant possession of the vehicle in the interim. The Nevada Supreme Court rejected Sullivan's arguments in an Order of Affirmance filed on November 24, 2020. Sullivan v. State, Docket No. 78567, ROA 23 2954-6.

Sullivan filed a Petition for Writ of Habeas Corpus (Post-Conviction) (“Petition”) on February 9, 2021. ROA 24 2961-77. In his Petition, Sullivan raised a single ground for relief, alleging that he was factually innocent because he “had stolen the truck five days earlier [and] I was already in possession of the truck before I entered it.” (emphasis in original) ROA 24 2967. On the same day, Sullivan filed a Motion for Appointment of Counsel. ROA 24 2960. The State opposed Sullivan’s Motion for Appointment of Counsel on February 19, 2021. ROA 24 2983-6. Sullivan then filed a Motion to Dismiss Habeas Petition Without Prejudice on March 11, 2021. ROA 24 2994-6. On April 1, 2021, the district court entered an Omnibus Order denying Sullivan’s request for the appointment of counsel and directing the State to respond to the Petition. ROA 24 3000-3002. On April 5, 2021, after Sullivan formally submitted his Motion to Dismiss, the district court entered an Order Granting Petitioner’s Motion to Dismiss Habeas Petition Without Prejudice and Modifying Omnibus Order of April 1, 2021. ROA 24 3011-2.

On November 10, 2021, Sullivan filed a new Petition for Writ of Habeas Corpus (Post-Conviction) (“Second Petition”) and a separate Motion for Appointment of Counsel. ROA 24 3017 - 25 3044. In his Second Petition, Sullivan raised two grounds for relief asserting variations

of the same argument. In Ground One, Sullivan asserted that his conviction and sentence were unconstitutional because he lacked the specific intent necessary to commit burglary, disagreeing with the Nevada Supreme Court's ruling in its Order of Affirmance. ROA 24 3030-3. In Ground Two, Sullivan asserted that the district court erred by allowing his Burglary conviction to stand because he was also convicted of Grand Larceny of a Motor Vehicle which occurred eight days prior to the Burglary, again disagreeing with the Nevada Supreme Court's Order of Affirmance. ROA 24 3034-6. The district court ordered the State to respond in an Order filed on November 19, 2021. ROA 24 3047-8.

The State opposed Sullivan's second Motion for Appointment of Counsel on November 19, 2021. ROA 24 3053-8. Sullivan filed an Addendum to Petitioner's Ex Parte Motion for Appointment of Counsel on December 1, 2021. ROA 24 3062-76. The State filed a Motion to Dismiss Sullivan's Second Petition on December 7, 2021, arguing that the doctrine of the law of the case precluded the district court from re-addressing and overruling the Nevada Supreme Court's Order of Affirmance. ROA 24 3077-80. Sullivan filed a combined Response to State's Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction) and Opposition to

Motion for Appointment of Counsel on December 27, 2021. ROA 24 3084-5.

On February 18, 2022, the district court entered an Order (1) Directing Supplemental Response from Petitioner; (2) Holding Motion for Appointment of Counsel in Abeyance; (3) Staying Decision on Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus. ROA 24 3102-6.

On February 25, 2022, Sullivan filed a Supplement to Habeas Corpus (Post-Conviction) ("Supplemental Petition"). ROA 24 3115-77. The Supplemental Petition set forth three additional grounds for relief. *Id.* Ground 3 alleged ineffective assistance of appellate counsel for failing to present federal caselaw that he claims "would have precluded the [Nevada Supreme] court's reason for denying the direct appeal. ROA 24 3117. Ground 4 claimed that the Nevada Supreme Court erred in its Order of Affirmance because Sullivan claims that he could not have had the specific intent to commit burglary eight days after he stole the vehicle. ROA 24 3120-2. In Ground 5, Sullivan asserted ineffective assistance of counsel by his trial counsel for failing to get the Burglary charge dismissed at sentencing based upon the same rationale he had raised in his direct appeal and raised in his other post-conviction claims – *i.e.*, that he could not have

committed Burglary when he had stolen the vehicle some days earlier and continued to possess the stolen vehicle in the interim. ROA 24 3123-5.

On April 8, 2022, the State filed a Motion to Dismiss Supplement to Petition for Writ of Habeas Corpus (Post-Conviction). ROA 24 3184-9.

On April 18, 2022, Sullivan filed a Supplement to Petitioner's Opposition ("Response") to State's Motion to Dismiss Petition for Writ of Habeas Corpus (Post-Conviction) and Opposition for Appointment of Counsel. ROA 25 3193-3201. On the same day, he also filed an Addendum to Supplemental Opposition to Dismiss Petitioner's Habeas Corpus and Motion for Appointment of Counsel. ROA 25 3202-4. On April 20, 2022, Sullivan filed a Motion to Amend Ground One of Petitioner's Habeas Corpus (Post-Conviction). ROA 25 3205-14. On April 21, 2022, Sullivan filed an Addendum to Supplemental Opposition to Dismiss Petitioner's Habeas Corpus and Motion for Appointment of Counsel. ROA 25 3215-7.

On June 6, 2022, Sullivan filed a Motion to Submit Additional Material in Support of Supplemental Opposition to State's Motion to Dismiss Petitioner's Habeas Corpus and Motion for Appointment of Counsel. ROA 25 3251-6. On June 13, 2022, Sullivan filed a Motion for Enlargement of Time, seeking additional time to modify his post-conviction petitions. ROA 25 3257-66. On that same day, Sullivan also filed a Motion

to Allow Petitioner to Add Additional Grounds to Writ of Habeas Corpus and a Motion to File Amended Petition for Writ of Habeas Corpus and to Withdraw a Prior Motion. ROA 25 3267 – 26 3314.

On June 17, 2022, Sullivan filed an Amended Petition for Writ of Habeas Corpus (Post-Conviction) (“Amended Petition”) setting forth nine grounds for relief. ROA 26 3315 – 27 3419.

On July 12, 2022, the district court entered its Second Omnibus Order (1) Denying Respondent’s Motion to Dismiss Supplemental Petition Filed April 8, 2022; (2) Construing Petitioner’s Supplemental Petition as a Response to Respondent’s Motion to Dismiss Petition for Writ of Habeas Corpus Filed December 7, 2021; (3) Granting Respondent’s Motion to Dismiss Petition for Writ of Habeas Corpus Filed on December 7, 2021; (4) Denying Petitioner’s Motion for Appointment of Counsel; and (5) Denying Petitioner’s Other Filings as Moot. ROA 27 3442-8.

On July 18, 2022, Sullivan filed a Motion to Include Supplement to the Amended Writ of Habeas Corpus. ROA 27 3452-60.

On August 1, 2022, Sullivan filed his Notice of Appeal.¹ ROA 29 3554-5.

¹ The Notice of Appeal indicates that Sullivan is appealing the district court’s judgment entered on or about July 21, 2022. This appears to be a transposition error as the district court did not enter any order on July 21,

V. STATEMENT OF THE FACTS

For purposes of this appeal, the Statement of the Case, set forth above, serves as the Statement of the Facts.

VI. STANDARD OF REVIEW

“A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review. However, a district court’s findings will be given deference by this court on appeal, so long as they are supported by substantial evidence and are not clearly wrong.”

Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005) *citing* Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996) and Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

VII. DISCUSSION

After having previously voluntarily dismissed his first Petition, Sullivan timely filed his Second Petition on November 10, 2021. ROA 24 3017 – 25 3044. Later, after the State filed a Motion to Dismiss the Second Petition, pointing out that Sullivan’s claims were barred by the doctrine of the law of the case, Sullivan attempted to file a Supplemental Petition on February 25, 2022. ROA 24 3115-77. The State argued that Sullivan had not requested leave of the district court before filing his Supplemental

2022. Sullivan appeals from the district court’s Second Omnibus Order entered on July 12, 2022, as evidenced by the contents of his Opening Brief.

Petition, and he was therefore not authorized to file a Supplemental Petition adding substantive claims for relief. Moreover, the three new claims added to Sullivan's Supplemental Petition set forth variations on the same claim that was subject to the doctrine of the law of the case. Sullivan persisted in filing supplemental pleadings, ultimately seeking to file his Amended Petition on June 17, 2022, adding even more substantive claims. ROA 26 3315 – 27 3419. Again, Sullivan had not requested leave of the district court to supplement his Second Petition.

NRS 34.724 *et seq.* is the statutory basis for a pro se petitioner to file a postconviction petition for a writ of habeas corpus. NRS 34.750 is the only statute within NRS Chapter 34 that directly addresses the filing of a supplemental petition. It provides that when counsel has been appointed to represent an indigent petitioner pursuant to the considerations set forth at NRS 34.750(1), counsel may then file and serve supplemental pleadings. NRS 34.750(3).

NRS 34.780(1) explains that the Nevada Rules of Civil Procedure apply to habeas proceedings, to the extent that they are not inconsistent with the provisions of NRS Chapter 34. NRCP 15 allows that amendments and supplements to pleadings may only occur either within 21 days after a pleading was served (for amendment) or upon leave of the court. Neither

Sullivan’s Supplemental Petition nor his Amended Petition were offered within the 21-day window for amendment, nor were they filed with leave of the court.

As a result, to the extent that Sullivan argues that in the absence of any rule or statute precluding the filing of an amended or supplemental petition, a petitioner is permitted to file an amended or supplemental petition, he is wrong. Amended Opening Brief pp. 5-6. NRS 34.750(5) explicitly states that “No further pleadings may be filed except as ordered by the court.” NRCP 15 allows for amended pleadings, but only under certain circumstances, neither of which apply here.

The Nevada Supreme Court has also recognized that amended petitions are allowable and that new claims may be raised even as late as the evidentiary hearing. See Miles v. State, 120 Nev. 383, 91 P.3d 588 (2004); State v. Powell, 122 Nev. 751, 138 P.3d 453 (2006); Barnhart v. State, 122 Nev. 301, 130 P.3d 650 (2006). But the decision to allow an amendment or new claims to proceed is within the discretion of the district court. *Id.*

Here, Sullivan sought to unilaterally supplement his postconviction petition without first requesting leave of the district court, as required by NRS 34.750 and NRCP 15. As a result, the district court did not abuse its

discretion in declining to consider those pleadings in resolving the State's Motion to Dismiss Sullivan's Second Petition.

Additionally, the two claims raised in Sullivan's Second Petition raised variations on the same theme – that Sullivan could not have been convicted of Burglary because he had possessed the stolen vehicle for several days before committing the charged burglary. As this same claim was considered and rejected by the Nevada Supreme Court on direct appeal, the district court properly held that the claims were barred by the doctrine of the law of the case. ROA 27 3445, Sullivan v. State, Docket No. 78567 (Order of Affirmance filed November 24, 2020), Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

VIII. CONCLUSION

Because Sullivan did not seek leave of the district court to supplement his postconviction habeas petition, the district court did not abuse its discretion by declining to consider Sullivan's unauthorized filings.

Additionally, the district court correctly applied the doctrine of the law of the case to dismiss Sullivan's claims that had already been raised and disposed of by the Nevada Supreme Court on direct appeal. For those

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reasons, the district court's order dismissing Sullivan's postconviction petition should be affirmed.

DATED: February 3, 2023.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: Kevin Naughton
Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: February 3, 2023.

CHRISTOPHER J. HICKS
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CERTIFICATE OF MAILING

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on February 3, 2023, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Keith Sullivan #92630
Southern Desert Correctional Center
P.O. Box 208
Indian Springs, NV 89070

/s/ Tatyana Ducummon
TATYANA DUCUMMON