

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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RAUL GARCIA

Appellant,

v.

THE STATE OF NEVADA

Respondent.

CASE NO. 83021

Appeal from the Dismissal of a Petition for Writ of Habeas Corpus
Second Judicial District Court, Washoe County
The Honorable Lynne K. Simons, Department 6

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed pursuant to that rule. These representations are made so that the justices of this Court may evaluate any potential conflicts warranting disqualification or recusal.

1. Attorney of Record for Appellant: Lyn E. Beggs, Esq.
2. Publicly-held Companies Associated: None
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DATED this 7th day of December, 2021.

LYN E. BEGGS, ESQ.

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JURISDICTIONAL STATEMENT

Pursuant to NRS 34.575(1), this is an appeal of the dismissal of a post-conviction petition writ of habeas corpus¹. An Order dismissing the Motion to Correct Illegal Sentence and Vacate Judgment and/or Modify Sentence was filed on April 30, 2021, with a Notice of Entry of Order filed on May 3, 2021. The Notice of Appeal was timely filed on June 1, 2021. This Court has jurisdiction to hear this appeal pursuant to NRS 34.575(1) and NRAP 4(b).

STATEMENT OF ISSUES FOR REVIEW

1. *The district court erred finding Appellant Garcia's Motion (Petition) procedurally barred.*
2. *The district court erred in dismissing Appellant Garcia's Motion (Petition) without an evidentiary hearing on the merits of the case.*

STATEMENT OF THE CASE

Appellant Garcia was charged by Information on October 16, 2000 with one count Sexual Assault on a Child Under the Age of Fourteen Years and two counts of Lewdness with a Child Under the Age of Fourteen Years Appellant's. Appellant's Appendix ("AA") I, 001. Appellant. Garcia was found guilty on all counts after a jury trial held February 13 – 14, 2001. AA I, 005. On March 29, 2001, Appellant Garcia

¹ While Mr. Garcia filed a Motion to Correct and Illegal Sentence, the district court treated the motion as a post-conviction writ of habeas corpus. AA I, 120.

was sentenced to life with the possibility of parole after ten years on each count; the sentence of each count running consecutive to the others. AA I, 010.

Subsequent to his conviction, Appellant Garcia filed a timely notice of direct appeal. AA I, 012. His conviction was affirmed on March 14, 2002 (AA I, 035) with Remittitur being issued on April 9, 2002. AA I, 040.

Appellant Garcia filed an application to Proceed In Forma Pauperis in the district court on March 29, 2007, however he did not file a post-conviction petition for writ of habeas corpus at the time. AA I, 041. He then filed a Request for an Enlargement of Time on September 9, 2008, requesting additional time to file a petition for writ of habeas corpus, however the Request was never submitted for decision and never acted upon. AA I, 045.

Subsequently, Appellant Garcia filed a Petition for Writ of Habeas Corpus on July 11, 2012. AA I, 047. That Petition was dismissed by the district court as untimely on July 17, 2012 (AA I, 061) with a Notice of Entry of Order being filed on July 25, 2012. (AA I, 059. Appellant Garcia did not appeal the dismissal.

Appellant Garcia then filed a First Amended Petition for Writ of Habeas Corpus was filed on September 25, 2012. AA I, 063. The First Amended Petition was again denied as untimely on October 12, 2012 (AA I, 079) with a Notice of Entry of Order being filed on October 17, 2012. AA I, 081. No appeal was filed regarding the dismissal.

Appellant Garcia then filed a Motion to Correct Illegal Sentence and Vacate Judgement and/or Modify Sentence on December 30, 2019. AA I, 085. The district court issued an Order on April 1, 2020, directing the State to file a response and within the Order indicated that the district court would treat the Motion procedurally as a post-conviction petition for writ of habeas corpus. AA I, 094. The district court also appointed counsel for Appellant Garcia. AA I, 098. A Notice of No Supplement was filed on March 11, 2021. AA I, 100.

The State filed an Opposition/ Motion to Dismiss on March 23, 2021. AA I, 103. Appellant Garcia, through counsel, filed a Reply to Opposition/Opposition to Motion to Dismiss in response on March 30, 2021. AA I, 111. The district court ultimately dismissed Appellant Garcia's Motion on April 30, 2021 (AA I, 120) with a Notice of Entry of Order being filed on May 3, 2021. AA I, 118. Appellant Garcia then filed a notice of appeal on June 1, 2021. AA I, 131.

STATEMENT OF FACTS

Appellant Garcia was found guilty of one count of Sexual Assault on a Child Under the Age of Fourteen Years and two counts of Lewdness with a Child Under the Age of Fourteen Years after a jury trial in February 2001. AA I, 008. The three charges against Appellant Garcia involved the same minor child and all three charges were alleged to have occurred on the same day, August 6, 2000. AA I, 001-003. At all times during the trial, Appellant Garcia was assisted by a Spanish speaking interpreter. AA

I, 005-006. Appellant Garcia was sentenced on March 29, 2001, as described above and subsequently filed a timely direct appeal. AA I, 010, 012.

On appeal, counsel for Appellant Garcia raised two issues only; whether the district court had erred in refusing to allow Garcia to present evidence regarding coaching of the alleged victim and her father, and whether the district court erred in giving a jury instruction that Garcia asserted inappropriately bolstered the credibility of the alleged victim. AA I, 015. The direct appeal did not address any issues related to how the crimes of which he had been convicted had originally been charged in the Information. This Court ultimately found that the district court had not erred as argued in the direct appeal and affirmed the conviction. AA I, 035.

Appellant Garcia initiated post-conviction proceedings in 2007 but never actually filed a petition for post-conviction relief. AA I, 041, 045. He subsequently filed a post-conviction petition in July 2012 in pro per which was dismissed as untimely. AA I, 047, 061. He subsequently filed a first amended petition in September 2012 which was again denied as untimely in October 2012. AA I, 063, 079. As described in Appellant Garcia's Reply/Opposition, Garcia is primarily a Spanish speaker and both petitions were filed without any real legal advice and without a proper interpreter or Spanish legal materials. AA I, 113-114.

Appellant Garcia filed his Motion to Correct an Illegal Sentence in December 2019 in which he raised a challenge to his consecutive sentences for lewdness asserting in essence that count II of the Information for lewdness should have been merged into count I for sexual assault as the instance of lewdness was incidental to the sexual assault. AA I, 086-092. As described above, the district court construed the Motion as a post-conviction petition for writ of habeas corpus.

After a Notice of No Supplement was filed (AA I, 100) the State filed its Opposition/Motion to Dismiss raising multiple grounds for dismissal of Appellant Garcia's Motion (Petition). The State argued that the Motion was not an appropriate vehicle for Garcia's claims as his sentence was not an illegal sentence. Further, the State argued that treated as a petition for post-conviction relief, it was procedurally barred and failed to raise specific factual allegations, that if true, would warrant relief. AA I, 103-109. Appellant Garcia filed a Reply/Opposition countering the State's argument and asserting that the Motion was the appropriate vehicle for Garcia's claims and that if treated as a petition per the district court's direction, Appellant Garcia was raising meritorious claims of ineffective assistance of counsel and that the procedural bars could be overcome. AA I, 111-116.

The district court dismissed the Motion (Petition), again indicating that the court was evaluating the Motion as a post-conviction petition for writ of habeas corpus. AA I, 124. The district court ruled that the Motion (Petition) was procedurally barred as a

successive petition and that no good cause existed to overcome the procedural bar. AA I, 125. However, the district court chose to examine the merits of Appellant Garcia's claims and found that he had not asserted claims that warranted relief, finding specifically that the counts of sexual assault and lewdness could not be consolidated. The district court found ultimately that Appellant Garcia's Motion (Petition) was untimely and that he had failed to make a claim for deficient representation. AA I, 126-129. Appellant Garcia subsequently filed a timely Notice of Appeal on June 1, 2021, giving rise to the instant matter. AA I, 131.

SUMMARY OF THE ARGUMENT

The district court erred in dismissing Appellant Garcia's Motion (Petition). Appellant Garcia asserts that a Motion to Correct Illegal Sentence was the appropriate vehicle for his claims. Treated as a post-conviction petition for writ of habeas corpus, Appellant Garcia asserts he has shown good cause to overcome the procedural bars. Finally, Appellant Garcia argues that the district court erred in dismissing his claims without an evidentiary hearing as he has raised claims with enough specificity that he is entitled to an evidentiary hearing.

ARGUMENT

1. *The district court erred finding Appellant Garcia's Motion (Petition) procedurally barred.*

Standard of Review:

The issue of whether the district court erred in finding that Appellant Garcia's Motion (Petition) was procedurally barred is both a legal and factual question. "An appellate court gives deference to the district court's factual findings regarding good cause, but it will review the court's application of the law to those facts de novo. State v. Huebler, 128 Nev. 192, 195, 275 P.3d 91, 93 (2012).

Argument:

NRS 34.726 provides that a post-conviction petition for writ of habeas corpus must be filed within one year of the issuance of the appellate court's remittitur if a conviction has been appealed. A petitioner can overcome the procedural bar of a petition filed outside of the one-year time frame by demonstrating that the delay was caused by events or conditions external to his control and that he will be unduly prejudiced if his petition is dismissed. NRS 34.726(1); Id., 128 Nev. at 197, 275 P.3d at 94-95. Further, NRS 34.810(1)(b)(2) provides in part that a petition must be dismissed if grounds in the petition could have been raised in a prior petition. NRS 34.810(2) provides that a petition must be dismissed if a second or successive petition fails to raise new or different grounds "and that the prior determination was on the merits".

As described above, the district court construed Appellant Garcia's Motion to Correct Illegal Sentence as a post-conviction writ of habeas corpus thereby subjecting

it to the limitations of NRS 34.726 and 34.810. “To overcome these statutory procedural bars, a petitioner must demonstrate good cause for the default and actual prejudice. We have defined good cause as a substantial reason ... that affords a legal excuse.” Brown v. McDaniel, 130 Nev.565, 569, 331 P.3d 867, 870 2014) (internal citations omitted). “To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate two things: “[t]hat the delay is not the fault of the petitioner” and that the petitioner will be “unduly prejudice[d]” if the petition is dismissed as untimely. Under the first requirement, “a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules.” State v. Huebler, 128 Nev. 192, 195, 275 P.3d 91, 94-95 (2012)(citing Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003)). See also Coleman v. Thompson, 501 U.S. 722, 111 S. Ct 2546 (1991).

The district found that Appellant Garcia’s argument that his language barrier prevented him from timely filing post-conviction petitions and raising all ground properly was not persuasive. Appellant Garcia respectfully disagrees with the district court’s finding and renews his position that he has shown good cause. Appellant Garcia is a primarily Spanish-only speaker; he was provided with an interpreter at all times during his trial. Appellant Garcia contends his language barrier prevented him from accessing and understanding the materials needed to submit a timely petition for writ of habeas corpus prior to finding a translator/legal assistant within the Nevada

Department of Corrections (“NDOC”) to assist him with the filing of the instant Motion (Petition). “[E]quitable tolling may be justified if language barriers actually prevent timely filing” of a post-conviction filings. Mendoza v. Carey, 449 F.3d 1065, 1069 (9th Cir. 2006). Appellant Garcia renews his argument that his language barrier did indeed prevent timely filing. The NDOC does not provide interpreters or legal materials in Spanish or other languages. Appellant Garcia’s previous petitions filed in 2012 were with basic assistance from another inmate and no access to appropriate legal advice to address procedural bars at the time and accordingly the 2012 petitions were dismissed as untimely.

Further, NRS 34.810(2) was incorrectly applied by the district court as the previous petitions were dismissed on procedural grounds, not on the merits, and is not applicable to Appellant Garcia’s Motion (Petition). *See Boatwright v. Angelone*, 109 Nev. 318, 322, 849 P.2d 274, 276 (1993).

Finally, Appellant Garcia asserts that had the district court not construed his properly pled motion addressing an illegal sentence as a post-conviction petition for writ of habeas corpus, the procedural bars of NRS Chapter 34 would not be applicable.

2. *The district court erred in dismissing Appellant Garcia's Motion (Petition) without an evidentiary hearing on the merits of the case.*

Standard of Review:

The district construed Appellant Garcia's Motion as petition for post-conviction relief and reviewed the merits raised in the Motion as a claim of ineffective assistance of counsel (AA I, 126), which would be a violation of Appellant Garcia's rights under the 5th, 6th and 14th Amendments. Claims of ineffective assistance of counsel have been determined by this Court to be questions of both law and fact and thus such claims are reviewed *de novo*. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005) (citing Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996)). However, the district court's findings will be given deference if not clearly erroneous and supported by substantial evidence. Id.

Further, a habeas petitioner is not entitled to an evidentiary hearing if the factual allegations are belied or repelled by the record." Thomas v. State 120 Nev. 37, 44, 83 P.3d 818, 823 (2004)(citing Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984)). The denial of a request for an evidentiary hearing is reviewed for an abuse of discretion. Berry v. State, 131 Nev. 957, 969, 363 P.3d 1148, 1156 (2015).

Argument:

While the district court found that Appellant Garcia's Motion (Petition) was

procedurally barred, the district court chose to evaluate the claims raised on their merits under the standard for reviewing claims of ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). The district court found that Appellant Garcia had failed to raise a colorable claim for relief. Appellant Garcia respectfully disagrees. A petitioner need not set forth an exact recitation of what a witness will testify to, rather the petitioner must provide the witness's name "or descriptions of their intended testimony." *Hargrove*, 100 Nev. at 503, 686 P.2d at 225. Appellant Garcia did not draft his Motion as a petition for writ of habeas corpus and therefore it is not pled in the matter that such a petition would be pled. However, he has clearly set forth the issues regarding the redundancy of the charges in this matter. The claims set forth in the Motion (Petition) are pled with enough specificity that it clearly meets the standards of *Hargrove* and merited an evidentiary hearing if the district court was inclined to evaluate the pleading on its merits.

Both Appellant Garcia and Respondent State relied upon *Crowley v. State*, 120 Nev. 30, 83 P.3d 282 (2004) to support their positions in the district court pleadings; Appellant Garcia arguing the holding applicable to his case and the State arguing in essence, the cases to be factually different. AA I, 089-092; 106-108. The district court also addressed the holding in *Crowley* and found that it was factually different from Appellant Garcia's case and had been decided four years after his

conviction and therefore it was reasonable that neither his trial counsel nor appellate counsel raised the issue of count II of lewdness being incidental to the charge of sexual assault². The district court also found that *Crowley* was factually different from Appellant Garcia's case. AA I, 128. However, the district court appears to rely solely on Appellant Garcia's pleading and the Information in making that determination. Id.

Appellant Garcia asserts that it was inappropriate for the district court to make a determination as to whether the count II lewdness charge was incidental to the charge of sexual assault without an evidentiary hearing on the issue. As discussed above, Appellant Garcia did not plead his Motion in the format of a post-conviction petition, however it was pled with enough specificity that Appellant Garcia would be entitled to an evidentiary hearing under *Hargrove*.

CONCLUSION

Appellant Garcia contends that the district court erred in finding that his Motion (Petition) was procedurally barred and asserts that he has shown good cause to overcome the procedural bars. Further, Appellant Garcia contends the district court erred in making a finding that he had not raised a colorable claim for ineffective assistance of counsel regarding the issue of the redundancy of the sexual assault

² Of note, the defendant in *Crowley* was charged in 2001, the year Appellant was convicted of similar charges.

charge and the count II lewdness charge and asserts that regardless of the format of his pleading he has pled the issue with enough specificity that he is entitled to an evidentiary hearing on the issue. Accordingly, Appellant Garcia respectfully requests that this Court remand this matter to the district court for an evidentiary hearing.

ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals because involves a post-conviction appeal related to category A felonies. See NRAP 17(b)(2)(a). Appellant submits to this Court's discretion whether to assign this appeal to the Court of Appeals

DATED this 7th day of December, 2021.

LYN E. BEGGS, ESQ.
Attorney for Appellant

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) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman, 14 points.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) as, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

3. Finally, I certify that I have read the 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 the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 7th day of December, 2021.

LYN E. BEGGS, ESQ.

CERTIFICATE OF SERVICE

Electronically

I hereby certify that on this date the foregoing document was filed electronically with the Nevada Supreme Court. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

Washoe County District Attorney
Kevin Naughton, Appellate Deputy

Via USPS

I hereby certify that on this date the foregoing document was mailed via USPS, first-class postage pre-paid, to the following:

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DATED this 7th day of December, 2021.

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