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### Summary of State v. Greene, 129 Nev. Adv. Op. No. 58

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CRIMINAL LAW – CRIMINAL PROCEDURE, HABEAS PETITIONS

**Summary**

The Court considered an appeal from a district court order granting respondent's post-conviction petition for a writ of habeas corpus.

**Disposition/Outcome**

An ineffective-assistance-of-counsel claim to show good cause and prejudice to overcome procedural bars to a habeas petition must be supported by the record. When the district court directs a prevailing party to draft an order resolving a post-conviction petition for a writ of habeas corpus, it must provide sufficient direction regarding the basis for its decision to enable the prevailing party to draft the order.

**Facts and Procedural History**

Delbert Greene took part in the robbery of a grocery store attendant on June 7, 2007. Subsequently, he was convicted of burglary while in possession of a deadly weapon (count I), conspiracy to commit robbery (count II), and robbery with the use of a deadly weapon (count III). Greene was given a sentence of 36-106 months in prison for count I; a prison term of 18-60 months for count II, to run consecutively with count I; and a prison term of 48-180 months plus an equal and consecutive term for the deadly weapon enhancement for count III. The court erred by ordering count III to run concurrently with count I, but consecutively with count II. In addition, the court failed to specify the sentence for the deadly weapon enhancement. On direct-appeal, the Court remanded for a new sentencing hearing.<sup>2</sup>

On remand, the trial court amended the sentences for the three counts to be imposed consecutively. Greene appealed from the amended judgment of conviction. The court affirmed the amended judgment of conviction.<sup>3</sup>

Greene also timely filed a post-conviction petition for a writ of habeas corpus while his appeal from the amended judgment of conviction was pending. Greene appealed based on ineffective-assistance-of-counsel claims in addition to direct-appeal issues. The judge refused to appoint counsel, refused an evidentiary hearing and denied Greene's petition, with very little discussion of the issues raised. The Nevada Supreme Court affirmed the order.<sup>4</sup>

Approximately three years later, Greene filed a second post-conviction petition for a writ of habeas corpus, but this time, the petition was related to the resentencing hearing. Greene claimed that 1) his counsel did not appear for the resentencing hearing, but sent an unprepared associate instead; 2) the amended judgment of conviction

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<sup>1</sup> By Brittnie Watkins

<sup>2</sup> *Greene v. State*, Docket No. 42110 (Order Affirming in Part and Remanding, May 18, 2004).

<sup>3</sup> *Greene v. State*, Docket No. 43628 (Order of Affirmance, August 24, 2005).

<sup>4</sup> *Greene v. State*, Docket No. 45127 (Order of Affirmance, September 16, 2005).

erroneously increased his sentence; and 3) procedural bars to his petition should be excused because he did not know his collateral, federal challenge had been decided or that he could advance in state court while his federal matter was pending. Once again, the judge refused to appoint counsel, refused an evidentiary hearing, and denied Greene's petition. The judge found the petition to be untimely without good cause.<sup>5</sup> On appeal, the Nevada Supreme Court found that Greene was unable to show that impairment external to the defense prevented him from observing procedural default rules.<sup>6</sup> The Court affirmed the order denying Greene's petition, but also remanded the case to correct a clerical issue in the sentencing.<sup>7</sup>

Approximately one week later, the trial court corrected the clerical error to read that count III was to run consecutive to counts I and II, NOT consecutive to counts II and III. Greene filed two additional post-conviction petitions for writs of habeas corpus related to the second amended judgment of conviction. The same trial judge again refused to appoint counsel, refused an evidentiary hearing and denied the petition with no discussion of the merits. On appeal, the Nevada Supreme Court consolidated the cases and affirmed the order.<sup>8</sup> The Court concluded that 1) Greene did not have a right to counsel at the proceeding that corrected the clerical error because no substantial rights were implicated<sup>9</sup> 2) Greene's presence was not required at the proceeding to correct the clerical error<sup>10</sup> 3) the lower court did not err when increasing Greene's sentence in the second amended judgment of conviction and 4) Greene failed to demonstrate that he was denied his right to a direct appeal from the second amended judgment of conviction.<sup>11</sup>

Over six and a half years after the amended judgment of conviction was affirmed, Greene filed the petition currently under consideration. This time, Greene had the assistance of counsel. The court determined the petition was untimely, successive, and an abuse of the writ. The petition failed to show good cause or prejudice to excuse the procedural bars.

## **Discussion**

Greene's instant petition argued substantive issues, alleging that his counsel was ineffective at the resentencing hearing. Greene claims an associate attorney who had no knowledge of the case and who did not put forth an argument when the court added 28 years was ineffective. The Court rejected the argument related to counsel, stating that there was no source for this claim or the portrayal of counsel. The petition argued (without citation to legal authority) that the resentencing resulted in an improper enhancement of Greene's sentence by two different offenses based on the same fact pattern asserting the presence of a weapon. This, Greene's post-conviction attorney

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<sup>5</sup> See Nev. Rev. Stat. 34.726(1) (2013); Nev. Rev. Stat. 34.810(1)(b), (2)-(3) (2013).

<sup>6</sup> See *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003); see also *Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), *abrogated by statute on other grounds as recognized by State v. Huebler*, 128 Nev. \_\_, \_\_ n.2, 275 P.3d 91, 95 n.2 (2012).

<sup>7</sup> *Greene v. State*, Docket No. 52584 (Order of Affirmance and Remand to Correct Judgment of Conviction, August 25, 2009). See Nev. Rev. Stat. 176.565 (2013).

<sup>8</sup> *Greene v. State*, Docket Nos. 56013/56546 (Order of Affirmance, November 8, 2010).

<sup>9</sup> See *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

<sup>10</sup> See *Gallego v. State*, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001).

<sup>11</sup> See *Harris v. Warden*, 114 Nev. 956, 959, 964 P.2d 785, 787 (1998).

claims, was double jeopardy because Greene's parole dates were changed. The State argued unreasonable delay and pointed out that Greene had already asserted the ineffective-assistance-of-counsel issue in his second habeas petition. A new district court judge granted Greene's petition, although regrettably and without explanation.

On appeal, the State argued that it was improper for the district court judge to request that Greene's counsel draft the order without providing an explanation.<sup>12</sup> The Court agreed, finding that the district court did not set forth any finding for Greene's counsel to use when drafting the order, and this was improper.

The State also argued that the district court improperly found that Greene successfully overcame procedural bars to his habeas petition with sufficient proof of good cause and prejudice. The Court agreed, reiterating that Greene did not file his fifth and instant petition until six and a half years after the Court affirmed Greene's amended judgment of conviction, making the petition untimely. The Court also determined that Greene's fifth petition was successive because he had previously filed four and attempted to re-litigate claims he made in his second petition. Lastly, the Court determined that good cause was not shown because 1) the district court's order based its determination on facts that are not supported by the record and 2) the district court judge's finding that the revisions to Greene's sentences were cause for delay do not explain the fact that Greene did not raise issues of sentencing in his first habeas petition and it took him three years to address those issues in his second habeas petition.

## **Conclusion**

The Court reversed the decision of the district court and remanded for proceedings consistent with its opinion.

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<sup>12</sup> See *Byford v. State*, 123 Nev. 67, 70, 156 P.3d 691, 693 (2007).