

IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL JOHN HAAG,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43137

FILED

DEC 01 2004

ORDER OF AFFIRMANCE

JANETTE M. GLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

This is an appeal from a district court order denying appellant Paul John Haag's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

On January 13, 1997, Haag was convicted, pursuant to a jury verdict, of one count each of aggravated stalking and battery with the use of a deadly weapon. The district court sentenced Haag to serve a prison term of 28 to 72 months for the stalking count and a consecutive prison term of 48 to 120 for the battery count. Haag appealed, and this court affirmed the judgment of conviction.<sup>1</sup> The remittitur issued on May 25, 1999.

On December 27, 2000, Haag filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. The district court appointed counsel to represent Haag, and counsel filed a supplement to the petition. The State filed a response to

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<sup>1</sup>Haag v. State, Docket No. 29969 (Order Dismissing Appeal, April 29, 1999).

the supplement. After conducting an evidentiary hearing, the district court denied Haag's petition on March 1, 2004, finding that it was untimely and procedurally barred. This appeal followed.

Haag filed his petition approximately eighteen months after this court issued the remittitur in his direct appeal. Thus, Haag's petition was untimely filed and procedurally barred absent a showing of good cause for the delay and prejudice.<sup>2</sup> Good cause for the delay is an impediment external to the defense that prevents the petitioner from filing the petition in a timely manner.<sup>3</sup>

In an attempt to demonstrate cause for the delay, Haag argues that he sustained severe brain damage when he was shot in the head, which affected his cognitive skills and rendered him incapable of filing a timely petition. Although Haag acknowledges that this court has never ruled that mental incompetence is good cause to excuse an untimely filing, Haag argues that, in his case, brain damage coupled with his mental illness should be deemed good cause because Haag essentially had "no understanding that a post conviction relief statutory right was available to him."

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<sup>2</sup>See NRS 34.726(1).

<sup>3</sup>Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994); Passanisi v. Director, Dep't Prisons, 105 Nev. 63, 66, 769 P.2d 72, 74 (1989).

We conclude that Haag has failed to demonstrate good cause to excuse his procedural default.<sup>4</sup> At the evidentiary hearing, trial counsel testified that the shooting did not interfere with Haag's ability to think or reason and that, although Haag could not remember the alleged battery, he remembered other events vividly. Nonetheless, even assuming Haag had limited mental capabilities, this court has recognized that organic brain damage and limited intelligence does not constitute good cause to excuse the untimely filing of a post-conviction petition.<sup>5</sup>

Alternatively, Haag contends that his failure to show good cause should be excused because "plain error" occurred in the proceedings below when trial and appellate counsel did not object "to the failure of the trial court to properly instruct the jury that a vehicle is not an inherently dangerous weapon." To the extent that Haag alleges that he demonstrated good cause because his counsel was ineffective with respect to the jury instruction involving the use of a deadly weapon, we conclude the district court properly rejected that claim. This court has ruled that allegations of ineffective assistance of counsel are not an impediment external to the defense sufficient to overcome a procedural default.<sup>6</sup>

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<sup>4</sup>See generally Mazzan v. Warden, 112 Nev. 838, 921 P.2d 920 (1996); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

<sup>5</sup>See Phelps v. Director, Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988), abrogated on other grounds by Nieto v. State, 120 Nev. \_\_\_, 97 P.3d 1140 (2004) (rehearing pending).

<sup>6</sup>See Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) ("in order [for a claim of ineffective assistance of counsel] to constitute  
*continued on next page . . .*

To the extent that Haag alleges that he is actually innocent of the use of a deadly weapon, and therefore his failure to show good cause should be excused to avoid a fundamental miscarriage of justice, we disagree.<sup>7</sup> In support of his claim of actual innocence, Haag cites to Kazalyn v. State,<sup>8</sup> wherein this court held that an automobile is not a deadly weapon as a matter of law. We note, however, that our holding in Kazalyn is inapposite because that case involved a deadly weapon enhancement under NRS 193.165. Haag was not subject to a deadly weapon sentencing enhancement under NRS 193.165, but rather the deadly weapon was an actual element of the charged crime, battery with use of a deadly weapon.<sup>9</sup> Accordingly, the jury properly considered whether the vehicle was a deadly weapon by applying the functional test, namely, considering whether Haag used his vehicle in a deadly manner when he rammed the victim's vehicle.<sup>10</sup> Haag's claim that he is actually

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*... continued*

adequate cause, the ineffective assistance of counsel claim itself must not be procedurally defaulted").

<sup>7</sup>See Mazzan, 112 Nev. at 842, 921 P.2d at 922 (stating that a petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice).

<sup>8</sup>108 Nev. 67, 825 P.2d 578 (1992), modified on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

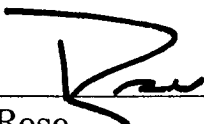
<sup>9</sup>See NRS 200.481(2)(e)(1).

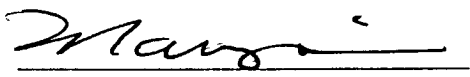
<sup>10</sup>See Zgombic v. State, 106 Nev. 571, 573-74, 798 P.2d 548, 550 (1990).


innocent of the use of a deadly weapon is therefore not credible. Accordingly, we conclude that the district court did err in ruling that Haag's petition was procedurally barred.

Having considered Haag's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. Lee A. Gates, District Judge  
Gary E. Gowen  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk