

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALVIN D. BARNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43291

FILED

DEC 22 2004

ORDER OF REVERSAL AND REMAND

[Signature]
CLERK OF SUPREME COURT
DEPUTY CLERK

This is an appeal from an order of the district court dismissing appellant Alvin Barner's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Charles M. McGee, Judge.

On March 6, 1986, the district court convicted Barner, pursuant to a jury verdict, of one count of sexual assault. The district court sentenced Barner to serve a term of life in the Nevada State Prison with the possibility of parole. This court dismissed Barner's appeal from his judgment of conviction and sentence.¹ The remittitur issued on July 14, 1987. Thereafter, Barner unsuccessfully sought post-conviction relief.²

¹Barner v. State, Docket No. 17401 (Order Dismissing Appeal, June 25, 1987).

²Barner v. State, Docket No. 21829 (Order Dismissing Appeal, March 25, 1992); Barner v. Warden, Docket No. 31877 (Order Dismissing Appeal, February 16, 2000); Barner v. State, Docket No. 36597 (Order of Affirmance, October 8, 2001).

On June 23, 2003, Barner filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The district court appointed counsel to represent Barner.³ On October 29, 2003, the district court entered an order striking Barner's unverified petition and granting him leave to re-file a verified petition. On December 15, 2003, Barner filed a verified copy of his petition. The State filed a motion to dismiss Barner's petition, arguing that it was untimely and successive. Further, the State specifically pleaded laches. Barner's counsel notified the district court that she was having witness problems, but otherwise failed to respond to the State's motion to dismiss. Pursuant to NRS 34.770, the district court declined to conduct an evidentiary hearing, and on April 21, 2004, the district court dismissed Barner's petition. This appeal followed.⁴

Barner filed his petition approximately sixteen years after this court issued the remittitur from his direct appeal. Thus, Barner's petition was untimely filed.⁵ Moreover, Barner's petition was successive because he had previously filed several post-conviction petitions for writs of habeas corpus.⁶ Barner's petition was procedurally barred absent a demonstration of good cause and prejudice.⁷ Further, because the State

³See NRS 34.750.

⁴We note that Barner is represented by counsel in this appeal.

⁵See NRS 34.726(1).

⁶See NRS 34.810(1)(b)(2), (2).

⁷See NRS 34.726(1); NRS 34.810(3).

specifically pleaded laches, Barner was required to overcome the presumption of prejudice to the State.⁸

In an attempt to excuse his procedural defects, Barner argues that he recently received copies of letters allegedly written by the victim in which she admitted to lying during Barner's trial. Barner attached copies of the letters to his petition.

We conclude that Barner demonstrated that the failure to consider his witness recantation claim could result in a fundamental miscarriage of justice.⁹ Barner provided sufficient facts to warrant an evidentiary hearing on this claim.¹⁰ Therefore, we reverse the district court's order and remand the matter for an evidentiary hearing to determine the authenticity of the letters allegedly written by the victim. If the district determines the letters are authentic, a new trial should be ordered only if the following standards are met:

(1) the court is satisfied that the trial testimony of material witnesses was false; (2) the evidence showing that false testimony was introduced at trial is newly discovered; (3) the evidence could not have been discovered and produced for trial even with the exercise of reasonable diligence; and (4) it is probable that had the false testimony not been admitted, a different result would have occurred at trial.¹¹

⁸See NRS 34.800(2).

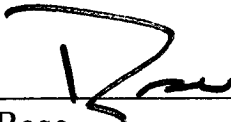
⁹See Mazzan v. Warden, 112 Nev. 838, 921 P.2d 920 (1996).

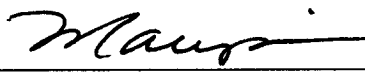
¹⁰See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

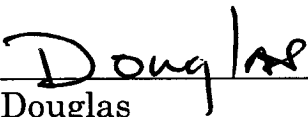
¹¹Callier v. Warden, 111 Nev. 976, 990, 901 P.2d 619, 627-28 (1995).

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. Charles M. McGee, District Judge
Mary Lou Wilson
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk